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A TREATISE ON THE LAW
OF
TAXATION BY LOCAL AND
SPECIAL ASSESSMENTS

INCLUDING

Assessments for Streets, Sidewalks, Alleys, Sewers and all other City
Improvements, as well as Assessments for all Rural Im-
provements, such as Roads, Ditches, Drains,
Bridges, Viaducts, Water Systems
and Irrigation

BY

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IN TWO VOLUMES

Vol. I

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PREFACE.

In this work, the authors have attempted to do what has never been done before—to cover the whole field of what is properly the law of Taxation by Local and Special Assessment in a thorough and exhaustive manner. They have given an analysis of the substantive law of Assessments in a way never approached in any other work—and they have also discussed with especial care and detail the practical questions of the method by which the public corporations may enforce Assessments and the methods whereby the property owner may seek relief. Great care and study has been given to the subject of Rights and Remedies, including Pleading, Parties, Evidence and Procedure.

The subject of Taxation by Assessment has become a very important one, occupying the attention of Courts and Attorneys in a great number of cases. This work has been in preparation for a number of years, and every effort has been made to make it as valuable to the busy lawyer as possible. The Table of Contents is a minute analysis of the whole subject. It not only gives a comprehensive scope of the subject, but also enables the reader readily to turn to the particular section in which any given point is treated. The index is very full and complete. The citation of authorities is very exhaustive, and parallel references to other than the official reports are given. The date of the leading case is always specified, and cases are cited down to final revision of page proof.

The present treatise is the result of an attempt to gather together and state in connected form, the principles of the law of Taxation by Local and Special Assessments, established by ad-

judications as they have been worked out in detail in the courts, for it is thus that the law grows and will continue to grow, notwithstanding all attempts at generalization and condensation.

The arrangement and text are the work of Mr. Wm. Herbert Page.

WM. HERBERT PAGE.

PAUL JONES.

Columbus, Ohio, January 10, 1909.

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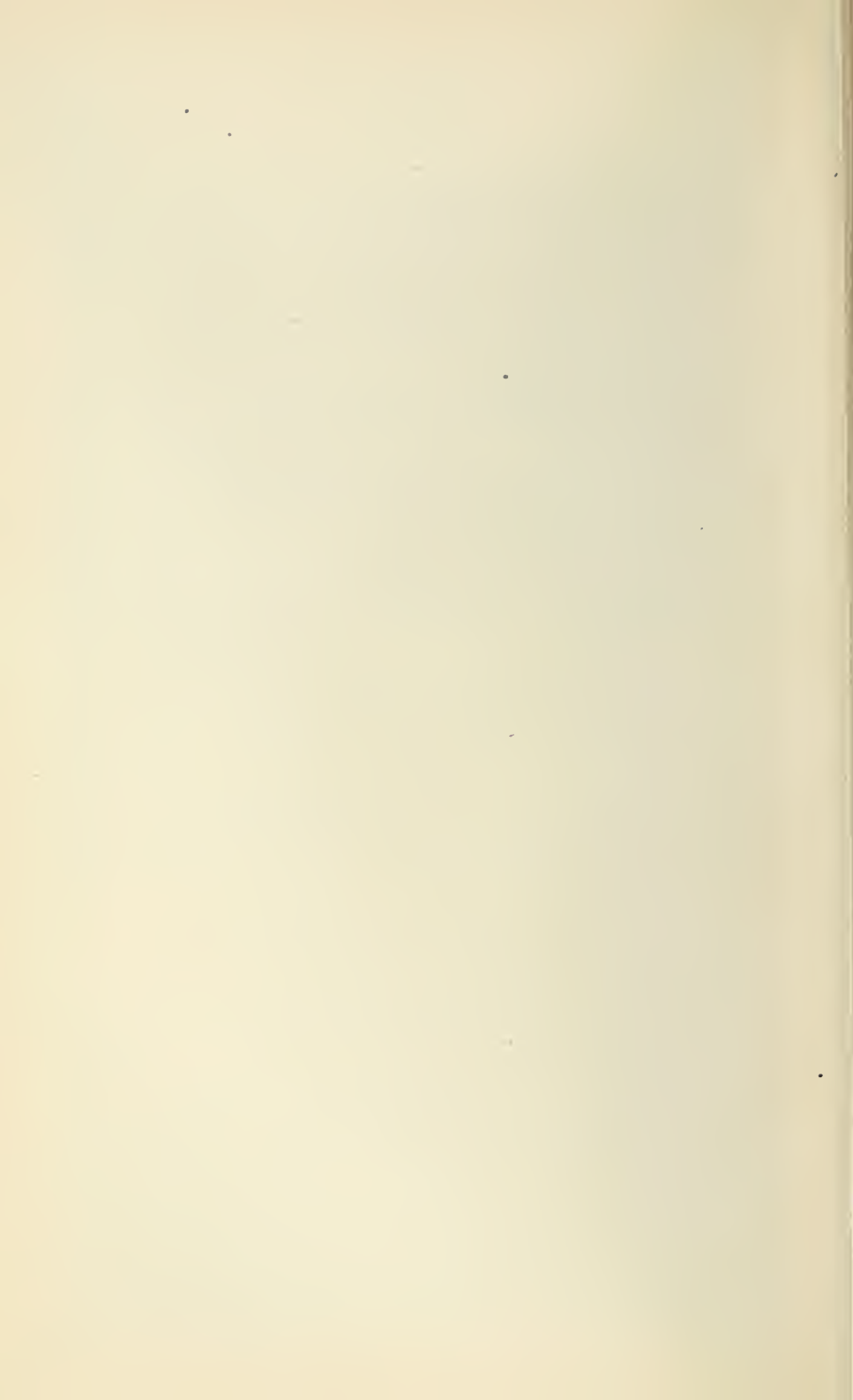


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Taxation by Assessment

CHAPTER I.

NATURE OF ASSESSMENT AND PLACE IN LAW.

§ 1. Derivation of "assessment."

Assessment is a word which like so many other law terms has come into our language from old French. The Latin word *assidere* meant "to sit by" and was used especially of judges in court. It thus acquired the idea of deciding or passing upon. From it was derived the low Latin *assessare* meaning "to value for taxation." From this latter term we find the old French *assesser*, meaning to regulate or to settle. From this term we get the English word "assess" and the noun "assessment." It is thus in derivation akin to the word "assize." A relic of its original Latin meaning is found in the word "assessor" which is used of assistants as "assessor judges" in consular courts—a meaning well recognized though not common. Assessment then by derivation is the act or sometimes the result of deliberating and deciding.

§ 2. Technical meanings of "assessment" outside of taxation.

Again, like too many of our law terms, "assessment" has acquired several technical meanings in law, all having the general idea of the act or result of deliberation and deciding in a judicial or quasi-judicial capacity.¹ While we have to deal here with but one of these meanings, the others must be noted for the purpose of indicating forms of assessment which have nothing but the name in common with the subject here discussed. Assessment in the law of damages means the ascertaining of the amount of damages, by proceedings of a judicial character.² While in our law this is

¹"To decide the degree of; to determine the extent of; as, to assess a punishment." Anderson's Law Dictionary, Title "Assessment." "The act or proceeding by which a sum due or payable is determined; also the sum itself as a payment or obligation." Anderson's Law Dictionary. Title "Assessment."

²"Fixing the amount of damages to which the prevailing party in a suit is entitled." Bouvier's Law Dict., Title "Assessments;" Gifford v. Republican Valley & Kansas Railroad Company, 20 Neb. 538, 31 N. W. 11 [1886].

usually effected by means of the deliberations of a jury, the word in this sense has nearly the same meaning as the original Latin term. In the law of eminent domain it has a meaning which is the converse of that discussed in this work—that is, it denotes the act of fixing the damages to be paid to the owners of property taken in eminent domain or injured by such taking, and often the distribution of such damages among the several land owners in due proportion.³ A similar general significance is found when the word is used in connection with the doctrine of contribution. In this sense it means the judicial determination of the shares to be paid by those liable to make contribution.⁴ The term is also used of adjustment or apportionment of loss under the doctrine of general average.⁵ Other forms of this general meaning are found when the word is used of the determination (in the first instance extra-judicial) of the amount to be paid at a given installment by those who have subscribed to a common purpose, in amounts payable in installments. A common example of this use of the term is the determination of the amount to be paid in by subscribers to stock in a corporation.⁶ A similar meaning is that of liability on premium notes given by members of mutual fire insurance companies.⁷ Apportionment of liabilities among stock-holders of an insolvent corporation, in jurisdictions where stock-holders are liable

³ *Hutchins v. Vandalia Levee and Drainage District*, 217 Ill. 561, 75 N. E. 354 [1905]; *Kotheimer v. Louisville Interurban R. R. Co.* (Ky.) 89 S. W. 104, 28 Ky. L. R. 298 [1905]; *Mayor and Common Council of Newark v. Weeks*, 70 N. J. L. (41 Vr.) 166, 56 Atl. 118 [1903]; *State, Stewart, Pros. v. Mayor, etc., of Hoboken*, 58 N. J. L. (29 Vr.) 696, 36 Atl. 1129 [1896]; *affirming State, Stewart Pros. v. Mayor and Common Council of the City of Hoboken*, 57 N. J. L. (28 Vr.) 330, 31 Atl. 278 [1894].

⁴ "Adjusting the shares of a contribution by several towards a common beneficial object according to the benefit received." *Bouvier's Law Dict.*, Title "Assessments."

⁵ "An apportionment made in general average upon the various arti-

cles and interests at risk according to their value at the time and place of being in safety, for contribution for damage and sacrifices purposely made and expenses incurred for escape from impending peril." *Bouvier's Law Dict.*, Title "Assessments." *Bedford Commercial Insurance Company v. Parker*, 2 Pick. 1, 11, 13 Am. Dec. 388 [1823]; *McLoon's Administrator v. Cummings*, 73 Pa. St. 98 [1873].

⁶ "Used of a business corporation, a rating or fixing by the board of directors of the proportion of his subscription which every subscriber is to pay when notified of it and when called on." *Anderson's Law Dict.*, Title "Assessment."

⁷ *Bouvier's Law Dict.*, Title "Assessments."

for the debts of the corporation in an amount over and above the amount of their subscriptions, is another example of the use of the term with a similar meaning.

§ 3. Technical meanings of "assessment" in general taxation.

"Assessment" is used in the law of taxation with a meaning, like that of the low Latin verb from which it is derived, of valuing property for the purpose of taxation.¹ Involved with this meaning is often that of listing and valuing property for the purpose of taxation,² and, indeed, the term is often used to include the valuation of property for taxation and the determination of the amount that each is to pay,³ or to include all the steps necessary to impose the tax,⁴ or the means employed to enforce payment of

¹ *People ex rel. Hallett v. Board of County Commissioners of Arapahoe County*, 27 Colo. 86, 59 Pac. 733 [1899]; *State ex rel. Lewis v. Smith*, 158 Ind. 543, 63 L. R. A. 116, 63 N. E. 214, 25, 64 N. E. 18 [1901]; *Woodbridge v. City of Detroit*, 8 Mich. 274 [1860]; *People of the State of New York ex rel. The New York Central & Hudson River Railroad Company v. Priest*, 169 N. Y. 432, 62 N. E. 567 [1902]; *Gray v. Stiles*, 6 Okl. 455, 49 Pac. 1083 [1897]; "Determining the value of a man's property or occupation for the purpose of levying a tax." *Bouvier's Law Dict.*, Title "Assessment."

² *Huntington v. Worthen*, 120 U. S. 97, 7 S. 469 [1887]; *Lyman v. Howe*, 64 Ark. 436, 42 S. W. 830 [1897]; *Allen v. McKay & Co.*, 120 Cal. 332, 52 Pac. 828 [1898]; *City of Chicago v. Fishburn*, 189 Ill. 367, 59 N. E. 791 [1901]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1900]; *Pomeroy Coal Co. v. Emlen*, 44 Kan. 117, 24 Pac. 340 [1890]; *Hines v. City of Leavenworth*, 3 Kan. 180 [1865]; *State ex rel. Allen v. Kansas City, St. Joseph & Council Bluffs Railroad Company*, 116 Mo. 15, 22 S. W. 611 [1893];

State ex rel. City of Butte v. Johnson, 16 Mont. 570, 41 Pac. 706 [1895]; *Hacker v. Howe*, 72 Neb. 385, 101 N. W. 255 [1904]; *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117 [1901]; *Southern Railway Co. v. Kay*, 62 S. C. 28, 39 S. E. 785 [1901].

³ *People v. Weaver*, 100 U. S. 539 [1879]; *Dollar Savings Bank v. United States*, 19 Wall. 227 [1873]; *State of Connecticut v. New York, New Haven & Hartford Railroad Company*, 60 Conn. 326, 22 Atl. 765 [1891]; *Rood v. Board of Supervisors of Mitchell Co.*, 39 Ia. 444 [1874]; "Determining the share of tax to be paid by each individual." *Bouvier's Law Dict.*, Title "Assessment." "The assessment is the official ascertainment of the amount of the tax to be charged upon the property." *Walker v. District of Columbia*, 6 Mackey (D. C.) 352, 355 [1888].

⁴ *Stephani v. Catholic Bishop of Chicago*, 2 Ill. App. 249 [1878]; *Pennington v. Woolfolk*, 79 Ky. 13 [1880]; *Rothschild v. Pegole*, 105 Mich. 388, 63 N. W. 309 [1895]; *Chicago, Burlington & Quincy Railway Company v. Village of Wilber*, 63 Neb. 624, 88 N. W. 660 [1902]; *Hurford v. City of Omaha*, 4 Neb. 336

the tax.⁵ The exact shade of meaning depends in most cases upon the context of the constitutional or statutory provision in which the term is used. "The word 'assessment' means the specific amount charged on the property and not the mere act of valuation."⁶

§ 4. Meaning of "assessments" as here discussed—Assessment based on benefits.

With none of the foregoing meanings of the term "assessment" are we here concerned. The form of assessment discussed in this work is what is variously termed the local assessment, the special assessment, the "assessment for benefits,"¹ or often merely the assessment. Without attempting an accurate definition here it may be said that it is generally a charge upon property, imposed by proper authority, usually in return for special benefits conferred upon such property by an improvement of a public character for the expense of making which the assessment is levied.² It is worth noting that the latest edition of one of the standard law dictionaries gives the meaning of the term as a meaning which attaches to it in New York only.³ It is, nevertheless, the meaning in which the term is most often used outside of a context showing that it is employed with reference to general taxation. It is in this sense that the term is used in this work, unless its meaning is in some way qualified. Under this general name are grouped a number of different forms of charges or exactions upon the property or upon the owner thereof, which in their extreme and typical forms are

[1876]; *State of Texas v. Farmer* 94 Tex. 232, 59 S. W. 541 [1900]; *Levy v. Wilcox*, 96 Wis. 127, 70 N. W. 1109 [1897]; *Chicago & Northwestern Railway Company v. Forest County*, 95 Wis. 80, 70 N. W. 77 [1897]. "Laying a tax." *Bouvier's Law Dict.*, Title "Assessment."

⁵ *Tebault v. City of New Orleans*, 108 La. 686; 32 So. 983 [1902].

⁶ *Lynch v. City of Kansas City*, 44 Kan. 452, 458, 24 Pac. 973 [1890].

¹ *City of Bridgeport v. New York & New Haven Railroad Company*, 36 Conn. 255, 4 Am. Rep. 63 [1869].

² "Assessments have reference to impositions for improvements which

are specially beneficial to individuals or property and which are imposed in proportion to the particular benefits supposed to be conferred. They are justified when the improvements confer special benefits and are equitable only when divided in proportion to such benefits." *Anderson's Law Dict.*, Title "Assessments."

³ "The term is used in this latter sense in New York distinguishing some kinds of local taxation whereby a peculiar benefit arises to the parties from general taxation." *Bouvier's Law Dict.* (Rawle's Revision) [1897], Title, "Assessment."

sharply distinct from one another, but which in their intermediate types are often so merged together as to be practically indistinguishable. The most common form which is usually the one discussed to the exclusion of the others, is the charge or exaction in some form, either in money or in work, which is levied upon property, generally upon realty, in return for and as an equivalent for the special and peculiar benefit conferred upon such property by the improvement to defray the cost of which the assessment in question is levied.⁴ Such a charge is rather optimistically referred to as a "contribution."⁵

§ 5. Assessment for performance of legal duty.

Another form of assessment, which is usually regarded as a true assessment also, is one which does not necessarily depend upon the theory of benefits.¹ It is found where the owner of realty is bound by law to do some act with reference to such realty,² which act is often the abatement of a nuisance existing thereon or caused by the use thereof, and such owner refuses or omits to do such act; and thereupon the public corporation in which such realty is situated, or some other branch of the government performs such act and charges such owner, or his property, or both, with the cost there-

⁴ *City of Chicago v. Blair*, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829 [1894]; *Excelsior Planting & Manufacturing Company v. Green*, 39 La. Ann. 455, 1 So. 873 [1887]; *Charnock v. Fordoche & Grosse Tête Special Levee District Company*, 38 La. Ann. 323 [1886]; *State, Morris & Essex Railroad Company, Pros. v. Jersey City*, 36 N. J. L. (7 Vr.), 56 [1872].

"For the validity of such assessments three elements must concur:

1. The work must be public and of a character to confer special local benefits on the district within which the assessment is levied.

2. The assessment must be supported by benefits actually or presumptively received by the persons or property subjected to it.

3. The contribution must not manifestly exceed the benefit conferred."

Mino v. Daspit, 43 La. Ann. 337, 338, 339, 9 So. 49 [1891].

⁵ *Opening of Park Avenue, Appeal of Luce Brothers*, (83 Pa. St. 175 [1876].

¹ Such a charge, which was held invalid because the purpose for which it was laid was held not to be a public duty, was said to be "an imposition upon lands . . . for which no better name was found in the court below, or has been discovered by me, than 'assessment.'" *Doughten v. City of Camden*, 72 N. J. L. (43 Vr.) 451, 452, 3 L. R. A. (N. S.) 817, 63 Atl. 170 [1905], reversing *Doughten v. City of Camden*, 71 N. J. L. (42 Vr.) 426, 59 Atl. 16 [1904].

² The purposes for which assessment of this sort may be levied are discussed elsewhere. See § 420.

of.³ Such charge or exaction is often called an assessment,⁴ and is generally discussed under that heading. Such identity of name does not, however, impart an identity of ideas; and an assessment of this type, which we may call an assessment for want of a better name, is sharply distinguished from the true assessment whenever the distinction in the theories underlying the two would lead to different results.⁵ Assessments of this sort differ from assessments for benefits in several important ways. Assessment for benefits is a form of a tax⁶ and is referred to the power of taxation.⁷ Assessment of the type under discussion is an exercise of the police power⁸ and does not have anything to do with taxation necessarily. Assessments for benefits must be apportioned in substantial proportion to benefits.⁹ Assessments of this type do not depend on benefits and therefore need not be apportioned with any reference to benefits unless the legislature so provides;¹⁰ in which

³ Mayor and Board of Trustees of the Town of New Iberia v. Fontelieu, 108 La. 460, 32 So. 369 [1902]; Nugent v. City of Jackson, 72 Miss. 1040, 18 So. 493 [1895]; Horbach v. City of Omaha, 54 Neb. 83, 74 N. W. 434 [1898]; Van Wagoner v. Mayor and Aldermen of City of Paterson, 67 N. J. L. (38 Vr.) 455 [1902]; State, Kirkpatrick, Pros. v. Commissioners of Streets and Sewers in City of Brunswick, 42 N. J. L. (13 Vr.) 510 [1880]; State, Van Tassel, Pros. v. Mayor and Aldermen of Jersey City, 37 N. J. L. (8 Vr.) 128 [1874]; State, Sigler, Pros. v. Fuller, 34 N. J. L. (5 Vr.) 227 [1870]; Brown v. Keener, 74 N. C. 714 [1876]; Sessions v. Crunkilton, 20 O. S. 349 [1870]; Bliss v. Kraus, 16 O. S. 54 [1864]; Charleston v. Werner, 38 S. C. 488; 37 Am. St. Rep. 776; 17 S. E. 33 [1892]; Mayor and Aldermen v. Maberry 25 Tenn. (6 Humph.) 368, 44 Am. Dec. 315 [1845]; Washington v. Mayor and Aldermen of Nashville, 31 Tenn. (1 Swan.) 177 [1851]; Adams v. Fisher, 63 Tex. 651 [1885]; Rude v. Town of St. Marie, 121 Wis. 634; 99 N. W. 460 [1904]; State, ex rel. Baltzell, v. Stewart, 74 Wis. 620, 6 L. R. A.

294, 43 N. W. 947 [1889]; Donnelly v. Decker, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389 [1883].

⁴ Nugent v. City of Jackson, 72 Miss. 1040, 18 So. 493 [1895]; Horbach v. City of Omaha, 54 Neb. 83; 74 N. W. 434 [1898]; Bliss v. Kraus, 16 O. S. 54 [1864]; Adams v. Fisher, 63 Tex. 651 [1885]; Rude v. Town of St. Marie, 121 Wis. 634, 99 N. W. 460 [1904]; Donnelly v. Decker, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389 [1883].

⁵ Mayor and Board of Trustees of the Town of New Iberia v. Fontelieu, 108 La. 460, 32 So. 369 [1902]; Charleston v. Werner, 38 S. C. 488, 37 Am. St. Rep. 776, 17 S. E. 33 [1892].

⁶ See § 8.

⁷ See § 89.

⁸ See § 93.

Thus the court said that a question as to such exactions "is not governed by the principles of law applicable to a local tax for improvements," but that is referable to the police power. Charleston v. Werner, 38 S. C. 488, 37 Am. St. Rep. 776; 17 S. E. 33 [1892].

⁹ See Chapter XIII.

¹⁰ See § 717.

latter case the legislature usually exacts less from the property owner than it might. This power to levy assessments for benefits exists only when granted by the legislature,¹¹ and cannot be implied from a grant of power to make the improvement for which it is sought to levy the assessment.¹² Assessment of this type is a power existing as a part of and incidental to the police power, and may be granted in very general terms.¹³ A source of much confusion, however, is found in the fact that courts have disagreed as to which type of assessment, assessments for certain kinds of improvement were; and that the same court has at different times placed the same kind of improvement now under one and now under the other of these types.¹⁴

§ 6. Assessment for property or service furnished at request.

A number of cases exist which present facts very much like those of the regular local assessment, but which differ from the local assessment in one essential fact. This essential difference is that in these cases it is optional with the party so charged to incur the liability by acceptance of the benefit for which the charge is made, or to abstain from such benefit and thus to be free from liability. Common examples of this are ordinances providing for furnishing water in part or all of the city to those who wish to take it, at a price fixed by the ordinance, where the persons who make use of the water are charged an amount, sometimes estimated at a lump sum, and sometimes based upon the amount consumed. Whichever form the charge may assume, the person who makes use of such commodity is under no legal obligation to do so, and does so voluntarily.¹ Such a statute does not impose an assessment in the proper sense of the term, though the charge is often spoken of as a "tax."² The transaction really amounts to an offer by the municipal

¹¹ See Chapter VI.

¹² See § 231.

¹³ See § 230.

¹⁴ For illustrations of the classes of assessments referred to these two different types, see §§ 419-421.

¹ *Provident Institution for Savings v. Mayor, etc., of Jersey City*, 113 U. S. 506, 28 L. 1102, 5 S. 612 [1885], (affirming *Provident Institution for Savings v. Allen* 37 N. J. Eq. [10

Stew.] 627 [1883], which affirms without opinion 37 N. J. Eq. [10 *Stew.*] 36 [1883]; *City of East Grand Forks v. Luek*, 97 Minn. 373; 107 N. W. 393 [1906]; *Burke v. City of Water Valley*, 87 Miss. 732, 112 Am. St. Rep. 468, 40 So. 820 [1905].

² *Village of Lemont v. Jenks*, 197 Ill. 363; 90 Am. St. Rep. 172, 64 N. E. 362 [1902]; *Cook County v. City of Chicago*, 103 Ill. 646 [1882].

corporation and an acceptance by the party who takes the water, thus forming a contract.³ The transaction then is substantially a contract of sale.⁴ Accordingly so-called assessments of this sort cannot be levied on vacant property where water might be used but is not in fact used.⁵ Such an assessment cannot be levied by a city under a contract with a water company which the city has cancelled as being invalid.⁶ It is confused with assessments proper, in part because such charge is made by a public corporation, although the transaction is the same when the commodity furnished is supplied by a private corporation or an individual. Another source of confusion is the fact that the city is often given a lien upon the property upon which such commodity is used for the price thereof. The city may by ordinance make the owner of realty liable for light and water furnished to his lessee and used upon the realty so leased.⁷ An ordinance provided for a lien upon realty for the price of water furnished for use thereon, the lien to be lost if the water was not turned off thirty days prior to the expiration of a collection

³ *Village of Lemont v. Jenks*, 197 Ill. 363, 90 Am. St. Rep. 172; 64 N. E. 362 [1902]. The liability of a guarantor of such a bill is considered in *Board of Public Works of City of Niles v. Pinch*, — Mich. —, 116 N. W. 408 [1908]. The question of the liability of A. to B. for making wrongful use of water which comes through B.'s meter and for which B. is liable to the city is considered in *Weidman v. Wilson*, — Mich. —, 116 N. W. 593 [1908]. Recovery of the difference between the advance payment and the rate for the water which was actually used is considered in *American Brewing Co. v. City of St. Louis*, — Mo. —, 108 S. W. 1 [1907, 1908].

⁴ "The water rates are imposed and collected not as a tax but as a compensation to be paid by those who choose to receive and use the water." *City of Chicago v. Northwestern Mutual Life Insurance Co.*, 218 Ill. 40, 1 L. R. A. (N. S.) 770, 75 N. E. 803 [1905].

⁵ *Hoboken Manufacturers R. Co. v.*

Mayor, etc., of City of Hoboken, — N. J. L. —, 68 Atl. 1098 [1908]; *State, Culver, Pros. v. Mayor and Aldermen of Jersey City*, 45 N. J. L. (16 Vr.) 256 [1883]; *State, Vreeland, Pros. v. Mayor and Aldermen of Jersey City*, 43 N. J. L. (14 Vr.) 135 [1881], (affirmed *Mayor, etc., of Jersey City v. State, Vreeland, Pros.*, 43 N. J. L. (14 Vr.) 638 [1881]); *State, United New Jersey Railroad & Canal Company, Pros. v. Mayor and Aldermen of Jersey City*, 41 N. J. L. (12 Vr.) 471 [1879]; *Provident Institution for Savings v. Allen*, 37 N. J. Eq. (10 Stew.) 36 [1883].

⁶ *Regan Land Co. v. City of Carthage*, — Mo. App. —, 108 S. W. 589 [1908].

⁷ *City of East Grand Forks v. Luck*, 97 Minn. 373, 107 N. W. 393 [1906]. Contra; that a charge for water furnished to a tenant for years under a contract with him cannot be a lien upon the estate of the landlord; *Carpenter v. Mayor and Council of the City of Hoboken*, 33 N. J. Eq. (6 Stew.) 27 [1880].

period. Under such ordinance the vendee of realty upon which the lien has been lost cannot be held for arrearages which accrued prior to his purchase of such realty.⁸ A rule requiring water to be turned off upon default in payment and not to be turned on again until the arrears are paid has been held to be unreasonable where it operates to prevent a lessee of realty who tenders the charges for his use of water, from being permitted to use water until the arrears due from a former tenant are also paid.⁹ This, however, is merely special remedy given for a charge which is essentially contractual in its nature.¹⁰ Another source of confusion between a transaction of this sort and a true assessment is found in the fact that the city has ordinarily no option to sell or to decline to sell, but as long as all reasonable regulations have been complied with, the city is bound to supply water impartially to all who apply for the use thereof upon land which can be supplied from the city's pipes.¹¹ A similar case is presented under a statute providing that in the organization of a sanitary district, a city owning a system of waterworks which is supplied from a source which is preserved from pollution by the construction of the drain provided for, must furnish water to other cities incorporated towns or villages in such district not having any system of waterworks of its own, at the table of rates fixed the city owning such system of waterworks.¹² To be distinguished from such cases are those in which the charge is imposed on the owner of the land which may be supplied with water from the water-works system, irrespective of whether or not he accepts and makes use of such water. These are not cases of contract.¹³ Whether such charges can be classed as assessments or not, and whether they are valid or invalid are questions discussed in another connection.¹⁴ Another form of a charge which is in substance a contract is to be found where a municipality, under authority conferred by statute, imposes a

⁸ *City of Chicago v. Northwestern Mutual Life Insurance Co.*, 218 Ill. 40; 1 L. R. A. (N. S.) 770, 75 N. E. 803 [1905].

⁹ *Burke v. City of Water Valley*, 87 Miss. 732, 112 Am. St. Rep. 468, 40 So. 820 [1905].

¹⁰ See § 20.

¹¹ *City of Chicago v. Northwestern Mutual Life Insurance Co.*, 218 Ill.

40, 1 L. R. A. (N. S.) 770, 75 N. E. 803 [1905]; *Wagner v. City of Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545 [1893].

¹² *City of Chicago v. Town of Cicero*, 210 Ill. 290, 71 N. E. 356 [1904].

¹³ *Village of Lemont v. Jenks*, 197 Ill. 363; 90 Am. St. Rep. 172, 64 N. E. 362 [1902].

¹⁴ See § 353.

charge upon property owners who connect their land with a sewer system constructed by the city,¹⁵ the owner being free to avoid liability by refraining from making such connection. Such charge may be a fixed sum for the privilege of making the connection,¹⁶ or it may be a charge based upon the amount of sewage discharged from the premises into the sewer.¹⁷ Such a charge is not ordinarily regarded as a local assessment.¹⁸ Another form charge which is in substance a contract is to be found where a municipality under authority of statute imposes a charge for the removal of garbage, but leaves the owner free to avoid liability either by making such use of his property that no garbage is produced thereon, or by destroying it upon the premises. Such a charge even if valid is not an assessment.¹⁹ Such a charge is said not to be a local assessment for three reasons: (1) It is not a forced charge but is incurred by the voluntary act of the owner of the premises; (2) the amount of such charge is not determined in advance and (3) no lien therefor is created upon the realty.²⁰ Not all these reasons would hold good under all statutes. The third, especially, would not be a satisfactory reason in some jurisdictions.²¹ The first reason given is, in this connection, the one to be noted. The fact that a transaction of this sort is a contract and not a true assessment produces several specific differences between such a charge and a true assessment. (1) The power of the city to charge for such commodities may be given in very broad and general terms and is not restricted to an express grant of power by the legislature, as is the case in assessments for benefits.²² (2) Since the relation between the parties is a contractual one, the notice and hearing which are

¹⁵ *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242; 48 L. R. A. 277; 56 N. E. 1 [1900]; *City of Fergus Falls v. Boen*, 78 Minn. 186; 80 N. W. 961 [1899].

¹⁶ *City of Fergus Falls v. Boen*, 78 Minn. 186; 80 N. W. 961 [1899].

¹⁷ *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900].

¹⁸ *City of Fergus Falls v. Boen*, 78 Minn. 186; 80 N. W. 961 [1899]; In *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900], such

a charge seems to be treated as an assessment based on benefits as determined by the amount of sewage discharged, and levied for the purpose of keeping the sewer in repair.

¹⁹ *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222, 28 L. R. A. 679, 37 N. E. 402, 39 N. E. 869 [1894].

²⁰ *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222, 28 L. R. A. 679, 37 N. E. 402, 39 N. E. 869 [1894].

²¹ See § 1049.

²² See § 229.

essential in assessments for benefits are not required in the so-called assessments of this type.²³ (3) The question of benefits does not enter into the determination of the amount to be paid for the property or services thus furnished by the person who has received them.²⁴

§ 7. Definition of assessment.

A local assessment levied on the theory of benefits may then be defined as an enforced involuntary charge, generally in money though sometimes in the alternative in work and materials, imposed by competent political authority in order to raise funds to pay for part or all of an improvement of a public character whereby an especial local benefit has in the contemplation of the law been conferred upon certain property, in most cases, realty, but in some rare cases, personalty; imposed generally upon the property, but in some cases upon the owner thereof; and imposed in the contemplation of the law in return for such especial benefits, and in an amount not exceeding such special benefits.¹ This definition is more elaborate than is desirable, but the attempt to simplify seems to result in eliminating essential elements of the assessment, or else in producing a definition which does not agree with the result of carefully considered cases which must be recognized as authoritative in the law of assessments. Naturally the courts have not had occasion to con-

²³ See § 734.

²⁴ See § 718.

¹ For cases in which the elements of the definition here suggested are recognized, see *Illinois Central Railroad Co. v. Decatur*, 147 U. S. 190, 37 L. 132, 13 S. 293 [1893]; *Fair Haven & Westville Railroad Co. v. City of New Haven*, 77 Conn. 494, 59 Atl. 737 [1905]; *Sargent v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. 1028 [1895]; *Huston v. Tribbetts*, 171 Ill. 547, 63 Am. St. Rep. 275, 49 N. E. 711 [1898]; *City of Chicago v. Blair*, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829 [1894]; *New York, Chicago & St. Louis Ry. v. City of Hammond*, — Ind. —, 83 N. E. 244 [1908]; *Walker v. Jameson*,

140 Ind. 591, 49 Am. St. Rep. 222, 28 L. R. A. 679, 37 N. E. 402, 39 N. E. 869 [1894]; *Minor v. Dasput*, 43 La. Ann. 337, 9 So. 49 [1891]; *Daly v. Morgan*, 69 Md. 460, 1 L. R. A. 757, 16 Atl. 287 [1888]; *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903]; *Heman Construction Co. v. Wabash Ry. Co.*, — Mo. —, 104 S. W. 67 [1907]; *Wilson v. City of Auburn*, 27 Neb. 435, 43 N. W. 257 [1889]; *Shaler v. McAleese*, — N. J. Eq. —, 68 Atl. 416 [1907]; *State, Herrman, Pres. v. Town of Guttenberg*, 62 N. J. L. (33 Vt.) 605, 43 Atl. 703 [1898]; *City of Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; *Pettit v. Duke*, 10 Utah 311, 37 Pac. 568 [1894].

sider all these elements in any one case, and the definitions framed by them are applicable to the facts of the case in which the definition is to be found. A local assessment has been said to signify "charges upon adjacent property for improvements."² This definition in its context is a perfectly proper one, as the court was pointing out that "assessment" in the eleventh article of the constitution of Kansas referred to general taxation and meaning listing and valuing property for taxation,³ while in the twelfth section it referred to local assessments. As a general definition it is inadequate, since it restricts the assessment to adjacent property, and ignores the fact that in many jurisdictions it is a personal charge as well as a charge on property, and that in some jurisdictions it is merely a personal charge on the owner;⁴ it omits all mention of the class of improvements for which it may be levied; and omits all reference to the theory of benefits. An assessment of this sort has also been said to be an assessment to pay for an improvement for public purposes upon real property which is by reason of the locality of the improvement, specially benefited beyond the benefits conferred by the improvement upon the real property generally throughout the municipality.⁵ This definition ignores the fact that in some jurisdictions the assessment may be a personal charge, lays down the principle that a benefit to all the realty in the municipality cannot be a local benefit, a principle that is sharply controverted in some jurisdictions at least,⁶ and omits all reference to apportionment. An assessment is said to be "a tax on property levied according to benefits conferred on the property."⁷ Other definitions of assessments found in adjudicated cases are even more limited. Assessments for street purposes are said to be "those special and local impositions upon property in the immediate vicinity of an improved street which were necessary to pay for the improvement and laid with reference to the special benefit which such property derived from such expenditure of money."⁸ If used without any qualifica-

² *Hines v. City of Leavenworth*, 3 Kan. 180 [1865].

³ See § 103.

⁴ See Chapter XX.

⁵ *Wilson v. Board of Trustees of the Sanitary District of Chicago*, 133 Ill. 443, 27 N. E. 203 [1890].

⁶ See § 654.

⁷ *Adler v. Whitbeck*, 44 O. S. 539, 564, 9 N. E. 672 [1886].

⁸ *Raymond v. Cleveland*, 42 O. S. 522, 527 [1885]; quoting *Hill v. Higdon*, 5 O. S. 243, 247, 67 Am. Dec. 289 [1855].

tion in a statute and with this general meaning the word assessment means a valid assessment.⁹

§ 8. Assessment for benefits a form of taxation.

The nature of the power of the legislature to provide for levying local assessment is a question which is discussed in detail hereafter.¹ It is sufficient, in this connection to point out that by the great weight of authority a local assessment, levied in return for the benefits conferred upon the property assessed by the improvement for which the assessment is levied is a kind of tax.² The power to levy local assessments is said to be

⁹ *City of San Luis Obispo v. Pettit*, 87 Cal. 499, 25 Pac. 694 [1891].

¹ See Chapter V.

² *Whiting v. Quackenbush*, 54 Cal. 306 [1880]; *Hancock v. Whittemore*, 50 Cal. 522 [1875]. In the matter of opening and grading Market street, 49 Cal. 546 [1875]; *Appeal of Houghton*, 42 Cal. 35 [1871]; *Chambers v. Satterlee*, 40 Cal. 497 [1871]; *Emery v. The San Francisco Gas Company*, 28 Cal. 346 [1865]; *Fair Haven & Westville Railroad Company v. City of New Haven*, 77 Conn. 494, 59 Atl. 737 [1905]; *Sargent & Company v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822; 34 Atl. 1028 [1895]; *City of New London v. Miller*, 60 Conn. 112, 22 Atl. 499 [1891]; *City of Bridgeport v. New York & New Haven Railroad Company*, 36 Conn. 255, 4 Am. Rep. 63 [1869]; *Nichols v. City of Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636 [1854]; *Elmore v. Drainage Commissioners*, 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010, [1890]; *White v. People, ex rel. City of Bloomington*, 94 Ill. 604 [1880]; *City of Chicago v. Ward*, 36 Ill. 9 [1864]; *New York, Chicago & St. Louis Ry. v. City of Hammond*, -- Ind. ---, 83 N. E. 244 [1908]; *Board of Commissioners of County of Monroe v. Harrell*, 147 Ind. 500, 46 N. E. 124 [1896]; *Churchman v. City of Indianapolis*, 110 Ind. 259, 11 N. E. 301 [1886]; *Huston v.*

Tribbetts, 171 Ill. 547, 63 Am. St. Rep. 275, 49 N. E. 711 [1898]; *Palmer v. City of Danville*, 154 Ill. 156, 38 N. E. 1067 [1894]; *City of Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1892]; *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761 [1891]; *Wabash Eastern Railway Company of Illinois v. Commissioners of East Lake Fork Special Drainage District*, 134 Ill. 384; 10 L. R. A. 285, 25 N. E. 781 [1890]; *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1889]; *Prindiville v. Jackson*, 79 Ill. 337 [1875]; *Robinson v. City of Burlington*, 50 Ia. 240 [1878]; *Todd v. City of Atchison*, 9 Kan. App. 251, 59 Pac. 676 [1900]; *Bradley v. McAttee*, 7 Bush. 667; 3 Am. Rep. 309 [1870]; *Pleasants v. City of Shreveport*, 110 La. 1046, 35 So. 283; *State ex rel. Hill v. Judges of the Court of Appeals for the Third Circuit of the State of Louisiana*, 43 La. Ann. 1292, 16 So. 219 [1894]; *Yeatman v. Crandall*, 11 La. Ann. 220 [1856]; *New Orleans Drainage Company praying for the confirmation of a Tableau*, 11 La. Ann. 338 [1856]; *Gould v. Mayor and City Council of Baltimore*, 59 Md. 378 [1882]; *Mayor and City Council of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1 [1880]; *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903]; *Proprietors of the Cemetery of Mt. An-*

“essentially a power to tax.”³ The power of levying a local assessment is “distinguishable from our general idea of a tax, but owes its origin to the same source or power.”⁴ This proposition means, primarily, that an assessment is an enforced contribution for a public object. “It is a public tax in the sense that it is levied for a public object; it is a local tax in the sense in which most public taxes are local—that it is limited to

burn v. Mayor and Aldermen of Cambridge, 150 Mass. 12; 4 L. R. A. 836, 22 N. E. 66 [1889]; President and Fellows of Harvard College v. Board of Aldermen of the City of Boston, 104 Mass. 470 [1870]; Dorgan v. City of Boston, 12 All. 223 [1866]; People on the relation of Butler v. Board of Supervisors of Saginaw County, 26 Mich. 22 [1872]; Woodbridge v. City of Detroit, 8 Mich. 274 [1860], (decided by a divided court). Williams v. Mayor, etc., of Detroit, 2 Mich. 560 [1853]; Stinson v. Smith, 8 Minn. 366 [1863]; McComb v. Bell, 2 Minn. 295 [1858]; Heman Construction Co. v. Wabash R. Co., 206 Mo. 172; 104 S. W. 67 [1907]; Meier v. City of St. Louis, 180 Mo. 391; 79 S. W. 955 [1903]; Seaboard National Bank of New York v. Woesten, 176 Mo. 49, 75 S. W. 464 [1903]; Heman v. Schulte, 166 Mo. 409, 66 S. W. 163 [1902]; Moberly v. Hogan, 131 Mo. 19, 32 S. W. 1014 [1895]; Lamar Water & Electric Light Company v. City of Lamar, 128 Mo. 188; 32 L. R. A. 157, 31 S. W. 756 [1895]; City of St. Joseph to use of Gibson v. Farrell, 106 Mo. 437, 17 S. W. 497 [1891]; Keith v. Bingham, 100 Mo. 300, 13 S. W. 683 [1889]; City of St. Louis v. Speck, 67 Mo. 403 [1878]; Garrett v. City of St. Louis, 25 Mo. 505, 69 Am. Dec. 475 [1857]; Wilson v. City of Auburn, 27 Neb. 435, 45 N. W. 257 [1889]; Shaler v. McAleese, — N. J. Eq. —, 68 Atl. 416 [1907]; State, Agents, Pros. v. Mayor and Common Council of the City of Newark, 35 N. J. L. (6 Vr.) 168 [1871]; State, Sigler, Pros. v. Fuller,

34 N. J. L. (5 Vr.) 227 [1870]; In the matter of Van Antwerp, 56 N. Y. 261 [1874]; People ex rel. Griffin v. Mayor, etc., of Brooklyn, 4 N. Y. 419; 55 Am. Dec. 266 [1851]; Ireland v. City of Rochester, 51 Barb. 414 [1868]; Litchfield v. McComber, 42 Barb. 288 [1864]; In the matter of the Report of the Commissioners of Assessment for Grading, Paving, etc., Sackett Street in the City of Brooklyn, 4 Hun. 92 [1875]; Astor v. Mayor, Aldermen and Commonalty of the City of New York, 37 N. Y. Superior Ct. (5 J. & S.) 539 [1874]; Hilliard v. City of Asheville, 118 N. C. 845, 24 S. E. 738 [1896]; Pittsburgh v. Sterrett Sub-district School, 204 Pa. St. 635, 61 L. R. A. 183, 54 Atl. 463 [1903]; Morewood Avenue, Chamber's Appeal, 159 Pa. St. 20; 28 Atl. 123 [1893]; Scranton v. Jermyn, 156 Pa. St. 107, 27 Atl. 66 [1893]; In re Vacation of Center Street, 115 Pa. St. 247, 8 Atl. 56 [1886]; Wolf v. City of Philadelphia, 105 Pa. St. 25 [1884]; In re opening of Park Avenue, 83 Pa. St. 167 [1876]; Gault's Appeal, 33 Pa. St. 94 [1859]; Bishop v. Tripp, 15 R. I. 466, 8 Atl. 692 [1887]; Reelfoot Lake Levee District, v. Dawson, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041 [1896]; Allen v. Drew, 44 Vt. 174 [1872]; Blount v. City of Janesville, 31 Wis. 648 [1872]; Holton v. City of Milwaukee, 31 Wis. 27 [1872].

³Sargent & Company v. Tuttle, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. 1028 [1895].

⁴State, Sigler, Pros. v. Fuller, 34 N. J. L. (5 Vr.) 227, 230 [1870].

a certain locality. It differs from ordinary public taxes in that it is not levied upon the polls and estates within a municipality or a district in respect of public or common benefits, but upon particular lands in respect of a particular benefit received by them from the execution of a public object."⁵ Whether the right to levy assessments of this type in some cases may not be referred to and justified by some power of government other than the power of taxation, such as the police power or the power of eminent domain is a question which is discussed in detail elsewhere.⁶ Here it must be noted, first, that an assessment is very generally recognized as a manifestation of the taxing power; second, that as might be expected, such a proposition is so broad that it is used to support conclusions which are utterly inconsistent with each other; and third, that the question whether the term "tax" is so broad as to include "assessment" depends on the circumstances of each particular case.⁷

§ 9. Assessment for legal duty not taxation.

Assessments of the second type, that is, assessments levied to reimburse the public corporation for the cost of performing some act which the owner of the realty assessed, is bound by law to perform, but which he omits or refuses to do, do not, as we have seen, rest upon any theory of benefits conferred. Accordingly, such an assessment is not necessarily a form of taxation.¹ If the improvement confers benefit upon the property which it is sought to assess, and if the legislature provides that the amount assessed shall be limited to the benefits, and apportioned thereto, we have a form of taxation. This, however, is a case where the legislature, though having the right to levy the assessment of the second type irrespective of benefits, foregoes the extreme exercise of its power, exacts less from a property owner ordinarily than it would otherwise have a right to exact and levies an assessment of the first type. If the legislature sees

⁵ Proprietors of the Cemetery of Mt. Auburn v. City of Cambridge, 150 Mass. 12; 4 L. R. A. 836; 22 N. E. 66 [1889].

⁶ See §§ 92, 99-102.

⁷ See Chapter III.

¹ Van Wagoner v. Mayor and Aldermen of City of Paterson, 67 N. J. L. (38 Vr.) 455 [1902]; State, Kirk-

patriek, Pros. v. Commissioners of Streets and Sewers in City of New Brunswick, 42 N. J. L. (13 Vr.) 510 [1880]; State, Sigler, Pros. v. Fuller, 34 N. J. L. (5 Vr.) 227 [1870]. To the same effect see *obiter* in Dyar v. Farmington Village Corporation, 70 Me. 515 [1878].

fit to exercise the full extent of its power, and to assess for the cost of the work done irrespective of the benefits, we have what is ordinarily regarded as an exercise, not of the power of taxation, but of the police power.²

§ 10. Assessment for goods furnished not taxation.

The so-called assessment of the third type, that is, assessments for the price of commodities furnished for use on certain realty at the request of the person consuming them, is evidently not an exercise of the taxing power, nor is it a form of a tax. The relation between the public corporation, which furnishes the commodity, and the person consuming it, is a relation purely contractual in its nature. As said before, the relation between the parties is substantially what it would have been had the commodity been furnished by a private corporation or a natural person. The transaction is substantially a contract of sale, in some cases with additional remedies given to the public for the enforcement and collection of the purchase price over and above those granted in ordinary contracts of sale.¹ Such a charge is, however, not infrequently referred to as a tax or an assessment.² Thus a charge for water furnished is referred to as a "water tax or rates," and as "water rates or assessments."³

§ 11. Theory underlying the doctrine of assessment for benefits.

The theory underlying the doctrine of local assessments of the first type, which is held by the great majority of the courts is that is that the value of certain property is enhanced by an improvement of a public character, the property thus receiving an especial and peculiar benefit; and that upon such property a part or the whole of the cost of such public improvement is assessed to an amount not exceeding the amount of such benefits. The owner of the property is therefore under this theory no

² *Westenhaver v. Village of Hoytsville*, 28 Ohio C. C. 357 [1905]. "The taxing power of a municipal corporation is as distinct from its power to regulate the manner of making and repairing public roads and to enforce its ordinances by fine or imprisonment as it is distinct from the power of such corporations to enforce any police regulations. A fine for the

dereliction of duty is no more a tax than an imprisonment for the violation of a police regulation." *Barrow v. Hepler*, 34 La. Ann. 362, 365 [1882].

¹ See § 6.

² See § 6.

³ *Cook County v. City of Chicago*, 103 Ill. 646 [1882].

poorer by reason of the entire transaction, as the assessment only takes from him the equivalent of part or all of the special benefit which the public improvement has conferred upon him; or to state it in another way, the special benefits conferred on him by the public improvement compensate him or more than compensate him for the amount of the assessment which he is obliged to pay.¹ This general theory has been stated by the

¹Village of Norwood v. Baker, 172 U. S. 269, 43 L. 443, 19 S. 187 [1898]. (affirming Baker v. Village of Norwood, 74 Fed. 997; Bauman v. Ross, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; Illinois Central Railroad Company v. Decatur, 147 U. S. 190, 37 L. 132, 13 S. 293 [1893]; (affirming Illinois Central Railroad Company v. Decatur, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315 [1888]; Fay v. City of Springfield, 94 Fed. 409 [1899]; Mayor and Aldermen of Birmingham v. Klein, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386 [1889]; In the matter of the Bonds of Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675 [1891]; Bixler v. Board of Supervisors of the County of Sacramento, 59 Cal. 698 [1881]; In the matter of Opening and Grading of Market Street, 49 Cal. 546 [1875]; Chambers v. Satterlee, 40 Cal. 497 [1871]; Taylor v. Palmer, 31 Cal. 240 [1866]; City of Denver v. Knowles, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041 [1892]; Ferguson v. Borough of Stamford, 60 Conn. 432, 22 Atl. 782 [1891]; City of New Haven v. Fair Haven & Westerville Railroad Company, 38 Conn. 422, 9 Am. Rep. 399 [1871]; City of Bridgeport v. New York & New Haven Railroad Company, 36 Conn. 255, 4 Am. Rep. 63 [1869]; Allman v. District of Columbia, 3 App. D. C. 8 [1894]; City of Atlanta v. Hamlein, 96 Ga. 381, 23 S. E. 408 (1895); De Clercq v. Barber Asphalt Paving Company, 167 Ill. 215, 47 N. E. 367 [1897]; Illinois Central Railroad Company v. City of

Decatur, 154 Ill. 173, 38 N. E. 626 [1894]; Palmer v. City of Danville, 154 Ill. 156, 38 N. E. 1067 [1894]; City of Chicago v. Blair, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829 [1894]; Prindiville v. Jackson, 79 Ill. 337, [1875]; Mix v. Ross, 57 Ill. 121 [1870]; Trustees of the Illinois and Michigan Canal v. City of Chicago, 12 Ill. 403 [1851]; Gas Light & Coke Company v. City of New Albany, 158 Ind. 268, 63 N. E. 458 [1902]; Board of Commissioners of the County of Monroe v. Harrell, 147 Ind. 500, 46 N. E. 124 [1896]; Quill v. City of Indianapolis, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890]; Law v. Madison, Smyrna & Graham Turnpike Company, 30 Ind. 77 [1868]; City of New Albany v. Cook, 29 Ind. 220; [1867]; Marion Bond Company v. Johnson, 29 Ind. App. 294, 64 N. E. 626 [1902]; Becker v. Baltimore & Ohio South Western Railway Company, 17 Ind. App. 324, 46 N. E. 685 [1897]; Burke v. Lukens, 12 Ind. App. 648, 54 Am. St. Rep. 539, 40 N. E. 641 [1895]; Simpson v. City of Kansas City, 46 Kan. 438 [1891]; Henting v. Gilmore, 33 Kan. 234, 6 Pac. 304 [1885]; Gilmore v. Henting, 33 Kan. 156, 5 Pac. 781 [1885]; Excelsior Planting & Manufacturing Company v. Green, 39 La. Ann. 455, 1 So. 873 [1887]; City of Auburn v. Paul, 84 Me. 212, 24 Atl. 817 [1892]; Daly v. Morgan, 69 Md. 460, 1 L. R. A. 757 [1888]; Mayor, etc., of Baltimore v. Moore, 6 Harris & J. 375 [1825]; Mayor and City Council of Baltimore v. Hughes' Adm'r, 1 Gill. & J. 480; 19 Am. Dec. 243 [1829]; City of Boston v. Boston

courts in many different forms, varying according to the point of view taken by the specific court and according to the particular application of the general theory of assessments which it is sought to make in each specific case. Thus it has been said to be

- & Albany Railroad Company, 170 Mass. 95, 49 N. E. 95 [1898]; *Selectmen of Norwood v. New York & New England Railroad Company*, 161 Mass. 259, 37 N. E. 199 [1894]; *Proprietors of the Cemetery of Mt. Auburn v. Mayor and Aldermen of Cambridge*, 150 Mass. 12; 4 L. R. A. 836, 22 N. E. 66 [1889]; *City of Detroit v. Judge of Recorder's Court*, 112 Mich. 588, 71 N. W. 149 [1897]; *Sub nomine City of Detroit v. Chapin*, 42 L. R. A. 638 [1897]; *City of Detroit v. Daly*, 68 Mich. 503, 37 N. W. 11 [1888]; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535 [1876]; *Hoyt v. City of East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76 [1869]; *State ex rel. City of St. Paul v. District Court of Ramsey County*, 75 Minn. 292, 77 N. W. 968 [1899]; *State of Minnesota ex rel. Cunningham v. District Court of Ramsey County*, 29 Minn. 62, 11 N. W. 133 [1882]; *Rogers v. City of St. Paul*, 22 Minn. 494 [1876]; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451 [1879]; *Heman Construction v. Wabash R. Co.*, — Mo. —, 104 S. W. 67 [1907]; *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440 [1873]; *Lockwood v. City of St. Louis*, 24 Mo. 20 [1856]; *Lohrum v. Eyermaun*, 5 Mo. App. 481 [1878]; *Zoeller v. Kellogg*, 4 Mo. App. 163 [1877]; *City of Butte v. School District No. 1*, 29 Mont. 336, 74 Pac. 869 [1904]; *Medland v. Linton*, 60 Neb. 149, 82 N. W. 866 [1900]; *Smith v. City of Omaha*, 49 Neb. 883, 69 N. W. 402 [1896]; *Cain v. City of Omaha*, 42 Neb. 120, 60 N. W. 368 [1894]; *Hanscom v. City of Omaha*, 11 Neb. 37, 7 N. W. 739 [1881]; *Van Wagoner, Pros. v. Mayor and Aldermen of the City of Paterson*, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902]; *Wilson v. Inhabitants of the City of Trenton*, 61 N. J. L. 599, 68 Am. St. Rep. 714, 44 L. R. A. 540, 40 Atl. 575 [1898]; *State, Agens, Pros. v. Mayor and Common Council of Newark*, 37 N. J. L. 415, 18 Am. Rep. 729 [1874]; *Bogert v. City of Elizabeth*, 27 N. J. Eq. 568 [1876]; *Gottlieb v. Stranahan*, 138 N. Y. 345, 20 L. R. A. 455, 34 N. E. 286 [1893]; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289 [1878]; *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506 [1871]; *People, ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; *City of Asheville v. Wachovia Loan & Trust Co.*, 143 N. C. 360, 55 S. E. 800 [1906]; *City of Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; *Busbee v. Commissioners of Wake County*, 93 N. C. 143 [1885]; *Commissioners of Green County v. Commissioners of Lenoir County*, 92 N. C. 180 [1885]; *Walsh v. Barron*, 61 O. S. 15, 76 Am. St. Rep. 354; 55 N. E. 164 [1899]; *Wewell v. City of Cincinnati*, 45 O. S. 407, 15 N. E. 196 [1887]; *Raymond v. Cleveland*, 42 O. S. 522 [1885]; *Lima v. Cemetery Association*, 42 O. S. 128, 51 Am. Rep. 809 [1884]; *Fields v. Commissioners of Highland County*, 36 O. S. 476 [1881]; *Chamberlain v. Cleveland*, 34 O. S. 551, [1878]; *King v. Portland*, 38 Ore. 402, 52 L. R. A. 812, 63 Pac. 2 [1900]; *Huddleston v. City of Eugene*, 34 Ore. 343, 43 L. R. A. 444, 55 Pac. 868 [1899]; *Boyd v. Borough of Wilkesburg*, 183 Pa. St. 198, 38 Atl. 592 [1897]; *Morewood Avenue, Chambers's Appeal*, 159 Pa. St. 20, 28 Atl. 123 [1893]; *City of Erie v. Russell*, 148 Pa. St. 384, 23 Atl. 1102 [1892]; *City of Chester v. Black*, 132

"the fundamental principle of such special taxation, that it shall be measured by the special benefit."² Other forms of stating this general theory are as follows: "The assessment is made solely on the ground of benefits conferred."³ "It is a local assessment imposed occasionally, as required, upon a limited class of persons interested in a local improvement who are assumed to be benefited by the improvement to the extent of the assessment, and it is imposed and collected as an equivalent for that benefit and to pay for the improvement."⁴ "The foundation of special benefits for public improvements is the special benefit derived by the owners of property over and above the rest of the community."⁵ "The only basis on which special taxation or special assessments can be sustained is that the property subject to the assessments or taxation will be enhanced in value by such improvements to the extent of the benefit imposed."⁶ "Assessments for local improvements can be justified only upon the theory that the lands upon which they are laid are specially benefited by the improvements for which they are laid, and hence ought to bear the burden rather than property generally; and if a law should authorize such assessments to be laid without reference to benefits it would either take property for public good without compensation or it would take property from one person for the benefit of another."⁷ An assessment is said to be "in the nature of compensation for a benefit."⁸ "The principle on which they are levied is 'that the territory sub-

Pa. St. 568, 6 L. R. A. 802 [1890]; Opening of Park Avenue, 83 Pa. St. 175 [1886]; Kettle v. City of Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874 [1904]; Barnes v. Dyer, 56 Vt. 469 [1884]; Woodhouse v. City of Burlington, 47 Vt. 300 [1875]; Allen v. Drew, 44 Vt. 174 [1872]; Asberry v. City of Roanoke, 91 Va. 562, 42 L. R. A. 636, 22 S. E. 360 [1895]; Seanor v. Board of County Commissioners, 13 Wash. 48, 42 Pac. 552 [1895]; Stowell v. Milwaukee, 31 Wis. 53 [1872]; Holton v. City of Milwaukee, 31 Wis. 27 [1872].

² Vacation of Howard Street, 142 Pa. St., 601, 606, 21 Atl. 974 [1891].

³ Edwards & Walsh Construction

Company v. Jasper County, 117 Ia. 365, 381, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902].

⁴ City of Bridgeport v. New York & New Haven Railroad Company, 36 Conn. 255, 262, 263, 4 Am. Rep. 63 [1869].

⁵ Wewell v. City of Cincinnati, 45 O. S. 407, 424, 15 N. E. 196 [1887].

⁶ City of Butte v. School District No. 1, 29 Mont. 336, 339, 74 Pac. 869 [1904].

⁷ Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289 [1878].

⁸ Mayor and Aldermen of Birmingham v. Klein, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386 [1889].

jected thereto will be benefited by the work.' ”⁹ “Assessments for street improvements are upheld on the ground that the adjacent property, upon which the cost of the improvement is assessed, is enhanced in value to an amount equal to the sum assessed against it, and that the owner has received peculiar benefit which the citizens do not share in common.”¹⁰ “The making of such assessments is a form of taxation which rests upon the ground that the property in the neighborhood of a public improvement may receive special and peculiar benefits from the improvement that make it equitable as against the owner to charge it with the payment of a greater proportional part of the cost of the work than is paid by property owners generally.”¹¹ “Assessments for street improvements are upheld on the ground that the adjacent property upon which the cost of the improvement is assessed is enhanced in value to an amount equal to the sum assessed against it, and that the owners have received peculiar benefits which the citizens do not share in common.”¹² “A tax or assessment for local improvement is based upon the theory that it is a return for the benefit received by the person who pays the tax or by the property assessed.”¹³ “These local assessments are authorized on the principle of the direct benefits resulting to those upon whom they are made, from the improvements.”¹⁴ “An assessment is a charge laid upon individual property because the property upon which the burden is imposed receives a special benefit which is different from the general one which the owner enjoys in common with others as a citizen. . . . An assessment is levied only upon the property benefited. It is uniformly restricted to the means for paying those local burdens arising by reason of the wants of

⁹ *Bixler v. Board of Supervisors of the County of Sacramento*, 59 Cal. 698, 702 [1881]; quoting *Litchfield v. Vernon*, 41 N. Y. 123 [1869].

¹⁰ *Marion Bond Company v. Johnson*, 29 Ind. App. 294, 297, 64 N. E. 626 [1902]; (citing *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890]; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501 [1887]; *Heick v. Voight*, 110 Ind. 279, 11 N. E. 306 [1886]).

¹¹ *City of Boston v. Boston & Albany Railroad Company*, 170 Mass. 95, 98, 49 N. E. 95 [1898].

¹² *Quill v. City of Indianapolis*, 124 Ind. 292, 299, 300, 7 L. R. A. 681, 23 N. E. 788 [1890].

¹³ *Board of Commissioners of the County of Monroe v. Harrell*, 147 Ind. 590, 505; 46 N. E. 124 [1896].

¹⁴ *City of New Albany v. Cook*, 29 Ind. 220, 223 [1867].

small communities.”¹⁵ So the theory of assessments is said to be “that the value of the lots is enhanced by the public expenditure.”¹⁶ Such an assessment is said to be “an assessment to pay for an improvement for public purposes upon real property, which is, by reason of the locality of the improvement, specially benefited beyond the benefits by the improvement to real property generally throughout the municipality, proportioned by such benefits.”¹⁷ “The theory upon which such assessments are sustained as a legitimate exercise of the taxing power is that the party assessed is locally and peculiarly benefited over and above the ordinary benefit, which as one of the community, he receives in all public improvements to the precise extent of the assessment.”¹⁸ Hence, one who agrees to buy a property free from incumbrances is not prejudiced by the construction of improvements and the levy of assessments therefor, after the time fixed for performance of the contract to convey, since under the theory of assessments, the property is benefited to the amount of assessment.¹⁹ The improvement must be regarded as an entirety as far as it affects the question of special benefits. An assessment may be levied upon the theory of benefits where the improvement as a whole benefits the property assessed, even though a particular part of the improvement might have been omitted without affecting the benefit to the property.²⁰ To levy such an assessment is said to be “to assess for contributions.”²¹ Indeed some courts occasionally put so much emphasis upon the special benefit to the immediate locality that they minimize or ignore the general benefit

¹⁵ Walker v. Jameson, 140 Ind. 591, 594, 595, 49 A. S. R. 222, 28 L. R. A. 679, 37 N. E. 402, 39 N. E. 865 [1894].

¹⁶ Schenley v. The Commonwealth for the use of the City of Allegheny, 36 Pa. St. 29, 57, 78 Am. Dec. 359 [1859].

¹⁷ Wilson v. Board of Trustees of the Sanitary District of Chicago, 133 Ill. 443, 469, 27 N. E. 203 [1890]; (citing Guild v. City of Chicago, 82 Ill. 472 [1876]; City of Sterling v. Galt, 117 Ill. 11, 7 N. E. 471 [1886].

¹⁸ State, The New Jersey Railroad

& Transportation Company, Pros. v. Mayor and Common Council of the City of Newark, 27 N. J. L. (3 Dutch.) 185, 190 [1858], quoted City of Detroit v. Judge of Recorder's Court, 112 Mich. 588, 589, 71 N. W. 149; *sub nomine* City of Detroit v. Chapin, 42 L. R. A. 638 [1897].

¹⁹ Gotthelf v. Stranahan, 138 N. Y. 345, 20 L. R. A. 455, 34 N. E. 283 [1893].

²⁰ Boyd v. Borough of Wilkesburg, 183 Pa. St. 198, 38 Atl. 592 [1897];

²¹ Opening of Park Avenue, 83 Pa. St. 175 [1886].

to the public at large.²² However it is, under most theories of local assessment, necessary that there should be also a general benefit to the public as well as a special local benefit, since without the general public benefit, the state would have no authority to enforce contribution for an improvement, however beneficial it might prove to the individual property owners.²³ While the great majority of the courts are found to adopt the general theory here given, and to state it and restate it in many forms, differing somewhat in expression, but essentially the same, it must here be observed that the statement of the theory here given is so broad and general in its terms that it leaves open for future decision many questions which might at first glance seem to be precluded by the form in which the theory is stated. Who determines the question of the existence and amount of special benefits conferred by the public improvement in question—whether the legislature can directly or through grant of power to municipalities or public quasi corporations, make the decision of the officers of such corporations or of the legislature a finality, or whether the courts will review the question of benefits *de novo*, are all problems, the answer to which determines the very nature of the local assessment, but nevertheless problems left open for consideration. Courts which agree in their general theory of assessments differ sharply in the answers which they give to these questions. This branch of the subject is discussed elsewhere in detail.²⁴

§ 12. Divergent theories of assessment for benefits.

Another theory is advanced by the Supreme Court of Iowa. It is that the local assessment is without any justification as long as each improvement is considered separately. It is only when the fact is considered that ultimately all the public improvements will be constructed and property assessed to pay therefor, that a justification of local assessments can be found. "When we contemplate the case of a single street or a single block, the manner of specific taxation upon abutting lots may appear to

²² "Local improvements for which assessments are made are not supposed to be beneficial to the general public. They are usually beneficial wholly or mostly to the locality in which they are made, and they are to

be paid by the property specially benefited." *Van Deventer v. Long Island City*, 139 N. Y. 133, 34 N. E. 774 [1893].

²³ See § 283.

²⁴ See § 290 *et seq.*; § 666 *et seq.*

impose more unequally the burden in relation to the benefits, but when we take in view the fact that all the streets of the city, so far as the public good demands, are to be paved in the same way, we see at once that the burdens are more equally distributed. The lots on one street may not be taxed this year, but they will be next, or when the public good requires it. In due time they must bear their own burden. If the public good never requires it, all that can be said is that the taxpayer is relieved because the public interest does not demand the expenditure of revenue realized from such tax. In this view the system is equitable and just. I do not claim that this is so perfectly; I know that it is not. But, as I have before pointed out, no system in my opinion is or can be. But it approximates a just distribution of the burden and is as near thereto as the system of general taxation for such improvements can attain.”¹ There are two weak points in this theory. First, there is no assurance that subsequent improvements will be needed and constructed; nor, if they are constructed, is there any assurance, under many statutes, that the municipality may not elect to pay therefor by general taxation. If, however, the remaining improvements are paid for by general taxation, there is nothing left of the theory of equality in the long run. Second, even if a form of equality in the long run is thus obtained, it is an equality as to realty only. Personal property is, under most systems of assessment, omitted entirely—an omission hard to justify on the ground of equality or uniformity if the theory of benefits is repudiated. A somewhat similar theory has been suggested in a Mississippi case in which it has been said that if all the streets in a municipality were improved at once, the burden of the cost of such improvement would be equalized if assessed upon the benefited property.² The same theory as that adopted by the Iowa court had some time before been considered by the Supreme Court of Kentucky and held to be unsound, on the ground that an assessment upon one person could not be upheld or justified by the remote, contingent and uncertain possibility that a similar burden for a similar purpose might eventually and in process of time be imposed upon every other property owner.³ The Su-

¹ Warren v. Henly, 31 Ia. 31, 41 [1870].

³ City of Lexington v. McQuillan's Heirs, 9 Dana 513, 35 Am. Dec. 159 [1839].

² Town of Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451 [1879].

preme Court of Iowa has continued to adhere to the view that the justification of local assessments does not depend upon the theory of benefits.⁴ Thus the court has said: "We do not understand that it has ever been held by any court that a property owner, called on to pay assessments for the general public benefit is allowed to show that the specific personal benefit which he derives from the subject-matter for which the tax is levied is not equal to the amount of the tax imposed on him for that object."⁵ Again it has said that a street improvement "is a public object which will support such an assessment regardless of the fact of whether or not it is a benefit to the abutting property."⁶ This last case was taken on error to the Supreme Court of the United States and in that court it was urged that the assessment was invalid, since the Iowa theory of assessments was in violation of the Fourteenth Amendment; but the Supreme Court of the United States refused to consider or to pass upon this question on the ground that the Federal question, which it was thus sought to raise, had not been presented to the Iowa courts or passed upon by them.⁷ In California the courts seem disposed to ignore the theory of benefits and to insist that the power of the legislature to select such basis of apportionment as it may see fit does not depend on the fact of benefit to the property upon which the assessment is levied.⁸ In Kentucky it has been suggested that local assessments are to be justified on the same theory as that on which the citizens of a county have been required to make county roads and keep them in repair.⁹ The theory has been advanced that the property owner may be liable for an assessment, even though his property receives no particular benefit from the improvement for which the assess-

⁴ *Ft. Dodge Electric Light & Power Company v. City of Ft. Dodge*, 115 Ia. 568, 89 N. W. 7 [1902]; *Chicago, Milwaukee & St. Paul Railway Company v. Phillips*, 111 Ia. 377, 82 N. W. 787 [1900]; *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898]; *Gatch v. City of Des Moines*, 63 Ia. 718, 18 N. W. 310.

⁵ *Oliver v. Monona County*, 117 Ia. 43, 58, 90 N. W. 510 [1902].

⁶ *Dewey v. City of Des Moines*, 101 Ia. 416, 423, 70 N. W. 605 [1897].

⁷ *Dewey v. Des Moines*, 173 U. S. 193, 43 L. 665, 19 S. 379 [1899].

⁸ In the matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675 [1891].

⁹ *City of Lexington v. McQuillan's Heirs*, 9 Dana. 513, 35 Am. Dec. 159 [1840].

ment is levied.¹⁰ In Virginia, at a time when the constitution did not expressly restrict assessments as it now does,¹¹ the whole theory of assessments was considered, discussed at length, and sharply criticised.¹² The court said: "It is grossly unjust as well as destructive of the principles of free government to hold that the expense of opening, widening, extending, or otherwise improving a public street in a city or incorporated town should be borne by the few who live nearest to it when such improvement, if made, is founded in public necessity, and is not only open to the public at large, but is used by the public, perhaps, hundreds of times where it is used but once by any one of the abutting owners who are made to bear the burden of its erection. Any such imposition is necessarily repulsive to the sense of justice of every fair-minded man and it would seem impossible for any free government to long survive the practice of such inequality, extortion and oppression. There is no just ground upon which to place any such arbitrary system of taxation, and any such system is opposed to the very letter and spirit of our Constitution."¹³ At the same time the court refrained from deciding the case on the view of assessments here expressed, but rested its holding on the ground that the municipality in levying the assessment had not complied with the statute from which it derived its authority. While in some of these cases assessments of the second type are presented for consideration, in which the assessment is levied for the cost of doing something which the owner of the land assessed was legally bound to do and which he has neglected or refused to do, and accordingly the question of benefits is not necessarily involved,¹⁴ yet in many of the cases assessments of the first type are presented which in theory at least are based upon and limited by the benefits conferred by the improvement for which the assessment is levied. In other cases assessments have been said to be indefensible in theory.¹⁵ The New Jersey courts are disposed to justify assessments on the ground of ancient usage and long

¹⁰ *Otter v. Barber Asphalt Paving Co.*, — Ky. —, 96 S. W. 862 [1906].

¹¹ See § 161; § 303.

¹² *City of Norfolk v. Chamberlain*, 89 Va. 196, 229, 16 S. E. 730 [1892].

¹³ *City of Norfolk v. Chamberlain*, 89 Va. 196, 229, 16 S. E. 730 [1892].

¹⁴ See § 13; § 717.

¹⁵ *Weeks v. City of Milwaukee*, 10 Wis. 242 [1860].

continued custom as much as on the theory of benefits.¹⁶ While it is true that this reason has been advanced in cases involving assessments which may be classed as assessments for the cost of performing what it is the legal duty of the land-owner to do, such as drainage assessments;¹⁷ it has also been advanced in cases involving assessments of classes which are usually justified only on the theory of benefits such as streets.¹⁸ With reference to some classes of improvement¹⁹ the theory has been advanced that the power to compel public improvements of such types and to levy local assessments therefor is a branch of the power to provide for the regulation and management of interests common to a number of land-owners, which cannot be cared for efficiently except by a common control exercised alike over the willing and the unwilling.²⁰ In some jurisdictions we find that the theory upon which the doctrine of local assessments is based is a combination of the theory that the state may provide for the regulation and management of interests common to a number of land-owners as well as to the general public, and of the theory that the owners of land especially benefited by a public improvement, must bear the burden of its cost.²¹

§ 13. Theory underlying doctrine of assessment for legal duty.

The theory underlying the doctrine of assessment for the cost of performing a legal duty which the owner of the property is bound to perform, but which he has neglected or refused to perform, and which the public corporation has performed at his cost, has nothing to do with the doctrine of compensation

¹⁶ In matter of Drainage of the Great Meadows on Pequest River, 42 N. J. L. (13 Vr.) 553 [1880] (affirmed without opinion as Hoagland v. State, Simonton, Pros., 43 N. J. L. (14 Vr.) 456 [1881], and affirmed on error by the Supreme Court of the United States as Wurts v. Hoagland, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]; State, Society for Establishing Useful Manufactures, Pros. v. Mayor and Aldermen of City of Paterson, 42 N. J. L. (13 Vr.) 615 [1880].

¹⁷ In matter of Drainage of Great Meadows on Pequest River, 42 N. J.

L. (13 Vr.) 553 [1880]; (affirmed without opinion as Hoagland v. State, Simonton, Pros., 43 N. J. L. (14 Vr.) 456 [1881]; and affirmed by the Supreme Court of the United States as Wurts v. Hoagland, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]).

¹⁸ State, Society for Establishing Useful Manufactures, Pros. v. Mayor and Aldermen of City of Paterson, 42 N. J. L. (13 Vr.) 615 [1880].

¹⁹ See §§ 13, 334 *et seq.*; § 363.

²⁰ See §§ 13, 334 *et seq.*; § 363.

²¹ Town of Macon v. Patty, 57 Miss. 378; 34 Am. Rep. 451 [1879].

for benefits conferred by such improvement. The true theory in such cases is that the law compels the property owner to do certain things with reference to his property for the protection of the public, irrespective of the question whether the performance of such legal duty will benefit the property with reference to which such act is required or not.¹ In many cases such benefit is in fact conferred, a circumstance which often leads to confusion between assessments of this type and assessments based on the theory of benefits, and which often makes it impossible to determine whether a given assessment is based upon the one theory or the other. In other cases it may happen that no benefit is conferred, or that if a benefit is conferred, it is less in amount than the cost of doing such work. In these later cases the right of the legislature to authorize assessments for the cost of doing such work is established by the great weight of authority,² and clearly has no connection with the doctrine of benefits, and is not dependent thereon. Assessments which might be explained upon this theory are not infrequently referred to theories, different in expression, though not necessarily inconsistent with such theory. Thus it has been suggested that in some forms of public improvements, at least, assessments are to be justified on the theory of the power and duty of the state to make regulations for the management of property which for any reason can be managed efficiently only by concerted action.³ This theory does not attempt to demonstrate the propriety of placing the burden of the public improvement upon the individual owners instead of on the public treasury, and it seems to assume the duty of the property owner to make the improvement at his own expense—the very point which most

¹ State, *Kirkpatrick, Pros. v. Commissioners of Streets and Sewers in City of New Brunswick*, 42 N. J. L. (13 Vr.) 510 [1880]; State, *Agens, Pros. v. Mayor and Common Council of Newark*, 37 N. J. L. (8 Vr.) 415. 18 Am. Rep. 729 [1874]; State, *Sigler, Pros. v. Fuller*, 34 N. J. L. (5 Vr. 227) [1870].

² See § 93.

³ "It is the power of the government to prescribe public regulations for the better and more economical

management of property of persons, whose property adjoins, or which, from some other reason, can be better managed and improved by some joint operation, such as the power of regulating the building of party walls, making and maintaining partition fences and ditches, constructing ditches and sewers for the draining of uplands or marshes, which can be more advantageously drained by a common sewer or ditch. This is a well known legislative power, recog-

needs explanation and justification. A theory for justifying the power of local assessment, as distinguished from the motive of the legislature in exercising a clearly recognized power, it seems superfluous if other justification can be found and deficient if no other justification can be found. If the assessment is one which can be upheld on the theory of benefits, as an assessment for an improvement public in its nature, which confers an especial private benefit upon the property assessed therefor, or if it can be upheld on the theory of an assessment for the performance of a legal duty which rests primarily upon the owner of certain realty and which the public may perform at his expense if he refuses or omits to perform it, we have in either case an assessment which can be justified without resorting to the theory of the propriety of community of management. If, on the other hand, the assessment is one which cannot be upheld on either of these grounds, it is difficult to see, under constitutional restrictions, what power the legislature has, on the theory of a common management, to levy forced contributions for purposes not falling within either of these classes.

§ 14. Theory underlying doctrine of assessment for goods furnished at request.

The theory underlying the doctrine of the so-called assess-

nized and treated by all juriconsults and writers upon law through the civilized world; a branch of legislative power exercised by this state before and since the Revolution, and before and since the adoption of the present constitution, and repeatedly recognized by our courts. The legislature has power to regulate these subjects, either by general law, or by particular laws for certain localities or particular and defined tracts of land. When the constitution vested the legislative power in the Senate and General Assembly, it conferred the power to make these public regulations as a well understood part of that legislative power." *Coster v. Tide Water Company*, 18 N. J. Eq. [3 C. E. Green] 54, 68, 69 [1866]. "There are essential im-

provements which cannot be made on one tract without affecting another. These relate especially to drainage, protection from inundation and free passage and intercourse. These improvements sometimes become of public importance as well as indispensable to the proper enjoyment of each separate tract. In such cases society has arranged for the management of these common public and private interests as would be just and equitable; and to prevent the burden of such improvements from falling only on the liberal and public spirited, has provided for its equitable division among those interested. Such a regulation is a local assessment." *Town of Macon v. Patty*, 57 Miss. 378, 400, 401, 34 Am. Rep. 451 [1879].

ment for the value of goods furnished for use on certain realty at the request of the owner or occupant thereof, has nothing to do with the doctrine of compensation for benefits conferred. As has been said before,¹ the transaction amounts to a contract between the city which furnishes the commodity and the person at whose request the commodity is furnished, and the transaction is in effect a contract of sale, rather than an assessment. An assessment of this type being essentially a contract has nothing to do with taxation. It is entered into voluntarily, while taxation is essentially an involuntary imposition.²

§ 15. Assessment for benefits not based on contract.

An assessment for benefits is a forced charge, levied upon the property benefited by the improvement for which the assessment is levied, in some cases upon the owner of such property, imposed by the sovereign power of the state, or by some public corporation or quasi corporation, or in some cases by a private corporation, under authority conferred by the state. This follows from the fact that the assessment for benefits is a branch of the taxing power, and a special manifestation of such power. In turn, it is this characteristic of assessment for benefits that causes it to be classed as a branch of the power of taxation. The validity of a special assessment does not, therefore, rest upon any theory of the assent of the property owner to such charge levied, either upon his property or upon himself, nor does it rest upon any theory of contract between the property owner and the public.¹ The local assessment is es-

¹ See § 6.

² See §§ 15, 20.

¹ *City of Worcester v. Worcester Consolidated Street Railway Company*, 196 U. S. 539, 25 S. 327 [1905]; (affirming *City of Worcester v. Worcester Consolidated* 49, 64 N. E. 581 [1902]); *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 35 L. 446, 11 S. 790 [1891], (affirming *State, Essex Public Road Board, Pros. v. Skinkle*, 49 N. J. L. (20 Vr.) 65, 6 Atl. 435 [1886], which was affirmed in *State, Essex Public Road Board, Pros. v. Skinkle*, 49 N. J. L. (20 Vr.) 641, 10 Atl. 379

[1887]); *People v. Hulbert*, 71 Cal. 72, 14 Pac. 43 [1886]; *Haskell v. Bartlett*, 34 Cal. 281 [1867]; *Emery v. Bradford*, 29 Cal. 75 [1865]; *Gray v. Town of Cicero*, 177 Ill. 459, 53 N. E. 91 [1899]; *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222, 28 L. R. A. 679, 37 N. E. 402, 39 N. E. 869 [1894]; *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468 [1861]; *City of Shreveport v. Prescott*, 51 La. Ann. 1895, 46 L. R. A. 193, 26 So. 664 [1899]; *Henderson v. Mayor and City Council of Baltimore, use of Eshback*, 8 Md. 352 [1855]; *Rose v. Trestrail*, 62 Mo.

sentially a forced contribution, levied *in invitum*, by virtue of the sovereign power of the state.² "Such assessments are enforced proportional contributions of a somewhat special kind, made *in invitum*, by virtue of legislative authority conferred upon the municipality for that purpose, upon such terms and conditions as the legislature within constitutional limits may see fit to impose."³ Accordingly a statute modifying the rights and liabilities of the property owner is not a statute impairing the obligation of a contract,⁴ whatever other objection may be made thereto.⁵ So a local assessment is not a contract with reference to the right to interest thereon⁶ or with reference to the limitation of actions thereon.⁷ The contract entered into between the city and the contractor, providing for the construction of the improvement for which the assessment is levied, is not the basis of the action to collect such assessment.⁸ So if an improvement is constructed by the contractor under special contract with the land owner, no liability to the public corporation in the nature of an assessment lien exists therefor.⁹ In Louisiana it has been said that if the statute requires the consent of a majority of the property owners as a condition precedent to making the improvement, the local assessment lev-

App. 352 [1895]; *Brewster v. City of Syracuse*, 19 N. Y. 116 [1859]. "As the lien does not rest upon any agreement or specific assent of the owner of the land charged with this burden, and the improvement is often against his wish, a clear right should be shown by the municipality to justify such an act of sovereign power." *Western Pennsylvania Railway Company v. City of Allegheny*, 92 Pa. St. 100, 103 [1879].

² *City Street Improvement Company v. Babcock*, 139 Cal. 690, 73 Pac. 666 [1903]; *San Diego Investment Company v. Shaw*, 129 Cal. 273, 61 Pac. 1082 [1900]; *Brock v. Luning*, 89 Cal. 316, 26 Pac. 972 [1891]; *Mound City Land & Stock Company v. Miller*, 170 Mo. 240, 94 Am. St. Rep. 727, 60 L. R. A. 190, 70 S. W. 721 [1902]; *State ex rel. Greeley v. City of St. Louis*, 67 Mo. 113 [1877]; *Guinotte v. Egelhoff*, 64 Mo.

App. 356 [1895]; *Rose v. Trestrail*, 62 Mo. App. 352 [1895].

³ *Sargent & Company v. Tuttle*, 67 Conn. 162, 166, 32 L. R. A. 822, 823, 34 Atl. 1028 [1895].

⁴ *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 35 L. 446, 11 S. 790 [1891], (affirming *State, Essex Public Road Board, Pros. v. Skinkle*, 49 N. J. L. (20 Vr.) 65, 6 Atl. 435 [1886], affirmed in *State, Essex Public Road Board, Pros. v. Skinkle*, 49 N. J. L. (20 Vr.) 641, 10 Atl. 379 [1887]). *Brewster v. City of Syracuse*, 19 N. Y. 116 [1859].

⁵ See Chapter XVII.

⁶ *Haskell v. Bartlett*, 34 Cal. 281 [1867].

⁷ *People v. Hulbert*, 71 Cal. 72, 14 Pac. 43 [1886].

⁸ *Drew v. Town of Geneva*, 159 Ind. 364, 65 N. E. 9 [1902].

⁹ *McCausland v. Leuffer*, 4 Whart. (Pa.) 175 [1839].

ied for such improvement is not a forced contribution, but is based on the consent of the property owners.¹⁰ This principle has been suggested in determining whether an assessment is a tax within the meaning of a provision giving the Supreme Court jurisdiction in cases involving the validity of a tax, regardless of the amount involved.¹¹ The distinction is one which is not made by the courts of most other jurisdictions.¹² However, it has been held that a statute authorizing the organization of an irrigation district on the affirmative vote of a majority of the electors thereof, and providing that the bonds of the district and the interest thereon shall be paid from annual assessments on the realty in such district is so far a contract that a subsequent statute authorizing the board of directors of such district, without the consent of the owners of realty to pledge the realty itself for the bonds is held to be invalid as impairing the obligation of contracts.¹³ However, an assessment or the right to levy one may be the subject matter of a contract.¹⁴ Such a contract will be protected against state legislation impairing its obligation.¹⁵

§ 16. Theory of contract invoked in assessment.

In some cases, however, the theory of contract has been invoked in assessments levied upon the theory of benefits as a means of explaining in part the operation of such assessments. It is stated in some cases that in making an improvement to be paid for by local assessment, the municipality acts as the agent of the property owners upon whom the assessment is to be levied.¹ In making the improvement for which a local assess-

¹⁰ *Fayssoux v. Denis*, 48 La. Ann. 850, 19 So. 760 [1896].

¹¹ See § 1369.

¹² See § 779 *et seq.*

¹³ *Merchants' National Bank of San Diego v. Escondido Irrigation District*, 144 Cal. 329, 77 Pac. 937 [1904].

¹⁴ *McGee v. Mathis*, 71 U. S. (4 Wall.) 143, 18 L. 314 [1866], reversing *McGee v. Mathis*, 21 Ark. 40 [1860].

¹⁵ See § 171 *et seq.*

¹ *New Orleans v. Warner*, 175 U. S. 120, 44 L. 96, 20 S. 44 [1899]; modified on rehearing, 176 U. S. 92, 44 L.

385, 20 S. 280; *Lucas, Turner & Co. v. City of San Francisco*, 7 Cal. 463 [1857]; *Charnock v. Levee District*, 38 La. Ann. 323; *Liebstein v. Mayor and Common Council of the City of Newark*, 24 N. J. Eq. (9 C. E. Gr.) 200 [1873]; *Selumm v. Seymour*, 24 N. J. Eq. (9 C. E. Gr.) 143 [1873]; In the matter of the Petition of Livingston to Vacate an Assessment, 121 N. Y. 94, 24 N. E. 290 [1890]; In the matter of the Petition of Anderson to Vacate an Assessment, 109 N. Y. 554, 559 [1888]. "The city in directing and making the improvement was in some sense at least the agent

ment is to be levied the city is said to be "more of an agent than a principal."² "While it is true the city exercises but a delegated power in making these assessments and in so doing is acting as one of the instrumentalities of government, it is nevertheless true that in levying and collecting the same it acts merely as an agent of the parties and derives no direct benefit therefrom distinct from that of the property owners."³ A statute allowing the contractor to sue on the assessment is said to make him the agent of the municipality for the purpose of collecting such assessment.⁴ An improvement district embracing the territory of a city is said to act as agent of the property owners and not as agent of the city.⁵ These statements are, however, mere dicta, representing an analogy but not a principle. The municipality is the superior imposing a tax, not an agent binding a principal by contract. Wherever the question becomes a practical one, it is held that the public corporation or quasi corporation is not the agent.⁶ The liability of the parties to the agreement is sometimes based solely on the theory of an implied promise. Thus under a statute providing that on petition of one-third of the owners of land affected, the county commissioners should make a contract for drainage and assess the properties benefited, the proper number of land owners petitioned, the contract was let and the work done; but it proved to be of no benefit. It was held that the county commissioners and the land owners who did not petition were not liable, but that the owners who signed the petition had requested that the work be done, that it was done at their request, and that there was, accordingly, an implied promise on their part to pay

of the property owners, and if it permitted grossly extravagant or fictitious items to be included in the sum to collect which the assessment was levied, that operated as a fraud upon him and entitled him to relief in this proceeding." In the matter of the Petition of Livingston to Vacate an Assessment, 121 N. Y. 94, 105, 24 N. E. 290 [1890].

²North Pacific Lumbering & Manufacturing Company v. East Portland, 14 Or. 3, 12 Pac. 4 [1886].

³Edwards & Walsh Construction

Company v. Jasper County, 117 Ia. 365, 381, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902].

⁴Banaz v. Smith, 133 Cal. 102, 65 Pac. 309 [1901].

⁵Morrilton Waterworks Improvement District v. Earl, 71 Ark. 4, 69 S. W. 577, 71 S. W. 666 [1903]; Fitzgerald v. Walker, 55 Ark. 148, 17 S. W. 702 [1891].

⁶Board of Commissioners of Montgomery County v. Fullen, 111 Ind. 410, 12 N. E. 298 [1887].

therefor.⁷ The fallacy of this theory lies in the fact that the request to do the work was a request to do it for a payment to be made in a certain way; while the theory imposes a general liability upon the owners who petition for the improvement. Cases of this sort are usually explained upon the theory of estoppel.⁸

§ 17. Special contract to pay assessment.

In some cases, however, improvements are made under contracts between the municipal corporation and the owners of property benefited thereby, who agree to pay for such improvements. As long as such contract does not tend to place an undue share of the burden of the improvement upon the property owners who are not parties thereto, it is upheld, if possessing the elements of contracts in general.¹ Such charges, however, are not properly regarded as true assessments, but as liabilities arising out of contract. Under such contracts the cost of an improvement may be charged upon property which by statute would be exempt except for such contract,² such as a cemetery.³ So by virtue of such contracts assessments may be enforced under circumstances which would make such assessment invalid except for such contract. Thus a contract was enforced whereby the property owners agreed that if the city would leave standing a row of trees in the centre of a street which the city was about to pave, and would place curbstones around such trees for the purpose of protecting them, the said owners would pay the cost of the curbstones so placed opposite their land on their side of the street.⁴ So under such a contract an assessment may be enforced, although no order was made extending the time for performance, and under the statute in force such fact would invalidate the assessment.⁵ Such a contract, like any other, requires a valuable consideration to support it. Such

⁷ Moore v. Barry, 30 S. C. 530, 4 L. R. A. 294, 9 S. E. 589 [1889].

⁸ See § 1011 *et seq.*

¹ Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557 [1896]; Floyd v. Atlanta Banking Company, 109 Ga. 778, 35 S. E. 172 [1899]; Edwards v. Cooper, 168 Ind. 54, 79 N. E. 1047 [1907]; City of Springfield v. Harris, 107 Mass. 532 [1871]; Inhabitants of

Boston v. Brazer, 11 Mass. 447 [1814].

² Edwards v. Cooper, 168 Ind. 54, 79 N. E. 1047 [1907].

Edwards v. Cooper, 168 Ind. 54, 79 N. E. 1047 [1907].

⁴ City of Springfield v. Harris, 107 Mass. 532 [1871].

⁵ Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557 [1896].

consideration is sometimes found in the doing of additional work by the contractor in reliance on such promise.⁶ Another form of valuable consideration is the construction of the improvement in question after the promise is made and in reliance thereon.⁷ Another form of valuable consideration is an extension of time for payment of the assessment.⁸ If the improvement is made before the promise to pay the assessment is entered into, the question is then presented whether the benefits conferred upon the property by such improvement form a consideration for a promise to pay or not. It seems to be assumed in some jurisdictions that the existence of such benefits constituted a consideration.⁹ This view, however, is out of harmony with the general theories of consideration. The making of the improvement is a past transaction, imposing no liability upon the property or the owner thereof except in case of compliance with the terms of the statute.¹⁰ Such a transaction, leaving no liability of any kind cannot, properly speaking, form a consideration for a subsequent promise. If there is a genuine dispute as to the validity of the assessment, the compromise of such dispute and forbearance on the part of the city to enforce such assessment might furnish a consideration. In the absence of such compromise and forbearance the effect of such a promise made after the improvement is constructed can be explained only on the theory of estoppel or waiver. A special contract between the municipal corporation and the owners of property to be assessed may operate to prevent the owner from interposing defenses which he would otherwise be entitled to make. Thus an agreement that the cost of the improvement should be assessed against certain property will prevent the owners of such property who entered into such agreement from raising the question that the city, while it had authority to construct such improvement, had no authority to levy assessments therefor.¹¹ An agreement by which the owners of the land assessed agree that in consideration of permission to pay the assessment in installments the owners will not make any objection to the

⁶ *Bernstein v. Downs*, 112 Cal. 197, 44 Pac. 557 [1896].

⁷ *Edwards v. Cooper*, 168 Ind. 54, 79 N. E. 1047 [1907].

⁸ See § 1033.

⁹ *Floyd v. Atlanta Banking Com-*

pany, 109 Ga. 778. 35 S. E. 172 [1899].

¹⁰ See §§ 18, 777, Chapter VI.

¹¹ *Hendrickson v. Toledo*, 23 Ohio C. C. 256 [1901].

legality or regularity of the assessments prevents them from making defenses otherwise available, such as the defense that the report of the engineer on which the assessment was based did not contain a full description of each lot or parcel of ground bordering on the improved street, together with the name of the owner thereof.¹² Promises like this are often regarded not as valid contracts, enforceable in themselves, but as operating to estop the promisor from denying the validity of the assessment, or as operating as a waiver of defenses which might otherwise have been interposed.

§ 18. Assessment not based on quasi contract.

While the general theory of assessments for benefits presents some points of resemblance to quasi contract¹ assessment is not a form of quasi-contract other than as taxes generally are. The attempt to identify assessment with quasi-contract is made most often where by reason of failure to comply with the statutory requirements, or by reason of the statute's failure to comply with constitutional requirements, the assessment itself is invalid, and the attempt is then made to compel the owner to pay for the benefits conferred upon him by an action in quantum meruit, irrespective of the validity of the assessment. It is a fundamental rule of assessments that constitutional and statutory requirements must be complied with, in a substantial manner at least.² It is evident that if assessment can be identified with quasi-contract in the manner here suggested, all the restrictions upon the power of a public corporation to levy assessments are swept away,³ except the limitation that assessments must not exceed the amount of the benefits. There would be small use in framing rules, the violation of which would produce no legal consequences, and the law of assessments would, in a manner, cease here. Accordingly, where this attempt to identify assessment with quasi-contract has been made, it has failed in the absence of some specific statute authorizing recovery, and if the irregularities and defects are so marked as to avoid the assess-

¹² *Dunkirk Land Company v. Zehner*, 35 Ind. App. 694, 74 N. E. 1099 [1905].

¹ See § 11.

² See § 777, Chapter VI.

³ *Allen v. City of Davenport*, 132 Fed. 209, 65 C. C. A. 641 [1904], (reversing *City of Davenport v. Allen*, 120 Fed. 172 [1903]).

ment, no recovery can be had on the theory of quasi-contract.⁴ Of an action upon the common courts, ignoring the assessment, it is said that "it does not conform to any known rule of law."⁵ At a sale under an apportionment warrant issued against one who was not the true owner of the property, the owner of the warrant bid the property in. This was held to extinguish the assessment. Accordingly, if the assessment itself could not be enforced it was said that the owner was "under no common law or moral obligation to pay the debt in question."⁶ So the city cannot, after paying for the cost of the improvement, maintain an action against the property owner for money laid out and expended.⁷ If any cause of action exists it must be one on the assessment. The original proceeding leading up to the attempted assessment is a statutory proceeding *in invitum*,⁸ and recovery, if permitted at all, must be on the assessment and not for reasonable compensation.⁹ In some of these cases it does not appear that a benefit was, in fact, received by the property owner.¹⁰ Thus a levee was constructed at a time when such improvement could not be paid for by assessment.¹¹ The

⁴ O'Brien v. Wheelock, 184 U. S. 450, 22 S. 354 [1902], (affirming O'Brien v. Wheelock, 95 Fed. 883, 37 C. C. A. 309 [1899], which affirmed 78 Fed. 673 [1897]); Woollacott v. Meekin, — Cal. —, 91 Pac. 612 [1907]; McManus v. Hornaday, 124 Ia. 267, 100 N. W. 33 [1904]; Crawford v. Mason, 123 Ia. 301, 98 N. W. 795 [1904]; City of Owensboro v. Hope, — Ky. —, 110 S. W. 272 [1908]; City of Manistee v. Harley, 79 Mich. 238, 44 N. W. 603 [1890]; Heman v. Larkin, 108 Mo. App. 392, 83 S. W. 1019 [1904]; Neill v. Trans-Atlantic Mortgage Trust Company, 89 Mo. App. 644 [1901]; McQuiddy v. Brannock, 70 Mo. App. 535 [1897]; Galgreath v. Newton, 30 Mo. App. 380 [1887]; Brady v. Mayor, etc., of New York, 7 Abb. Pr. (N. Y.) 234 [1858]; Burns v. Patterson, 2 Handy (Ohio) 270 [1855]; Reilly v. City of Philadelphia, 60 Pa. St. 467 [1869]. "It will not do to say, because the property owner has been benefited by the improvement, that

he should pay for it whether the law has been complied with or not. This would be to invoke the spirit of expediency to which a court of justice should never resort." Municipal Securities Corporation v. Gates, — Mo. App. —, 105 S. W. 85, 86 [1908].

⁵ City of Manistee v. Harley, 79 Mich. 238, 44 N. W. 603 [1890].

⁶ Kirwin v. Nevin, 111 Ky. 682, 64 S. W. 647, 687 [1901].

⁷ Mayor and City Council of Baltimore v. Hughes' Adm'r, 1 Gill & J. 480, 19 Am. Dec. 243 [1829].

⁸ Galbreath v. Newton, 30 Mo. App. 380 [1887]. See §§ 15, 778.

⁹ Heman v. Larkin, 108 Mo. App. 392, 83 S. W. 1019 [1904].

¹⁰ O'Brien v. Wheelock, 184 U. S. 450, 22 S. 354 [1902], (affirming O'Brien v. Wheelock, 95 Fed. 883, 37 C. C. A. 309 [1899], which affirmed 78 Fed. 673 [1897]).

¹¹ Updike v. Wright, 81 Ill. 49 [1876].

levee was not kept up and proved to be of no actual benefit to the land owners, it amounting to a partial failure of an indivisible consideration. No recovery was allowed against the land owners.¹² In some of the cases, however, the existence of a benefit was clear.¹³ Thus if an assessment is invalid, the fact that the construction of a sewer, connected with the property assessed and thus used,¹⁴ or the grading of a street,¹⁵ or the construction of a sidewalk¹⁶ conferred a benefit upon the property of the land-owner does not make him liable therefor in quasi-contract. The theory that assessment may be regarded as a form of quasi-contract has possibly been invoked through a misapprehension of other principles applicable to the law of assessments, but not involving the doctrine of quasi-contract. Thus in many cases, certain forms of acquiescence in an improvement which result in special benefit are held to estop the property owner from attacking the validity of assessment therefor, and from setting up defects which, but for such circumstances so operating as an estoppel, would have defeated the assessment.¹⁷ While occasionally confused with quasi-contract the doctrine of estoppel is of a radically different nature, since its operation renders the assessment itself enforceable, and does not leave the right of recovery one for benefits without support for the assessment. Certain principles for ascertaining the amount of the benefits received are also occasionally confused with quasi-contract. Under some statutes the rule applicable to contracts is also applicable to assessments, and no recovery is allowed in case of material and substantial failure to construct the improvement as stipulated. In other jurisdictions and under other statutes this rule is relaxed so far that the contract price less the proper amount of abatement for defects in construction is the basis for the amount of the assessment.¹⁸ These statutory provisions take the contract price as the basis for determining

¹² *O'Brien v. Wheelock*, 184 U. S. 450, 22 S. 354 [1902], (affirming *O'Brien v. Wheelock*, 95 Fed. 883, 37 C. C. A. 309 [1899], which affirmed 78 Fed. 673 [1897].

¹³ *City of Manistee v. Harley*, 79 Mich. 238, 44 N. W. 603 [1890]; *Heman v. Larkin*, 108 Mo. App. 392, 83 S. W. 1019 [1904].

¹⁴ *City of Manistee v. Harley*, 79

Mich. 238, 44 N. W. 603 [1890]; *Neill v. Trans-Atlantic Mortgage Trust Company*, 89 Mo. App. 644 [1901].

¹⁵ *McQuiddy v. Brannock*, 70 Mo. App. 535 [1897].

¹⁶ *Heman v. Larkin*, 108 Mo. App. 392, 83 S. W. 1019 [1904].

¹⁷ See § 1011 *et seq.*

¹⁸ See §§ 529, 530.

the amount of the assessment and therefore do not, properly speaking, involve the theory of quasi-contract. More closely related to quasi-contract is the statutory rule which is in force in a few jurisdictions allowing recovery in case of certain defects for the reasonable value of the work done, not to exceed the contract price.¹⁹ This, however, is a statutory method for estimating the amount of the assessment and resembles quasi-contract only in that quasi-contractual principles have been to a limited extent enacted into statutory form. Under a statute which provided: "In any such proceeding where the court trying the same shall be satisfied that the work has been done or material furnished which, according to the true intent of the act, would be properly chargeable upon the lot or land through or by which the street, alley or highway improved, repaired or lighted, may pass, a recovery shall be permitted or a charge enforced, to the extent of the proper proportion of the value of the work or materials which would be chargeable on such lot or land, notwithstanding any informality, irregularity or defect in any such municipal corporation or its officers. * * *"²⁰ Under this statute it was held by the United States Circuit Court that recovery in *quantum meruit* could be had even if the assessment and contract were both invalid and the city had no right to pay the contractor.²¹ The Circuit Court of Appeals, however, held by a majority vote that such assessment could not be enforced in *quantum meruit*,²² where the contract was one which the State Supreme Court had held to be void and without the power of the city to make.²³ The Supreme Court of Iowa has taken the same view of such statute, holding that no recovery in *quantum meruit* could be allowed where the assessment was void,²⁴ although such statute prevents the owners of property from invoking defects which are not jurisdictional

¹⁹ *Quest v. Johnson*, 58 Mo. App. 54 [1894]. See also *Bingaman v. City of Pittsburg*, 147 Pa. St. 353, 23 Atl. 395 [1892].

²⁰ § 479, Code of Iowa [1873].

²¹ *City of Davenport v. Allen*, 120 Fed. 172 [1903].

²² *Allen v. City of Davenport*, 132 Fed. 209, 65 C. C. A. 641 [1904].

²³ *Allen v. City of Davenport*, 107

Ia. 90, 77 N. W. 532 [1898].

²⁴ *Snouffer v. Grove*, — Ia. —, 116 N. W. 1056 [1908], (involving the assessment the levy of which was enjoined in *Wingert v. Tipton*, 134 Ia. 97, 108 N. W. 1035); *Carter v. Cemansky*, 126 Ia. 506, 102 N. W. 438 [1905]; *Crawford v. Mason*, 123 Ia. 301, 98 N. W. 795 [1904].

to defeat the assessment, though the amount of recovery in some cases be reduced by such defects.²⁵

§ 19. Assessment for legal duty not based on contract.

From the nature of the assessment for the performance of a legal duty, and from the theory underlying such assessment,¹ it follows that the assessment for the performance of a legal duty is a forced charge upon the owner of the property from whom such legal duty may lawfully be exacted. While such assessment is not based upon any theory of the assent of the property owner to such charge, nor upon any theory of a contract between the property owner and the public. An assessment of this type is essentially a forced contribution made in invitum by the authority of the sovereign power of the state, and is not in any way dependent on the assent of the property owner.²

§ 20. Assessment for goods furnished based on contract.

From the nature of the assessment for goods furnished or services rendered, and from the theory underlying such so-called assessment,¹ it follows that the assessment of this type depends upon the assent of the owner of the property upon which, or with reference to which, use is made of the property for the use of which the assessment is levied. While such property owner is not consulted in most cases with reference to the original statute or ordinance which provides for such charge, he has the option of making use of such property and thus rendering

²⁵ *Ottumwa Brick & Construction Company v. Ainley*, 109 Ia. 386, 80 N. W. 510 [1899]; *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895 [1887]; *City of Chariton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882].

¹ See § 13.

² *Mayor and Board of Trustees of the Town of New Iberia v. Fontelleu*, 108 La. 460, 32 So. 369 [1901]; *Nugent v. City of Jackson*, 72 Miss. 1040, 18 So. 493 [1895]; *Horbach v. City of Omaha*, 54 Neb. 83, 74 N. W. 434 [1898]; *Brown v. Keener*, 74 N. C. 714 [1876]; *Sessions v. Crunkilton*, 20 O. S. 349 [1870]; *Bliss v.*

Krans, 16 O. S. 54 [1864]; *Charleston v. Werner*, 38 S. C. 488, 37 Am. St. Rep. 776, 17 S. E. 33 [1892]; *Mayor and Aldermen v. Maberry*, 6 Humph. (Tenn.) 368, 44 Am. Dec. 315 [1845]; *Washington v. Mayor and Aldermen of Nashville*, 1 Swan (Tenn.) 177 [1851]; *Adams v. Fisher*, 63 Tex. 651 [1885]; *Rude v. Town of St. Marie*, 121 Wis. 634, 99 N. W. 460 [1904]; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947 [1889]; *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389 [1883].

¹ See § 14.

himself liable to such charge, or, on the other hand, of refraining from the use of such property, and thereby incurring no liability for such charge. While a charge of this type is not properly termed an assessment, it is a charge which rests upon the assent of the property owner.² That the so-called assessment of this type does in fact rest upon the assent of the property owner is manifest in cases in which the attempt is made to levy an assessment of this sort without the consent of the property owner. Such assessments cannot be sustained as assessments of this type; and if not apportioned substantially in accordance with benefit and thus sustained as assessments based upon the theory of benefits, they fail altogether.³ The fact that such charge is based upon the assent of the property owner is said to be conclusive of the fact that it is not a true assessment.⁴

² *Provident Institution for Savings v. Mayor and Aldermen of Jersey City*, 113 U. S. 506, 28 L. 1102, 5 S. 612 [1885], affirming *Provident Institution for Savings v. Allen*, 37 N. J. Eq. (10 Stew.) 627 [1883], which affirmed without opinion 37 N. J. Eq. (10 Stew.) 36 [1883]; *City of Chicago v. Northwestern Mutual Life Insurance Co.*, 218 Ill. 40, 1 L. R. A. (N. S.) 770, 75 N. E. 803 [1905]; *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222, 28 L. R. A. 679, 37 N. E. 402, 39 N. E. 869 [1894]; *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]; *City of East Grand Forks v. Luck*, 97 Minn. 373, 107 N. W. 393 [1906]; *City of Fergus Falls v. Boen*, 78 Minn. 186, 80 N. W. 961

[1899]; *Burke v. City of Water Valley*, 87 Miss. 732, 112 Am. St. Rep. 468, 40 So. 820 [1905].

³ *Hoboken Manufactures Co. v. Mayor, etc., of City of Hoboken*, — N. J. L. —, 68 Atl. 1098 [1908]; *State, Culver, Pros. v. Mayor and Aldermen of Jersey City*, 45 N. J. L. (16 Vr.) 256 [1883]; *State, Vreeland, Pros. v. Mayor and Aldermen of Jersey City*, 43 N. J. L. (14 Vr.) 135 [1881], (affirmed *Mayor, etc., of Jersey City v. State, Vreeland, Pros.*, 43 N. J. L. (14 Vr.) 638 [[1881]]); *Provident Institution for Savings v. Allen*, 37 N. J. Eq. (10 Stew.) 36 [1883].

⁴ *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222, 28 L. R. A. 679, 37 N. E. 402, 39 N. E. 869 [1894].

CHAPTER II.

HISTORY OF LOCAL ASSESSMENTS.

§ 21. Early analogies to local assessments—Feudal exactions.

In mediaeval times the construction of public improvements which could confer special benefits on private property was a rare occurrence. Castles, palaces and cathedrals absorbed a much larger amount of the wealth of the people than paved streets, sidewalks and sewers. When public improvements of this sort were constructed, they were paid for in part by general taxation or its equivalent. The charge of such improvements in part rested upon the owners of certain land, in accordance with the general theory of the feudal system. Such a charge, however, was not a local assessment as we know it, nor did it possess the essential elements thereof. It was not based upon the theory of benefits, it was not apportioned according to benefits, and it was not imposed necessarily upon land benefited in the least by the improvement. A land-owner might be charged with the duty of constructing or maintaining a given public improvement; but if he was so charged, it was by virtue of an arrangement between himself and the lord of whom he held his land, and was in effect a part of the return made by him for such land. It stood on the same footing with the duty resting upon some tenants to furnish fully equipped men-at-arms in time of war, and with the duty resting upon other tenants to pay money, or grain, or other produce, for their land. These feudal charges and exactions undoubtedly familiarized people with the idea that a part or all of the cost of public improvements might be imposed upon certain private individuals. They cannot be regarded, however, as anything more than analogies to the local assessment as it ultimately appeared. The feudal charge did not develop into the local assessment, but rather, tended to be crowded out and extinguished by the local assessment as it developed under sub-

sequent legislation.¹ The later cases, however, showed a tendency to regard the feudal charge as persisting and as existing side by side with the statutory assessment.²

§ 22. Work on roads.

Another analogy to the local assessment has been sought in the duty imposed by law upon the residents of certain districts to work upon the roads for a certain time each year, or to pay a fixed sum of money in lieu thereof.¹ A charge of this sort is undoubtedly a tax. However, it lacks the essential elements of a local assessment. It is not imposed upon land-owners as such, is not apportioned according to benefits, and is not restricted to the lands benefited by the improvement. It is merely a special form of general taxation charged upon individuals, without reference to the property owned by them, resembling the local assessment chiefly in being a tax for the purpose of a public improvement which confers a special benefit, and differing from the ordinary form of general taxation solely in the fact that it is not apportioned in accordance to the value of the property owned by the taxpayer.

¹ *Rooke's Case*, 5 Rep. 99b (Hil. 40 Eliz.).

² *Keighley's Case*, 10 Rep. 139a (Mich. 7 Jac. 1). See § 25.

¹ *Kootenai County v. Hope Lumber Co.*, 13 Ida. 262, 89 Pac. 1054 [1907]; *People ex rel. v. Chicago & Alton Railway Co.*, 228 Ill. 102; 81 N. E. 813 [1907]; *Toledo, St. Louis & Western Railroad Co. v. People, ex rel.*, 226 Ill. 557, 80 N. E. 1059 [1907]; *St. Louis, Alton & Terre Haute R. Co. v. People*, 224 Ill. 155, 79 N. E. 664 [1906]; *Burnes v. Mayor and City Council of Atchison*, 2 Kan. 454 (original edition) [1864]; *City of Lexington v. McQuillan's Heirs*, 9 Dana (Ky.) 513, 35 Am. Dec. 159 [1839]; *Seaboard National Bank of New York v. Woesten*, 176 Mo. 49, 75 S. W. 464 [1903]. "At first every man was subject to the duty of working so many days every

year upon the public roads, and penalties were prescribed for those who failed to respond to an order to do such work. Then, as the natural and inevitable development of the system of improving roads the public was given authority to have the work done and to charge the cost thereof to the owners of the abutting property that was specially benefited by the improvement. And to insure the prompt payment of that cost a penalty for delay in payment was imposed. In both cases the penalty is imposed for failure to discharge a public duty. In the former instance it was a penalty for not working in person; and in the latter instance it is a penalty for not paying for the work done by another." *Seaboard National Bank of New York v. Woesten*, 176 Mo. 49, 61, 75 S. W. 464 [1903].

§ 23. Origin of assessments in drainage.

The necessity of draining marshes seems to have forced the adoption of a system of rules and regulations intended to equalize the burden of such drainage. The improvement and reclamation of Rumney Marsh seems to have been the occasion for the original adoption of provisions upon this subject. Coke tells us that "Rumney Marsh, in the County of Kent, containing 24,000 acres, is, at this day and long time hath been governed by certain ancient and equal laws of sewers made by a venerable justice, Henry de Bathe, in the reign of H. III., from which laws, not only other parts in Kent, but all England receive light and direction—for example: The said general act of 23 H. 8 Ca. 5, in the clause which giveth power to the commissioners to make statutes, ordinances and provisions, etc., necessary and behooveful after the laws and customs of Rumney Marsh, in the County of Kent, or otherwise by any ways or means, etc."¹ "Both the town and marsh of Rumney took their name of one Robert Rumney. This Robert (as appeareth by the book of Domesday) held this town of Odo, Bishop of Bai-eux, wherein he had 13 burgesses who, for their service at the sea, were discharged of all actions and customs of charge, except felony, breach of the peace and forestalling."²

§ 24. Statute 23, Hen. VIII., C. 5.

In the reign of Henry VIII., in 1531, a statute was passed providing for the construction of sewers, drains and other improvements, designed to reclaim traets of land. A part of this statute is as follows: "The bill of sewers with a new proviso, etc. Our sovereign lord the King, like a virtuous and most graeious princee, nothing earthly so highly weighing as the advancing of the common profit, wealth and eommodity of this, his realm, considering the daily great damages and losses which have happened in many and divers parts of this, his said realm, as well by the reason of the outrageous flowing surges and course of the sea in and upon marsh-grounds and other low places heretofore through politick wisdom won and made profitable for the great common wealth of this realm as also by occasion of land, waters and other outrageous springs in and upon meadows, pas-

¹ 4 Inst. (Coke) 276, 277.

² 4 Inst. (Coke) 277.

tures and other low grounds adjoining to rivers, floods and other water courses; and over that, by and through mills, mill-dams, wears, fishgarths, kedels, gores, gates, flood-gates, locks and other impediments in and upon the same rivers and other water-courses, to the inestimable damages of the commonwealths of this realm, which daily is likely more and more to increase unless speedy redress and remedy be in this behalf shortly provided; wherein albeit that divers and many provisions have been before this time made and ordained, yet none of them are sufficient remedy for the reformation of the premises, hath therefore by deliberate advice and assent of his lords, spiritual and temporal, and also his loving commons in this present parliament assembled, ordained, established and enacted, That commissions of sewers and other premises shall be directed in all parts within this realm from time to time, where and when need shall require, according to the manner, form, tenor and effect hereafter ensuing, to such substantial and indifferent persons as shall be named by the lord chancellor and lord treasurer of England and the two chief justices for the time being, or by three of them, whereof the lord chancellor be one.”¹ The form of commission to be issued under such statute was as follows: “We, therefore, for that by reason of our dignity and prerogative royal, we be bounden to provide for the safety and preservation of our realm of England, willing that speedy remedy be had in the premises have assigned you and six of you of the which we will that A., B. and C. shall be three to be our justices, to survey the said walls, streams, ditches, banks, gutters, sewers, gates, calcies, bridges, trenches, mills, mill-dams, flood-gates, ponds, locks, hebbing-wears, and other impediments, lets and annoyances aforesaid, and the same cause to be made, corrected, repaired, amended, put down, or reformed as the case shall require, after your wisdoms and discretions; and therein as well to ordain and do after the form, tenor and effect of all and singular the statutes and ordinances made before the first day of March, in the three and twentieth year of our reign, touching the premises or any of them as also to enquire by the oaths of the honest and lawful men of said shire or shires, place or places, where such defaults or annoyances be, as well within

¹ 23 Hen. VIII., C. 5, par. 1 [1531].

the liberties as without (by whom the truth may the rather be known), through whose default the said hurts and damages have happened and who hath or holdeth any lands or tenements, or common of pasture or profit of fishing or hath or may have any hurt, loss or disadvantage by any manner of means in the said places as well near to the said dangers, lets and impediments as inhabiting or dwelling thereabouts by the said walls, ditches, banks, gutters, gates, sewers, trenches and the other said impediments and annoyances; and all those persons and every one of them to tax, assess, charge, distrain and punish as well within the metes, limits and bounds of old time, accustomed or otherwise, or elsewhere within our realm of England after the quantity of their lands, tenements and rents, by the number of acres and perches, after the rate of every person's portion, tenure or profit or after the quantity of their common of pasture or profit of fishing or other commodities there, by such ways and means and in such manner and form as to you or six of you whereof the said A., B. and C. to be three, shall seem most convenient to be ordained and done for redress and reformation to be had in the premises.² . . .” By the express provisions of this statute the laws and customs of Rumney Marsh were extended at the discretion of the commissioners, over England. The commissioners were authorized “to make and ordain statutes, ordinances and provisions from time to time, as the case shall require, for the safeguard, conservation, redress, correction and reformation of the premises and of every of them and the parts lying to the same, necessary and behoofful after the laws and customs of Rumney Marsh, in the County of Kent or otherwise by any ways or means after your own wisdoms and discretions.”³ This provision, it was held subsequently, did not compel the commissioners to follow the customs of Rumney Marsh if they did not deem it advisable so to do.⁴ Section 8 of this statute provides that if the tax or assessment levied as therefore provided for, was not paid, the lands of the delinquent taxpayer, held by him in fee simple, fee tail, for life or for years, might be sold. This provision was subsequently extended to provide for a sale of lands held

² 23 Hen. VIII., C. 5, par. III.

³ 23 Hen. VIII., C. 5, par. III.

⁴ Keighley's Case, 10 Rep. 139a (Mich., 7 Jac. 1).

in copyhold in case of default.⁵ Section 9 of the statute, 23 Hen. VIII., C. 5. provides that the decrees of the commissioners therein provided for shall bind the lands of the king. Section 13 of the same statute provides for the payment of the expenses of the improvements including the compensation of the commissioners, their clerk, and the like, out of the taxes, levies and the like, therein provided for. Coke explains this statute as follows: “Quando aqua profuit, that is, when water doth issue, vulgarly sue: hereupon cometh the word suera for a sewer, passage, channel or gutter of water. At the complaint of Henry de Lacye, Earle of Lincolne, a commission of sewers was granted to Roger de Brabason, Mayor, and the sheriffs of London. Their authority is by commission under the great seal *in haec verba*, at this day groundend and warranted by the act of parliament of 23 Hen. VIII.”⁶

§ 25. Effect of statutory assessment on prescriptive duties.

The effect of a statutory right of local assessment for such improvements upon the special duties resting upon certain land-owners to keep such improvements in repair—duties originating in many cases under the feudal system as returns for the land granted to the tenant, ultimately justified in many cases on the doctrine of prescription—was presented for judicial consideration. It was held at first that the tax ought to be levied upon all the owners of land benefited, and not upon the owners immediately adjoining to the exclusion of others, even if the owners immediately adjoining always used to repair such improvement, or were bound to repair such improvement, by prescription.¹ This holding was subsequently explained and modified; and the rule was laid down that if A. was bound by prescription to repair a wall as against the sea (*contra Fluxum Maris*), and A. was at fault in not repairing such wall against ordinary damage and deterioration, the commissioners might tax A. only, while if the wall was wrecked by a sudden and unusual flood the commissioners might tax all who would be damaged by

⁵ 7 Ann. c. 10.

⁶ IV Coke's Institutes, 275.

¹ Rooke's Case, 5 Rep. 99b (Hil. 40 Eliz.)

such injury to the wall, without waiting to compel A. to make such repairs.²

§ 26. Questions arising under early statute.

The questions which arose under the statute foreshadowed many of the questions which have constantly been presented to the courts of this country under our statutes providing for local assessments. The provision of the statute entrusting the matter of repairs and assessments to the commissioners "according to your wisdom and discretion" was held not to give them an unlimited and arbitrary discretion, but to require them to act in substantial accordance with law and justice.¹ An assessment for these purposes could be laid only on those who would be damaged by failure to make the improvement and keep it in repair, or who would be benefited by the reformation thereof.² Accordingly, where A. owned land on higher ground than that drained by the ditch in question, which ground drained into another stream, and was in no way benefited by the construction of a ditch, it was held that no assessment could be levied upon A.³ In the absence of specific statutory authority it was held that the commissioners of sewers could not make a new river.⁴ If an old wall could be repaired so as to perform the necessary service, it was held that the commissioners ought not to destroy it and construct a new wall.⁵ A tax assessment and charge authorized by the statute should be in proportion to the quantity of land owned by each tenant, according to the acreage, or should be according to the rate of portion, tenure or profits held by him. Accordingly, an assessment upon a vill in gross, was held to be unauthorized.⁶ The

¹ Keighley's Case, 10 Rep. 139a (Mich., 7 Jac. 1). See to the same effect the King v. Commissioners of Sewers for Essex, 1 Barn. & Cress. 477, 2 How. & Ry. 700 [1823], where contribution for rebuilding a wall east down by an unusual storm is not allowed unless the party who repairs the sea-wall has not been in default in his duty to make repairs.

² Keighley's Case, 10 Rep. 139a (Mich., 7 Jac. 1). To the same effect see the King v. Commissioners of

Sewers for Essex, 1 Barn. & Cress. 477, 2 How. & Ry. 700 [1823].

³ Case of Isle of Ely, 10 Rep. 141a (7 Mich., Jac. 1).

⁴ Anselm v. Barnard, 2 Keb. 675 (Trin. 22 Car. II).

⁵ Case of Isle of Ely, 10 Rep. 141a (7 Mich., Jac. I).

⁶ Case of Isle of Ely, 10 Rep. 141a (7 Mich., Jac. I).

king owned eight hundred acres in a tract drained by a ditch. This land was omitted from the assessment. The assessment was held, for that reason, to be invalid on the ground that "a tax is unjust because by the not taxing of them a greater portion was laid upon the rest of the land than of right ought to be."⁷ Under the statute it was held that notice was necessary, and should be given to the owners of the property to be assessed.⁸ If an old ditch existed, draining certain land so that it was not benefited by the construction of a new ditch, the commissioners ought to refund the assessment levied and make new assessments, on the theory of benefits.⁹ The commissioners ought to describe the lands assessed. It was not necessary for them to name the owners thereof, since the imposition of such a requirement would make, in effect, an end of all assessments. On the other hand, it was not sufficient to describe the area taxed as all the land from such a place to such a place.¹⁰

§ 27. Assessment extended to street improvements.

More than eighty years before the American Revolution, the idea of local assessments was extended in England to streets, lanes and alleys. A statute of William & Mary provided: "VI., and be it further enacted by the authority aforesaid, That all open streets, lanes and alleys, which are now paved within any of the parishes or places aforesaid, shall be from time to time repaired, amended and paved at the costs and charges of the householders, inhabitants in any such streets and lanes respectively; and where any houses shall be empty and unoccupied in any such streets and lanes, then to be paved and repaired at the charge of the owners or proprietors thereof in the manner following (that is to say): every of the said householders, owners or proprietors of houses, to repair, pave, and keep repaired, amended and paved, the streets, lanes or alleys before his house, stables or out-houses, so far as his housing, walls or buildings extend unto the center-stone, channel or middle of the same

⁷ Whitley v. Fawsett, Styles 12, 13 (23 Car. I).

⁸ Whitley v. Fawsett, Styles 12, 13 (23 Car. I).

⁹ Bow v. Smith, 9 Mod. 94 (Easter, 10 Geo. I).

¹⁰ Bow v. Smith, 9 Mod. 94 (Easter, 10 Geo. I).

street, lane or alley; upon pain to forfeit twenty shillings for every perch, or rod, and after that rate for a greater or less quantity for every default of twenty shillings a week, for every week after, until the same shall be sufficiently paved and amended.”¹ Sections 9 and 10 of this statute provided for cleaning streets by a general tax. Section 13 of this statute provided for repairing streets by a general tax. Section 15 of this statute required householders to set out lights in front of houses at their own expense. It will be noticed that this statute requires each householder or land-owner, as the case might be, to repair the street in front of his house. The exaction imposed was in the form of work and labor, the penalty in money being for the purpose of coercing performance.

§ 28. Early colonial legislation—Pennsylvania.

The idea of local assessment was therefore one with which the English immigrants to this country at the date of its original settlement, were, to a greater or less degree, familiar. We find accordingly that early colonial statutes provided for local improvements to be paid for by local assessments, appearing within a few years after the statute of 2 William & Mary.¹ Such provisions existed in Pennsylvania from the year 1700. “By a province law of 1700 commissioners or assessors were to be appointed by the governor, with four of his council, for regulating the streets and water courses, the pitching, paving and graveling thereof; the clearing of docks, and repairing landing-places and bridges in the towns (the water-courses under ground to be arched and laid with brick or stone), and to defray the charge of pitching, paving, graveling and regulation of the said streets, and scouring and cleaning said docks each inhabitant concerned was to pay towards the same, in proportion to the number of feet of his lots or landings adjoining, on each or either side of the said streets or docks. And for defraying the charge of repairing landing-places, bridges, making common sewers, and paving, pitching, graveling or regulating any part of the streets; scouring and cleansing any part of the docks belonging to the public, each inhabitant in the said respective town or place was to pay his

¹ 2 William & Mary, Second Session, Ch. 8, Section VII [1690].

¹ See § 28.

proportional rate according to his estate in each town. The commissioners were empowered to agree with and employ workmen for performing the same from time to time, and having made the assessments were to appoint collectors and receivers thereof, and in case of non-payment each collector, by a warrant from the proper justice, was to levy the same by distress and sale of the delinquent's goods. A similar law had been passed in 1698."¹ "The districts [i. e., in the neighborhood of Philadelphia] being sparsely settled, with large vacant spaces, and inhabited by persons unable to bear heavy taxation, resorted to the old method of 1700, which applied to the whole province, of localizing the taxes and imposing the cost of the improvements upon those who were immediately benefited by them. The district of the Northern Liberties comprised all of that part of the township of that name lying between the west side of Sixth street and the River Delaware, and between Vine street and Cohocksink Creek; and by the act of 1803 its commissioners were given full power to pave the footways and gutters within said district, to plant curbstones, and assess the freeholders in front of whose ground such footways shall be paved, in order to defray the expense of paving and keeping them in repair, in proportion to their respective extents of front; and upon the application of two-thirds of the freeholders on any street, lane or alley, to establish lamps and a nightly watch in such street, lane or alley, the expense to be defrayed by an assessment agreeably to the county rates and levies within the district so lighted and watched, and upon like application to pitch and pave any street, lane or alley, provided said street, lane or alley, so required to be paved, be not less in length than one nor exceeding two squares at any one time, and the owners of land in front of which such street is pitched and paved, shall be taxed in proportion to the respective fronts of their property within the streets so pitched and paved."² Similar acts were passed in 1813, 1826, 1837 and in 1844.³ An interesting and detailed account of assessment legislation in Pennsylvania is to be found

¹ Dissenting opinion of Read, J., in *Hammett v. Philadelphia*, 65 Pa. St. (15 P. F. Smith) 146, 157, 158, 3 Am. Rep. 615 [1869, 1870].

² From dissenting opinion of Read, J., in *Hammett v. Philadelphia*, 65

Pa. St. (15 P. F. Smith) 146, 160, 3 Am. Rep. 615 [1869, 1870].

³ *Hammett v. Philadelphia*, 65 Pa. St. (15 P. F. Smith) 146, 160, 161, 3 Am. Rep. 615 [1869, 1870].

in some of the opinions of the Supreme Court.⁴ A history of the legislation in Pennsylvania for the recovery of municipal claims is found in an opinion of the Supreme Court of Pennsylvania.⁵

§ 29. New York.

The existence of the local assessment in New York slightly antedates its existence in Pennsylvania. "In the colony and state of New York, the system of taxation for local purposes by assessing the burden according to the benefit has been in force for more than one hundred and fifty years. It was applied to highways in the county of Ulster in 1691: *Bradf. Laws*, 45. The power was given to the corporation of New York in the same year: *Id.*, 9. This statute remained in force in 1773, when Van Schaack's edition of the statutes was published, and no evidence of its repeal is found until 1787, when it seems to have been revised and its provisions re-enacted under the state constitution: *Van Schaack's Laws*, 8, 9; 2 *Jones & Var.* 152; 1 *Greenl.* 443. The colonial statute was doubtless in force when the state constitution was adopted. It is not unworthy of remark, that in April, 1691, a bill of rights was passed for the security and protection of the people of the province. The statute authorizing the assessments first mentioned was passed afterwards during the same year. In January, 1787, an act was passed declaring the rights of the citizens of this state, and prohibiting among other things that any person should be deprived of his property except by due course of law. The statute of 1787, authorizing street assessments in the city of New York, was passed by the same legislature, and sanctioned by the same council of revision, which had assented to the bill of rights. Street assessments upon the same principle were authorized in the city of New York in 1793: 3 *Greenl.* 58; and in 1795: *Id.* 244, 245; and in 1796: *Id.* 333, 334; and in 1801: 2 *K. & R.* 130; and in 1813: 2 *R. L.* 407. The corporation of New York has had and exercised

⁴ A detailed history of special assessment legislation in Philadelphia is given in the dissenting opinion of Read, J., in *Hammett v. Philadelphia*, 65 Pa. St. (15 P. F. Smith) 146, 157-177, 3 *Am. Rep.* 615 [1869, 1870]. For further account of assessment statutes in Pennsylvania see

Washington Avenue, 69 Pa. St. 352, 358-360, 8 *Am. Rep.* 255 [1871]; *Vacation of Howard Street*, Philadelphia, 142 Pa. St. 601, 21 *Atl.* 974 [1891].

⁵ *Northern Liberties v. St. John's Church*, 13 Pa. St. 104 [1850].

authority to make street assessments from the infancy of that city. Similar powers have been conferred on nearly every city, and on many of the villages of this state. It has also been applied to highways, to turnpike roads, and to the draining of marshes.”¹

§ 30. South Carolina.

Local assessments in South Carolina, too, slightly antedate those in Pennsylvania. “An examination of our statutes prior to 1790 relating to the improvement of streets and sidewalks will show that the provisions therein related to the city of Charleston and that such statutes were confined—that of 1698 (7 Stat. 12) to requiring every inhabitant of Charleston to amend and raise the sidewalk in front of his house in the manner and to the dimensions therein prescribed on penalty of forfeiting for each house a penalty to be collected under the warrant of a justice of the peace and that of 1764 to requiring the construction of sewers or drains and sidewalks. These statutes were considered and upheld with reluctance in the two cases of *Cruikshanks v. City Council*, 1 M’Cord 360 decided in 1821, and *Yeadon v. City Council*, decided in 1828 (cited 12 Rich. 733) and when the act of 1850 (12 Stat. 59, 60) was considered by the court in the case of *State v. City Council* 12 Rich. 702 the court of errors distinctly repudiated as foreign to our laws any mode of taxation for the improvement of streets in the city of Charleston which looked to the assessment of property abutting on George street in that city according to the benefits to be derived from such improvement to such land-owners under the said act of 1850, saying: “As has been said, the general rule knows nothing about partial assessments for benefits or the selection of a portion for a class. Existence of persons, or the possession of property, not the supposed benefits, are the guide. When each is taxed according to the value of his property, both equality and certainty may be attained to a reasonable extent; but what may be beneficial, or otherwise, is a matter of opinion or fancy or vague conjecture.”¹ This is the more interesting since South Carolina to-day is the only state

¹ *People ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266, 282, 283 [1851].

¹ *Mauldin v. City Council of Greenville*, 42 S. C. 293, 302, 303; 46 Am. St. Rep. 723, 27 L. R. A. 284, 20 S. E. 842 [1893].

which has totally repudiated the local assessment and all its works.

§ 31. Other colonial and state legislation.

The colonies already mentioned have been selected only as examples, showing the geographical extent of the local assessment statutes that appeared within a few years of the enactment of the English statute of 2 William and Mary. The local assessment also appeared in many other of the American colonies. "In Massachusetts, meadows, swamps and lanes may be assessed among the proprietors for the expense of draining the same, without reference to any political district, and in proportion to the benefit each proprietor derives from the work: R. S. of Massachusetts, 673. In Connecticut, the same power is given by statute to commissioners for draining marshy lands: Stat. of Connecticut, Ed. of 1839, p. 544."¹ A review of sidewalk legislation in Massachusetts from the statutes of 1799 c. 31 down to the present time is found in the opinion of the court in a recent case.² It will there be noted that the early assessment statutes are all special acts. An account of the development of assessments is also to be found in the opinion of the Supreme Court of Missouri.³ The Supreme Court of the United States has pointed out, in a case arising in Georgia, that local assessment was so uncommon in the early part of the nineteenth century that the word assessment must be regarded as then used in the sense of general taxation.⁴ No attempt is made here to do more than refer to some of the early statutes and comments thereon, for the purpose of showing the relation in point of time between the system of assessments and the specific constitutional provisions which restrict them.⁵ A tabulated statement of assessment statutes would possess but little value and is not here attempted.

¹ *People ex rel. Griffin v. Mayor*, etc., of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266 [1851].

² *Copeland v. Mayor and Aldermen of Springfield*, 166 Mass. 498, 44 N. E. 605 [1896].

³ *Newby v. Platte County*, 25 Mo. 258, 269, 270 [1857].

⁴ "The fact is notorious that a century ago special assessments were not usual in this country and at that time the word was used as synonymous with 'rates or taxes' generally." *Wells v. Savannah*, 181 U. S. 531, 543 [1901].

⁵ See Chapter V.

§ 32. Assessment not recognized by common law.

The local assessment, therefore, has no existence at the common law, but exists both in England and this country solely by virtue of statute.¹ Upon the enactment of the legislature depends the existence of the right of levying such assessments. In New Jersey it has been said that the system of local assessments was general in 1788, and that while not justifiable on theories either of taxation or of eminent domain, the system is "part of the local common law" and it is "quite too late to revert to first principles in order to overthrow a system of procedure which is possessed of such antiquity and has to its credit so many recognitions,"² and that assessments depend for their justification upon ancient usage.³ If really a part of the common law of New Jersey, the assessment is so by virtue of the adoption in New Jersey of the English assessment statutes as a part of their common law. On the other hand it has been said that there is no customary law of taxation in Tennessee.⁴

§ 33. Statutory assessment held valid.

The system of local assessment, therefore, is one of considerable antiquity in this country. It antedates specific constitutional provisions, which to a greater or less extent restrict or limit its operation. Its recognition as an established and existing system of taxation which must have been known to the framers of the state constitution, and which it cannot be supposed that they intended to destroy or subvert, has been insisted upon in many cases. "We may remark, too, that taxation of this character has prevailed too long and too extensively to be treated as illegitimate or denounced as legislative spoliation under the guise of the taxing power. It prevailed in England several centuries ago; and the assessments made there by the commissioners of sewers on the lands affected by their operations was taxation of this char-

¹ City of Owensboro v. Hope, — Ky. —, 110 S. W. 272 [1908]. See Chapter VI., § 775.

² Drainage Assessments. Hoagland v. Wurts, 41 N. J. L. (12 Vr.) 175, 180 [1879]. (affirming; In matter of Commissioners to drain the Great Meadows on Pequest River, 39 N. J. L. (10 Vr.) 433 [1877].

³ State, Society for Establishing Useful Manufactures, Pros. v. Mayor and Aldermen of the City of Paterson, 42 N. J. L. (13 Vr.) 615 [1880].

⁴ Taylor, McBean & Co. v. Chandler, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308 [1872].

acter. (28 Hen. VIII Chap. 5, Sec. 5.) In Massachusetts, from an early period, meadows, swamps and lowlands were required to be assessed among the proprietors to pay the expense of draining them (Rev. Stat. of Mass. p. 673), and in Connecticut the same power was given to commissioners for draining marshy lands. (Conn. Stat. Ed. 1839, p. 544). It is said by the judge, who delivered the opinion of the court of appeals in the Brooklyn case before referred to, (*People ex rel Griffin v. Mayor, etc., of Brooklyn*, 4, N. Y. 428), that the system of local taxation for local improvements by assessing the burden according to the benefit, had prevailed for more than one hundred and fifty years, and that this power was given to the corporation of New York in 1691, and had since been conferred on nearly every city and on many of the villages of the state.”¹ “It is far too late to question now the validity of legislation like this imposing local assessments, investing the local authorities with the discretion of judging as to the necessity for the improvements, and with power to levy and apportion the charge.”² “We believe the power exists; it has been recognized as an existing power in the state by the public, the legislature and by at least three decisions of this court. It may be difficult, perhaps impossible, to trace it to its proper source, and square its operation by logical rules, derived from a consideration of it as one of the precisely defined powers of the constitution. It had its origin and development in the principle of local self-government, characteristic of free institutions, founded by the Anglo-Saxon race—the leaving to each local community the due administration of the affairs in which it had an exeeptive, peculiar and local interest, and in the nature of real property to which it is alone applicable. It is not the creation of a philosophical brain drafting constitutions and forms of government, but the outgrowth of the necessities and varying exigencies of local communities, and hence like all institutions of similar origin and development, has inconsistencies and incongruities. Its practical operation, so as to prevent injustice, depends largely upon the good sense and the capacities of the Anglo-Saxon race for the successful working of free government and

¹Newby v. Platte County, 25 Mo. 258, 269, 270 [1857].

²Nugent v. City of Jackson, 72 Miss. 1040, 1056, 18 So. 493 [1895].

the management of their private affairs.''³ It is probably this recognition as an existing system of taxation which has saved it under the provisions of modern constitutions. The courts have, with the exception of one state,⁴ taken the attitude that the system of local assessment must be reconciled with the constitutional provisions rather than be destroyed by them. Hampered and limited by constitutional provisions as it has been, it has, nevertheless, prevailed where a new and unheard of system of taxation would probably have been overthrown by the courts as being in violation of the rights guaranteed by the constitution to the property owners. Even the courts which have criticised the system of local assessments as a system of taxation which cannot be sustained on principle have nevertheless upheld it.⁵

§ 34. Development of constitutional restraints.

The force and effect of constitutional provisions affecting taxation and local assessment were not at first understood very accurately by the courts. When such constitutional provisions as those requiring uniformity of taxation and forbidding the taking of property without due process of law were seen to have some application to the local assessment, the very existence of the power of local assessment was sharply challenged. At one time it seemed as though the constitutional provision requiring uniformity of taxation would be applied by the court to the local assessment with the result that the existence of that power would be denied. The system of local assessments, however, had become too firmly entrenched in the system of American taxation thus to be overthrown. The final result of this discussion was the view that while the local assessment is a form of tax, it is not a tax within the constitutional provision requiring uniformity of taxation except in the very special and peculiar sense that the amount of the assessment must not exceed the amount of the benefits conferred for the improvement for which the assessment is levied, and that the assessment must be apportioned according to such benefits. When this view became thoroughly established, it

³ *Town of Macon v. Patty*, 57 Miss. 378, 379, 400, 34 Am. Rep. 451 [1879].

⁴ For the view of the courts of South Carolina see §§ 30, 118.

⁵ *Weeks v. City of Milwaukee*, 10

Wis. 242 [1860]; *Municipality Number Two Praying for Opening of Benton Street v. White*, 9 La. Ann. 446 [1854]; *City of Norfolk v. Chamberlain*, 89 Va. 196; 16 S. E. 730 [1892].

seemed for awhile under the decision of the courts as though a power of taxation had been discovered which was subject to no practical restraint. It was assumed that the legislative determination as to the existence and amounts of special benefits was final and conclusive. The application of this doctrine together with that of the freedom of the local assessment from the constitutional restrictions of uniformity left the legislature practically free to assess as it chose, as long as the purpose was one which might combine the elements of a public use and an especial local benefit. From that time on there has been a constant struggle to restrain the power of local assessment by the application of other constitutional provisions such as that forbidding the taking of property without due process of law and by the application of limitations deduced from the very nature of the local assessment itself.¹ This attempt to restrict and regulate the power of

¹ An excellent discussion of the early history of this attempt to restrain the power of local assessment is found in *Town of Macon v. Patty*, 57 Miss. 378, 390, 34 Am. Rep. 451 [1879].

The court said:

"As the dangerous nature of the power began to be more and more recognized, when considered as a taxing power only and therefore virtually without restriction, unless imposed by the Constitution, and as the courts had held that it was not within the constitutional restriction in reference to the taxing power, the judicial mind, giving more importance to those peculiarities which distinguished it from the taxing power pure and simple, began to discover restrictions and limitations arising from its nature and characteristics, as well as from the nature and characteristics of the taxing power in general."

The court then discussed certain cases in which restrictions have been imposed upon the power of local assessment; among them *City of Lexington v. McQuillan's Heirs*, 39 Ky. (9 Dana) 513; in which it was held improper to apportion the cost by

requiring each owner to pay the expense in that part of the improvement in front of his own land; the New Jersey cases, such as *Tidewater Co. v. Coster*, 18 N. J. E. (3 C. E. Green) 518, 90 Am. Dec. 634; *State, New Jersey Railroad & Transportation Company, Pros. v. Mayor and Common Council of the City of Newark*, 27 N. J. L. (3 Dutch.) 185; *State, Van Tassel, Pros. v. Mayor and Aldermen of Jersey City*, 37 N. J. L. (8 Vr.) 128; *State, Hoboken Land & Improvement Company, Pros. v. Mayor, etc., Hoboken*, 36 N. J. L. (7 Vr.) 291, in which the court came to the conclusion that the determination of the legislature as to the amount of benefits conferred by the improvement upon the property in question was not conclusive, but that the amount of benefits could be inquired into in each case as a fact; and the Pennsylvania cases, such as *Washington Avenue*, 69 Pa. St. (19 P. F. Smith) 352, 8 Am. Rep. 255, and *Hammett v. Philadelphia*, 65 Pa. St. (15 P. F. Smith) 146, 3 Am. Rep. 615, in which it was held that assessments must be limited to special benefits, and that the front-foot rule could not be applied in all cases

local assessment is discussed in detail in the following chapters.

indiscriminately, and that it was inapplicable to rural property.

The court then said, "In tracing thus far the decisions in some of the most important states of the Union on the subject of local assessments, we have seen the gradual rise of the revisory power of the courts over

this public imposition, which has not been extended to taxation pure and simple, and we have also seen the recognition of the wide differences between the practical operation of the two powers." *Town of Macon v. Patty*, 57 Miss. 378, 395, 34 Am. Rep. 451 [1879].

CHAPTER III.

RELATION BETWEEN ASSESSMENT AND GENERAL TAXATION.

§ 35. General distinction between tax and assessment.

While an assessment is in one sense a tax, it is a tax of a peculiar nature,¹ differing from a general tax in important characteristics.² It is said that an assessment is "distinguishable from our general idea of a tax but owes its origin to the same source or power."³ The chief and most important distinction between a tax and a local assessment is that a tax is levied for the purpose of raising revenue for paying the expenses of the government. The only benefits which the tax-payers receive, they receive as members of organized society. Many of the most valuable of these benefits would enure to them if they were not possessed of any property to be taxed. If, possessing property, some of them were able to evade the payment of the tax, they would receive the same benefits as they receive in case of payment. The individual tax-payer is, therefore, poorer in a sense by reason of the payment of the tax. The local assessment, on the other hand, does not, in theory at least, leave the property owner who pays his assessment any the poorer by reason of the entire transaction since he is

¹ *City of Bridgeport v. New York & New Haven Railroad Company*, 36 Conn. 255; 4 Am. Rep. 63 [1869]; *Munson v. Board of Commissioners of the Atchafalaya Basin Levee District*, 43 La. Ann. 15, 8 So. 906 [1891].

² "Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal pur-

poses and governed by principles that do not apply generally." *Cooley on Taxation*, 416, 417, quoted *Bixler v. Board of Supervisors of the County of Sacramento*, 59 Cal. 698, 702 [1881].

³ *State, Sigler, Pros. v. Fuller*, 34 N. J. L. (5 Vr.) 227 [1870].

⁴ "Between taxes, or general taxes, as they are sometimes called by way of distinction, which are the exae-

fully compensated by the special benefits conferred upon him by the improvement for the amount of the assessment thus paid.⁴

tions placed upon the citizen for the support of the government paid to the state as a state, the consideration of which is protection by the state, and special taxes or special assessments which are imposed upon property within a limited area for the payment for a local improvement supposed to enhance the value of all property within that area there is a broad and clear line of distinction, although both of them are properly called taxes, and the proceedings for their collection are by the same officers and by substantially similar methods. Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limit to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property and the promotion of those various schemes which have for their object the welfare of all.* * * On the other hand, special assessments or special taxes proceed on the theory that when a local improvement enhances the value of neighboring property, that property should pay for the improvement." *Illinois Central Railroad Company v. Decatur*, 147 U. S. 190, 197, 198, 37 L. 132, 13 S. 293 [1893], (affirming *Illinois Central Railroad Company v. City of Decatur*, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315 [1890]).

"We have spoken of the assessment for benefits as a kind of taxation. The statement is correct to this extent, that the authority to lay special assessments for benefits is found in the taxing power of the legisla-

ture. It would, however, be improper to say that an assessment for benefits is ordinarily included in the term 'taxes' or 'taxation' It is not. 'It is never so spoken of in the charters of cities or boroughs or in the general law or in popular speech.' Taxes are the regular uniform and equal contributions which all citizens are required to make for the support of the government. An assessment for benefits may lack each of these qualities and yet be valid. 'It is a local assessment, imposed occasionally and upon a limited class of persons interested in a local improvement and is uniform only in that it is supposed to give an added value to the property of each person assessed to the full amount of the assessment.'" *City of New London v. Miller*, 60 Conn. 112, 116, 117, 22 Atl. 499 [1891].

Speaking of the term "assessment," the court said: "It was employed therefore to represent those local burdens imposed by municipal corporations upon property bordering on an improved street or situated so near it as to be benefited by the improvement, for the purpose of paying the cost of the improvement, and laid with reference to the benefit which such property is supposed to derive from the expenditure of the money. This definition *ex vi termini* describes the power and defines with precision its limits. It is not a power to tax all the property within the corporation for general purposes but a power to tax specific property for a specific purpose. It is not a power to tax property generally founded upon the benefits supposed to be derived from the organization of a government for the protection of life, liberty and property, but a power to tax specific property founded upon the benefit supposed to be de-

This distinction between a tax and a local assessment is very generally recognized by the courts.⁵ Furthermore a tax is a

rived by the property itself from the expenditure of the tax in its immediate vicinity. Hence property not benefited by the improvement cannot be subjected to the burden imposed for that purpose." *Taylor v. Palmer*, 31 Cal. 240, 254 [1866]. See § 665.

⁵ *Illinois Central Railroad Company v. Decatur*, 147 U. S. 190, 37 L. 132, 13 S. 293 [1893], affirming *Illinois Central Railroad Company v. City of Decatur*, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315 [1890]; *Mayor and Aldermen of Birmingham v. Klein*, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386 [1889]; *City of San Diego v. Linda Vista Irrigation District*, 108 Cal. 189, 35 L. R. A. 33, 41 Pac. 291 [1895]; *Wood v. Brady*, 68 Cal. 78, 5 Pac. 623, 8 Pac. 599 [1885]; *Taylor v. Palmer*, 31 Cal. 240 [1866]; *Hayden v. City of Atlanta*, 70 Ga. 817 [1883]; *De Clercq v. Barber Asphalt Paving Company*, 167 Ill. 215, 47 N. E. 367 [1897], (affirming *De Clercq v. Barber Asphalt Paving Company*, 66 Ill. App. 596 [1896]; *City of Mt. Vernon v. People*, 147 Ill. 359, 23 L. R. A. 807; *Adams County v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155 [1889]; *Mix v. Ross*, 57 Ill. 121 [1870]; *Trustees of the Illinois and Michigan Canal v. City of Chicago*, 12 Ill. 403 [1851]; *Lowe v. Board of Commissioners of Howard County*, 94 Ind. 553 [1883]; *Low v. Madison*, *Smyrna & Graham Turnpike Company*, 30 Ind. 77 [1868]; *City of Shreveport v. Prescott*, 51 La. Ann. 1895, 46 L. R. A. 193, 26 So. 664 [1899]; *Munson v. Board of Commissioners of The Atchafalaya Basin Levee District*, 43 La. Ann. 15, 8 So. 906 [1891]; *Town of Macon v. Pattv*, 57 Miss. 378, 34 Am. Rep. 451 [1879]; *McGuire v. Brockman*, 58 Mo. App. 307 [1894]; *Hansecom v. City of Omaha*, 11 Neb. 37, 7 N. W. 739 [1881];

Matter of New York, 11 Johns. (N. Y.) 77; *Busbee v. Commissioners of Wake County*, 93 N. C. 143 [1883]; *Lima v. Cemetery Association*, 42 O. S. 128, 51 Am. Rep. 809 [1884]; *Reeves v. Treasurer of Wood County*, 8 O. S. 333 [1858]; *Hill v. Higdon*, 5 O. S. 243, 67 Am. Dec. 289 [1855]; *Ridenour v. Saffin*, 1 Hand. (Ohio) 464 [1855]; *Washington Avenue*, 69 Pa. St. 352, 8 Am. Rep. 255 [1871]; *Winona & St. P. R. Co. v. City of Watertown*, 1 S. D. 46, 44 N. W. 1072 [1890]; *Taylor, McBean & Co. v. Chandler*, 56 Tenn. (9 Heisk.) 349, *sub nomine* *McBean v. Chandler*, 24 Am. Rep. 308 [1872]; *Hale v. City of Kenosha*, 29 Wis. 599 [1872]; *Soens v. City of Racine*, 10 Wis. 271 [1860]; *Knowlton v. Board of Supervisors of Rock County*, 9 Wis. 410 [1859].

"The general distinction that is taken between taxes and local assessments by courts and authors is that the former are forced contributions levied by the government alike on all property for the purpose of raising revenue for the support of the government without reference to the benefit that the taxpayers may derive therefrom, while the latter are, also, forced contributions which are levied by the government, but upon certain particular property and with a view of raising revenue for certain designated purposes, having direct reference to the special benefits which will enure to the property thus taxed." *City of Shreveport v. Prescott*, 51 La. Ann. 1895, 1904, 46 L. R. A. 193, 26 So. 664 [1899].

"Between this right to make special assessments for sidewalks and that of taxation for general corporation purposes there is in the judgment of courts a clear distinction involving in their exercise essentially different powers and principles, the

recurring charge upon which an assessment is levied occasionally only.⁶

one being an ordinary tax for defraying the expenses of the municipal government and the general improvement thereof; whilst the other is a special impositon or liability arising out of the benefit conferred upon the property assessed." *City of Fairfield v. Ratcliff*, 20 Ia. 396, 398 [1866].

"An assessment as distinguished from a tax is a special and local charge or imposition upon property in the immediate vicinity of municipal improvements, predicated upon the theory of benefits from such improvements, and levied as a charge upon land, or property specially benefited thereby, while a charge imposed by law upon the assessed value of all property, real and personal, in a district, is a tax, and not an assessment, although the purpose be to make a local improvement." *Holley v. County of Orange*, 106 Cal. 420, 39 Pac. Rep. 790 [1895].

"The distinction between a tax and a special assessment is, that a tax is imposed for some general or public object; an exaction made for the purpose of carrying on the government directly; a charge on property that lessens its value, and in the proportion in which the owner is required to pay, his pecuniary ability is diminished; whereas, a special assessment has none of those distinctive features: it is levied for a special purpose, and not for a general or public object; the property is specially assessed in the proportion in which it is benefited; the assessment is but an equivalent for the increased value given to the property." *De Clercq v. Barber Asphalt Paving Co.*, 66 Ill. App. 596, 597 [1896], (affirmed *De Clercq v. Barber Asphalt Paving Company*, 167 Ill. 215, 47 N. E. 367 [1897]).

⁶"A local assessment can only be levied on land. It cannot, as a tax,

can, be made a personal liability of the taxpayer; it is an assessment on the thing supposed to be benefited. A tax is levied on the whole state, or a known political subdivision, as a county or town. A local assessment is levied on property situated in a district created for the express purpose of the levy, and possessing no other function, or even existence, than to be the thing on which the levy is made. A tax is a continuing burden, and must be collected at stated short intervals for all time, and without it government cannot exist; a local assessment is exceptional both as to time and locality—it is brought into being for a particular occasion, and to accomplish a particular purpose, and dies with the passing of the occasion and the accomplishment of the purpose. A tax is levied, collected and administered by a public agency, elected by and responsible to the community upon which it is imposed; a local assessment is made by an authority *ab extra*. Yet it is like a tax, in that it is imposed under an authority derived from the legislature, and is an enforced contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is like a tax, in that it must be levied for a public purpose, and must be apportioned by some reasonable rule among those upon whose property it is levied. It is unlike a tax, in that the proceeds of the assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must enure to the property upon which it is imposed, or else the courts will interfere to prevent its enforcement." *Town of Macon v. Patty*, 57 Miss. 378, 386, 34 Am. Rep. 451 [1879].

§ 36. Exaction on political unit according to value held tax.

If the charge or exaction is levied upon all the property within the limits of some political unit, such as a city, county, and the like, and if the levy is made in proportion to the valuation of the property upon which it is levied, such a charge or exaction is held to be a tax, and not an assessment, even if it is levied for a purpose for which the local assessment might have been levied.¹ If the charge or exaction is levied upon all of the property in some pre-existing political subdivision of the given political unit, and is levied in proportion to the valuation of such property, such charge or exaction is ordinarily held to be a tax, and not a local assessment. The method of selecting the property which is to bear the burden in connection with the method of apportioning the burden among the property thus selected, shows that the charge was not based upon any theory of special benefits to the property upon which the tax is levied.² Thus a tax levied upon all the property in a given ward, for the construction of a bridge, has been held not to be a local assessment, but to be properly classed as a tax in the more limited sense of the term.³

§ 37. Exaction on assessment district according to benefits, frontage or area held assessment.

If a district is created which contains, or is supposed to contain, the property specially benefited by the improvement for which the assessment is levied, and if the exaction is levied upon the property in such district in proportion to the benefits conferred by such improvement, such form of exaction is regularly recognized as a local assessment and not a form of general taxation.

¹ County of Mobile v. Kimball, 102 U. S. 691, 26 L. 238 [1880], (affirming Kimball v. Mobile, 14 Fed. Cas. 489, 3 Woods 555 [1877]; Southern Ry. Co. v. Cherokee County, 144 Ala. 579, 42 So. 66 [1905]; Swanson v. City of Ottumwa, 118 Ia. 161, 59 L. R. A. 620, 91 N. W. 1048 [1902]; Town of Parkland v. Gaines, 88 Ky. 562, 11 S. W. 649 [1889]; Thomas v. Leland, 24 Wend. (N. Y.) 65 [1840]; Beggs v. Paine, 15 N. D. 436, 109 N. W. 322 [1906]; Warder

v. Commissioners, 38 O. S. 639 [1883].

² In speaking of an exaction the court said: "As this tax, though local, is levied on property, generally and irrespective of local benefit, we conclude that it is not a local assessment." Griggsry Construction Company v. Freeman, 108 La. 435, 438, 58 L. R. A. 349, 351, 32 So. 399 [1902].

³ Griggsry Construction Company v. Freeman, 108 La. 435, 58 L. R. A. 349, 32 So. 399 [1902].

A like result is reached if the property which is supposed to be benefited is marked off into an assessment district, and the exaction for the improvement is levied upon such property, in accordance with the frontage. Such an exaction is regularly held to be a local assessment, and not a form of general taxation.¹ If the land which is supposed to be benefited by the improvement for which the assessment is levied is made into an assessment district, and the exaction is apportioned among such property according to the area thereof, such a form of exaction is regularly held to be a local assessment, as distinct from a form of general taxation.² A common example of such form of assessment is found in levee districts, in which the property which is supposed to be benefited by the levee is often assessed at a certain rate per acre for the purpose of constructing the levee. Charges of this sort are regarded as local assessments.³

§ 38. Exaction on assessment district according to valuation.

If the property, which is supposed to be benefited, is made into a special district for taxation purposes, and the exaction is apportioned among such property in proportion to the value thereof, we have a case in which there is a conflict of authority on the question of whether such exaction is a local assessment or a form of general taxation. In a number of cases in which the question has been considered, it has been held that such an exaction is a

¹ *Allentown v. Henry*, 73 Pa. St. 404 [1873].

² *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475 [1894]; *George v. Young*, 45 La. Ann. 1232, 14 So. 137 [1893]; *Hollingsworth v. Thompson*, 45 La. Ann. 222, 40 Am. St. Rep. 220, 12 So. 1 [1893]; *Minor v. Daspit*, 43 La. Ann. 337, 9 So. 49 [1891]; *Munson v. Board of Commissioners of The Atchafalaya Basin Levee District*, 43 La. Ann. 15, 8 So. 906 [1891]; *Excelsior Planting & Manufacturing Co. v. Green*, 39 La. Ann. 455, 1 So. 873 [1887]; *Charnock v. Fordoche & Grosse Tête Special Levee District Co.*, 38 La. Ann. 323 [1886]; *Gillespie v. Police Jury of Concordia*, 5 La. Ann. 403 [1850]; *Second Municipality v. Duncan*, 2

La. Ann. 182; *Alcorn v. Hamer*, 38 Miss. 652 [1860]; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508 [1854].

³ *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475 [1894]; *George v. Young*, 45 La. Ann. 1232, 14 So. 137 [1893]; *Minor v. Daspit*, 43 La. Ann. 337, 9 So. 49 [1891]; *Munson v. Board of Commissioners of The Atchafalaya Basin Levee District*, 43 La. Ann. 15, 8 So. 906 [1891]; *Excelsior Planting & Manufacturing Co. v. Green*, 39 La. Ann. 455, 1 So. 873 [1887]; *Charnock v. Fordoche & Grosse Tête Special Levee District Co.*, 38 La. Ann. 323 [1886]; *Alcorn v. Hamer*, 38 Miss. 652 [1860]; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508 [1854].

local assessment and not a general tax.¹ The theory upon which this result is reached is that the exaction is levied solely upon the property benefited by the improvement, and that apportionment according to the value of such property is in these cases a fair method of approximating the apportionment according to benefits. Thus where the property benefited by a levee is made into a special levee district, and an exaction made upon the property in such district in proportion to its value, we have a charge which is, in these cases, regarded as a local assessment.² Like results have been reached where similar charges have been made for the expense of constructing sewers,³ or fences, under the stock law acts.⁴ In other cases a charge upon the property which is supposed to be specially benefited by the improvement apportioned among such property in proportion to the value thereof, is held to be a general tax, and not a local assessment.⁵ "Much has been said in the argument against the validity of the statute on the assumption that it was intended as an exercise of the power of local assessment, but inasmuch as the burden does not purport

Charnock v. Fordoche & Grosse Tête Special Levee District Co., 38 La. Ann. 323 [1886]; *Richardson v. Morgan*, 16 La. Ann. 429 [1862]; *Yeatman v. Crandell*, 11 La. Ann. 220 [1856]; *Mason v. Police Jury of Parish of Tensas*, 9 La. Ann. 368 [1854]; *Crowley v. Copley*, 2 La. Ann. 329 [1847]; *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629 [1898]; *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600 [1896]; *Page v. City of St. Louis*, 20 Mo. 136 [1854]; *Commissioners of Chatham County v. Seaboard Air Line Railway Co.*, 133 N. C. 216, 45 S. E. 566 [1903].

² *Charnock v. Fordoche & Grosse Tête Special Levee District Co.*, 38 La. Ann. 323 [1886]; *Richardson v. Morgan*, 16 La. Ann. 429 [1862]; *Yeatman v. Crandell*, 11 La. Ann. 220 [1856]; *Mason v. Police Jury of Parish of Tensas*, 9 La. Ann. 368 [1854]; *Crowley v. Copley*, 2 La. Ann. 329 [1847]; *Morrison v. Morey*, 146 Mo. 513, 48 S. W. 629 [1898]; *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600 [1896].

³ *Page v. City of St. Louis*, 20 Mo. 136 [1854].

⁴ *Commissioners of Chatham County v. Seaboard Air Line Railway Co.*, 133 N. C. 216, 45 S. E. 566 [1903]; *Harper v. Commissioners of New Hanover County*, 133 N. C. 106, 45 S. E. 526 [1903]; *Busbee v. Commissioners of Wake County*, 93 N. C. 143 [1883]; *Cain v. Commissioners of Davie County*, 86 N. C. 8 [1882].

⁵ *Holley v. County of Orange*, 106 Cal. 420 [1895]; *Williams v. Corcoran*, 46 Cal. 553 [1873]; *People v. Whyler*, 41 Cal. 351; *Burguières v. Sanders*, 111 La. 109, 35 So. 478 [1903]; *Miller v. Hixson*, 64 O. S. 39, 59 N. E. 749 [1901]; *Carlisle v. Hetherington*, 47 O. S. 235, 24 N. E. 488 [1890]; *Elliott v. Berry*, 41 O. S. 110 [1884]; *Bowles v. State of Ohio*, 37 O. S. 35 [1881]; *Fields v. Commissioners of Highland County*, 36 O. S. 476 [1881]; *City of Toledo for use of Gates v. Lake Shore & Michigan Southern Railway Co.*, 4 Ohio C. C. 113 [1889].

to have been apportioned to property benefited according to benefits, it was not a rightful exercise of such power. We do not think the legislature intended to exercise the power of local assessment according to benefits. Except as to property within a mile of the crossing of free turnpikes, there is no indication that special benefits were either the rule or the limit of the burden imposed. The intent of the legislature, we think, was to establish special taxing districts for the purpose of defraying the expenses of the construction of free turnpikes therein and to impose the burden thereof by taxation upon all the property within the district by a uniform rate according to its true value in money."⁶ Thus where a district is created for the purpose of constructing a road,⁷ or a free turnpike,⁸ or a levee,⁹ and the expense of such improvement is raised by a charge upon such property according to the valuation thereof, such charge is regarded in these cases as a general tax. An exaction of this sort, not to exceed ten mills on the dollar, upon all taxable real estate for the purpose of opening, widening, and grading streets, has been held to be a tax, even though called "assessment" in the statute by which such exaction was imposed.¹⁰ Under a statute authorizing the levy of a "special tax" to be levied "by the front foot or the assessed value thereof" a "special tax" of one per cent was levied on land in a street improvement district. This charge was upheld by the court as a form of general taxation, though referred to in the opinion as an "assessment." "Whether a legislature could authorize a municipal corporation to assess property for street improvements, not according to value, but according to the supposed benefit to accrue from the improvement to the property taxed, has sometimes been questioned, though generally, if not uniformly, such legislation has been sustained. But the tax under consideration involves no such question. It was assessed according to value upon the property abutting the street to be improved, and differs from ordinary taxation only in being levied upon streets instead of

⁶ Bowles v. State of Ohio, 37 O. S. 35, 44, 45 [1881].

⁷ Williams v. Corcoran, 46 Cal. 553 [1873].

⁸ Miller v. Hixson, 64 O. S. 39, 59 N. E. 749 [1901]; Carlisle v. Hetherington, 47 O. S. 235, 24 N. E. 488 [1890]; Bowles v. State of Ohio, 37

O. S. 35 [1881]; Fields v. Commissioners of Highland County, 36 O. S. 476 [1881].

⁹ People v. Whyler, 41 Cal. 351; Burguières v. Sanders, 111 La. 109, 35 So. 478 [1903].

¹⁰ Keys v. City of Neodesha, 64 Kan. 681, 68 Pac. 625 [1902].

larger districts. It is quite analogous in principle to the method of assessment of highway labor by districts in use in this and many other states. It is not taking private property for use without just compensation, but a method of distributing among the citizens the public burden of improving the streets. We think the assessment for improving the streets was valid."¹¹ A charge according to valuation upon all the property in a sewer district for the purpose of building a sewer has been called a "general tax."¹²

§ 39. Term "tax" *prima facie* excludes local assessment.

Since there is this important and fundamental distinction between the tax in the more limited sense and the local assessment, the question often arises whether provisions in constitutions and statutes which refer by name to taxes, include also local assessments. This is primarily a question of legislative intention. In the absence of anything to show the specific intention of the legislature, the general rule is that the local assessment possesses such marked peculiarities differentiating it from the tax in the more limited sense of the term, that the use of the term "tax" does not *prima facie* show an intention to include local assessments.¹

¹¹ Burnes v. Mayor and City Council of Atchison, 2 Kan. 448, 479 [1864].

¹² City of Toledo for use of Gates v. Lake Shore & Michigan Southern Railway Co., 4 Ohio C. C. 113 [1889].

¹ Board of Improvement Paving District No. 5 v. Sisters of Mercy of Female Academy of Ft. Smith, — Ark. —, 109 S. W. 1165 [1908]; Cribbs v. Benedict, 64 Ark. 555, 44 S. W. 707 [1897]; McGehee v. Mathis, 21 Ark. 40 [1860]; Chambers v. Satterlee, 40 Cal. 497 [1871]; Kilgour v. Drainage Commissioners, 111 Ill. 342 [1885]; City of Chicago v. Colby, 20 Ill. 614 [1858]; Higgins v. City of Chicago, 18 Ill. 276 [1857]; Trustees of the Illinois and Michigan Canal v. City of Chicago, 12 Ill. 403 [1851]; Yeomans v. Riddle, 84 Ia. 147, 50 N. W. 886 [1891]; Johnston v. Louisville, 74 Ky. (11 Bush.) 527

[1875]; Excelsior Planting & Manufacturing Company v. Green, 39 La. Ann. 455, 1 So. 873 [1887]; Charnock v. Fordoche & Grosse Tête Special Levee District Company, 38 La. Ann. 323 [1886]; Barrow v. Hepler, 34 La. Ann. 362 [1882]; Board of Levee Commissioners v. Lorio Bros., 33 La. Ann. 276 [1881]; Richardson v. Morgan, 16 La. Ann. 429 [1862]; Wallace v. Shelton, 14 La. Ann. 498 [1859]; Williams v. Cammack, 27 Miss. 209, 61 Am. Dec. 508 [1854]; Lamar Water & Electric Light Company v. City of Lamar, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W. 756 [1895]; City of Raleigh v. Peace, 110 N. C. 32, 14 L. R. A. 330, 14 S. E. 521 [1892]; Busbee v. Commissioners of Wake County, 93 N. C. 143 [1883]; County of Harris v. Boyd, 70 Tex. 237, 7 S. W. 713 [1888]; Taylor v. Boyd, 63 Tex. 533 [1885].

§ 40. Essential nature of charge controls.

The use of the terms "tax" and "assessment" in statutory or constitutional provisions is by no means conclusive of the nature of the charge. This depends rather upon its own elements than upon the name by which it is called.¹ On the one hand the term "assessment" is sometimes used where the context shows that a general tax is intended.² It has been said by the Supreme Court of the United States that local assessments were so rare a century ago that the word 'assessment' then employed in a statute must be taken as referring to rates or to general taxes.³ More often a charge which is essentially a local assessment is referred to in the statute as a tax.⁴ Thus a charge which is in its essential nature a local assessment is referred to as a "tax,"⁵ a "special tax,"⁶ a "macadam tax,"⁷ a "sewer tax,"⁸ or a "levee tax."⁹ So a statute making certain property of railroad corporations "subject to taxation by ordinance for city purposes" has been held to confer the power to levy local assessments as well as to impose general taxes.¹⁰ In speaking of an exaction called in the statute a 'tax' but apportioned according to benefits, the court said: "designating as a tax that which in its elements is an assessment can have

¹ *Doyle v. Austin*, 47 Cal. 353 [1874].

² *City Council of Augusta v. Murphy*, 79 Ga. 101, 3 S. E. 326 [1887]; *In the Matter of the Petition of Dassler for a Writ of Habeas Corpus*, 35 Kan. 678, 12 Pac. 130 [1886].

³ *Wells v. Savannah*, 181 U. S. 531, 45 L. 986, 21 S. 697 [1901].

⁴ *Haneock v. Whittemore*, 50 Cal. 522 [1875]; *People ex rel. Doyle v. Austin*, 47 Cal. 353 [1874]; *Daily v. Swope*, 47 Miss. 367 [1872].

"An assessment for levee purposes is not a tax in the strict legal sense of the term, although it is true the Legislature has called it so in the act whose constitutionality is attacked." *Yeatman v. Crandell*, 11 La. Ann. 220, 221 [1856].

⁵ *Willard v. Presbury*, 81 U. S. (14 Wall.) 676, 20 L. 719 [1869], (an assessment for re-paving a street).

⁶ As in street improvements: *Willard v. Presbury*, 81 U. S. (14 Wall.)

676, 20 L. 719 [1869]; *Tallant v. City of Burlington*, 39 Ia. 543 [1874]; *County of Harris v. Boyd*, 70 Tex. 237, 7 S. W. 713 [1888].

For free gravel roads: *Board of Commissioners of County of Monroe v. Harrell*, 147 Ind. 500, 46 N. E. 124 [1896].

For side walks: *City of Dubuque v. Harrison*, 34 Ia. 163 [1872]; *Merriam v. Moody's Executors*, 25 Ia. 163 [1872].

⁷ *Sanger v. Rice*, 43 Kan. 580, 23 Pac. 633 [1890].

⁸ *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895 [1887]; *Mason v. Spencer*, 35 Kan. 512, 11 Pac. 402 [1886].

⁹ *Yeatman v. Crandell*, 11 La. Ann. 220 [1856].

¹⁰ *City of Philadelphia for use of McCann v. Philadelphia & Reading Railroad Company*, 177 Pa. St. 292, 34 L. R. A. 564, 35 Atl. 610 [1896].

no effect in determining whether it is one or the other.”¹¹ In the same opinion the same charge is often referred to indiscriminately as a ‘tax’ and ‘assessment.’¹²

§ 41. Term ‘tax’ as including assessment.

If the statute specifically provides that the word ‘tax’ means any tax or special assessment, there is, of course, no question but that under such statute the word ‘tax’ includes assessments.¹ Under such statute an assessment is regarded as a tax within the meaning of a statute providing for foreclosure in equity of the lien given by statute for such assessments,² or within the meaning of a statute providing for appeals to a certain court.³ Under some statutes the provisions concerning taxes are so worded as to show the intention of the legislature to include assessments in such provisions. Full effect is, of course, given to such intention, and an assessment is a tax within the meaning of such statutes.⁴ Thus, under such statutes, an assessment is a tax with reference to the sale and conveyance of land for non-payment of taxes,⁵ and with reference to the settlement of unpaid taxes between the town treasurer and the county treasurer.⁶ So a certificate issued upon a sale of land for the non-payment of an assessment is a ‘tax certificate’⁷ and a statute limiting the bringing of an action “to set aside any sale of lands for the non-pay-

¹¹ *People ex rel. Doyle v. Austin*, 47 Cal. 353, 358 [1874].

¹² *Willard v. Presbury*, 81 U. S. (14 Wall.) 676, 20 L. 719 [1869]; *City of Dubuque v. Harrison*, 34 Ia. 163 [1872].

¹ *Blake v. People for use of Caldwell*, 109 Ill. 504 [1884].

² *Gauen v. Moredock and Ivy Landing Drainage District No. 1*, 131 Ill. 446, 23 N. E. 633 [1890].

³ *People ex rel. Johnson v. Springer*, 106 Ill. 542 [1883]; *Potwin v. Johnson*, 106 Ill. 532 [1883].

⁴ *Sanger v. Rice*, 43 Kan. 580, 23 Pac. 633 [1890]; *Pratt v. City of Milwaukee*, 93 Wis. 658, 68 N. W. 392 [1896]; *Yates v. City of Milwaukee*, 92 Wis. 352, 66 N. W. 248 [1896]; *Sheboygan County v. City of Sheboygan*, 54 Wis. 415, 11

N. W. 598 [1882]; *Dalrymple v. City of Milwaukee*, 53 Wis. 178, 10 N. W. 141 [1881].

“We have used the terms ‘assessment’ and ‘tax’ interchangeably, for they are so employed in the statute which rules this case. Within the meaning of those statutes a special assessment for the cost of grading is a tax.” *Sheboygan County v. City of Sheboygan*, 54 Wis. 415, 421, 11 N. W. 598 [1882].

⁵ *Sanger v. Rice*, 43 Kan. 580, 23 Pac. 633 [1890]; *Yates v. City of Milwaukee*, 92 Wis. 352, 66 N. W. 248 [1896].

⁶ *Sheboygan County v. City of Sheboygan*, 54 Wis. 415, 11 N. W. 598 [1882].

⁷ *Pratt v. City of Milwaukee*, 93 Wis. 658, 68 N. W. 392 [1896].

ment of taxes, or to cancel any tax certificate, or to restrain or prevent the issuing of any tax deed or any tax certificate or to set aside and cancel any tax deed" to "nine months after the making of such sale, date of such certificate or recording of such tax deed, as the case may be, and not thereafter" applies to a sale for the non-payment of a local assessment.⁸

§ 42. Assessment not tax within provisions for exemption.

Many constitutional and statutory provisions are found exempting property from taxation or from taxation for certain purposes. The validity and effect of these provisions are discussed in detail elsewhere.¹ In this connection it is sufficient to say that it is generally held that a local assessment is not a tax within the meaning of provisions of this sort.² This principle has been ap-

⁸ *Dalrymple v. City of Milwaukee*, 53 Wis. 178, 10 N. W. 141 [1881].

¹ See § 618.

² *Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 41 L. 590, 17 S. 230 [1897], (affirming *Ford v. Delta & Pine Land Co.*, 43 Fed. 181 [1890]); *Board of Improvement Paving District No. 5 v. Sisters of Mercy of Female Academy of Ft. Smith*, — Ark. —, 109 S. W. 1165 [1908]; *City of San Diego v. Linda Vista Irrigation District*, 108 Cal. 189; 35 L. R. A. 33; 41 Pac. 291 [1905]; *City of Bridgeport v. New York & New Haven Railroad Co.*, 36 Conn. 255, 4 Am. Rep. 63 [1869]; *City of Chicago in Trust for Use of Schools v. City of Chicago*, 207 Ill. 37, 69 N. E. 580 [1904]; *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]; *Illinois Central Railroad Co. v. City of Decatur*, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315 [1890]; *University v. People*, 80 Ill. 333, 22 Am. Rep. 187; *People v. Western Society*, 87 Ill. 246 [1871]; *City of Ottawa v. Spencer*, 40 Ill. 211 [1866]; *Trustees v. McConnel*, 12 Ill. 138 [1850]; *Edwards & Walsh Construction Co. v. Jasper County*, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006

[1902]; *Farwell v. Des Moines Brick Manufacturing Co.*, 97 Ia. 286, 35 L. R. A. 63, 66 N. W. 176 [1896]; *Paine v. Spratley*, 5 Kan. 317 [1870]; *Atchison, Topeka & Santa Fe Railroad Co. v. Peterson*, 5 Kan. App. 103, 48 Pac. 877 [1897]; *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212, 13 Ky. L. R. 385 [1891]; *City of Lafayette v. Male Orphans' Asylum*, 4 La. Ann. 1 [1849]; *Crowley v. Copley*, 2 La. Ann. 329 [1847]; *Lake Shore & Michigan Southern Railway Co. v. City of Grand Rapids*, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767 [1894]; *Lefevre v. Mayor, etc., of Detroit*, 2 Mich. 586 [1853]; *Washburn Memorial Orphan Asylum v. State*, 73 Minn. 343, 76 N. W. 204 [1898]; *Barber Asphalt Paving Co. v. City of St. Joseph*, 183 Mo. 451, 82 S. W. 64 [1904]; *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425, 74 S. W. 979 [1903]; *City of Clinton to use of Thornton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893]; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; *City of Beatrice v. Brethren Church of Beatrice*, 41 Neb. 358; 59 N. W. 932 [1894]; *State, New Jersey Midland*

plied to constitutional and statutory provisions exempting from taxation churches,³ cemeteries,⁴ charitable institutions,⁵ educational institutions,⁶ and public school property.⁷ So it has been

Railroad Co., *Pros. v. Mayor and Aldermen of Jersey City*, 42 N. J. L. (13 Vr.) 97 [1880]; *State, New Jersey Railroad & Transportation Company, Pros. v. City of Elizabeth*, 37 N. J. L. (8 Vr.) 330 [1875]; *State, Protestant Foster Home Society, Pros. v. Mayor and Common Council of the City of Newark*, 36 N. J. L. (7 Vr.) 478, 13 Am. Rep. 464 [1873]; *State, New Jersey Railroad & Transportation Co., Pros. v. Mayor and Common Council of the City of Newark*, 27 N. J. L. (3 Dutch.) 185 [1858]; *President and Council of the City of Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. L. (4 Zab.) 385 [1854]; *Roosevelt Hospital v. Mayor, Aldermen and Commonalty of the City of New York*, 84 N. Y. 108 [1881]; *Hassan v. City of Rochester*, 67 N. Y. 528 [1876]; *In re M. E. Church*, 66 N. Y. 395 [1876]; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 503 [1871]; *Sharp v. Speir*, 4 Hill 76 [1843]; *In the matter of the Application of the Mayor and Aldermen and Commonalty of the City of New York for the Enlarging and Improving a Part of Nassau Street in the said City*, 11 Johns. 77 [1814]; *City of Philadelphia v. Union Burial Ground Society of the City and County of Philadelphia*, 178 Pa. St. 533, 36 L. R. A. 263, 36 Atl. 172 [1896]; *Beltzhoover Borough v. Heirs of Beltzhoover*, 173 Pa. St. 213, 33 Atl. 1047 [1896]; *New Castle City v. Jackson*, 172 Pa. St. 86, 33 Atl. 236 [1895]; *Philadelphia v. Pennsylvania Hospital*, 143 Pa. St. 367, 22 Atl. 744 [1891]; *Second Universalist Society v. City of Providence*, 6 R. I. 235; *Winona & St. P. R. Co. v. City of Watertown*, 1 S. D. 46, 44 N. W.

1072 [1890]; *Yates v. City of Milwaukee*, 92 Wis. 352, 66 N. W. 248 [1896].

³*City of Atlanta v. First Presbyterian Church*, 86 Ga. 730, 12 L. R. A. 852, 13 S. E. 252 [1890]; *Lefevre v. Mayor, etc., of Detroit*, 2 Mich. 586 [1853]; *City of Beatrice v. Brethren Church of Beatrice*, 41 Neb. 358, 59 N. W. 932 [1894]; *In the matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York for the Enlarging and Improving a Part of Nassau Street in the said City*, 11 Johns. 77 [1814].

⁴*Louisville, v. Nevin*, 73 Ky. (10 Bush.) 549, 19 Am. Rep. 78 [1874]; *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506 [1871]; *Lima v. Cemetery Association*, 42 O. S. 128, 51 Am. Rep. 809 [1884].

⁵*Zabel v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212, 13 Ky. L. R. 385 [1891]; *City of Lafayette v. Male Orphans' Asylum*, 4 La. Ann. 1 [1849]; *Crowley v. Copley*, 2 La. Ann. 329 [1847]; *Washburn Memorial Orphan Asylum v. State*, 73 Minn. 343, 76 N. W. 204 [1898]; *Boston Seamen's Friend Society v. Mayor of City of Boston*, 116 Mass. 181, 17 Am. Rep. 153; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155, 11 Am. Rep. 412 [1872]; *Roosevelt Hospital v. Mayor, Aldermen and Commonalty of the City of New York*, 84 N. Y. 108 [1881].

⁶*In the matter of College Street*, 8 R. I. 474 [1867].

⁷*City of Chicago in Trust for Use of Schools v. City of Chicago*, 207 Ill. 37, 69 N. E. 580 [1904]; *St. Louis Public Schools v. City of St. Louis*, 26 Mo. 468 [1857].

applied to constitutional⁸ and statutory⁹ provisions exempting from taxation land belonging to the state, to municipalities and the like. It has been applied to statutes exempting land from "taxation" as long as it is leased, used and occupied by a State Agricultural Society¹⁰ and to a statute exempting from 'taxes charges or impositions' property of a society for the establishment of useful manufactures.¹¹ Under the constitution of Texas a homestead is exempt from forced sales, but by another provision this exemption does not apply to sales for taxes due thereon. The original view of the Supreme Court of Texas was that an assessment was a tax within the meaning of this latter provision and that accordingly a homestead was not exempt from a forced sale for non-payment of an assessment due thereon.¹² Subsequently, however, this view of the meaning of the word 'tax' was abandoned, the earlier decision was overruled, and it was held that an assessment is not a tax within the meaning of such provision, and that accordingly a homestead is exempt from forced sale for non-payment of an assessment.¹³ So an assessment is not a tax within the meaning of a statute providing for a certain form of taxation for railroads and exempting them from all other taxation;¹⁴ or within a statute exempting from taxation for five years from the sale thereof, any lands sold by the United States¹⁵ or within a statute exempting from 'all taxation' lands granted

⁸ *Barber Asphalt Paving Co. v. City of St. Joseph*, 183 Mo. 451, 82 S. W. 64 [1904]; *City of Clinton to use of Thornton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893].

⁹ *Hassan v. City of Rochester*, 67 N. Y. 528 [1876].

¹⁰ *Yates v. City of Milwaukee*, 92 Wis. 352, 66 N. W. 248 [1896].

¹¹ *President and Council of the City of Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. L. (4 Zab.) 385 [1854].

¹² *Lufkin v. City of Galveston*, 58 Tex. 545 [1883].

¹³ *Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770, 31 S. W. 52, 803 [1895]. To the same effect are *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154 [1896];

Lovenberg v. City of Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024 [1897].

¹⁴ *City of Bridgeport v. New York & New Haven Railroad Co.*, 36 Conn. 255, 4 Am. Rep. 63 [1869]; *Illinois Central Railroad Co. v. City of Decatur*, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315 [1890]; *Lake Shore & Michigan Southern Railway Co. v. City of Grand Rapids*, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767 [1894]; *State, New Jersey Midland Railroad Co., Pros. v. Mayor and Aldermen of Jersey City*, 42 N. J. L. (13 Vr.) 97 [1880]; *State, New Jersey Railroad & Transportation Co., Pros. v. City of Elizabeth*, 37 N. J. L. (8 Vr.) 330 [1875].

¹⁵ *Crowley v. Copley*, 2 La. Ann. 329 [1847].

to a certain railroad¹⁶ or exempting from taxation for any city purposes lands within the city limits used for agricultural purposes.¹⁷ In all these cases it is generally held that a local assessment is not a tax within the meaning of such provisions for exemption, and that it may, therefore, be levied notwithstanding such provisions. In Pennsylvania a local assessment was originally held to be a tax within the meaning of provisions in the constitution and statutes exempting certain property from taxation,¹⁸ except such assessments as were referred by the courts to the police power, such as assessments for curbing,¹⁹ or for sidewalks.²⁰ Subsequently, however, the earlier decisions were not followed, and it was held that within the meaning of such provisions for exemption an assessment is not a tax,²¹ on the ground that "the constitutional exemption relates to taxes proper, or general public contributions levied and collected by the state, or by its authorized municipal agencies for general governmental purposes, as distinguished from peculiar forms of taxation or special assessments imposed on property within the limited areas by which the property assessed is specially and peculiarly benefited and enhanced in value to an amount at least equal to the assessment."²² This later view has been taken in several cases decided subsequently,²³ and the Pennsylvania courts now seem to be committed to the rule accepted by the great weight of authority.

¹⁶ *Winona & St. P. R. Co. v. City of Watertown*, 1 S. D. 46, 44 N. W. 1072 [1890].

¹⁷ *Farwell v. Des Moines Brick Manufacturing Co.*, 97 Ia. 286, 35 L. R. A. 63, 66 N. W. 176 [1896].

¹⁸ *City of Erie v. First Universalist Church*, 105 Pa. St. 278 [1884]; *Olive Cemetery Co. v. Philadelphia*, 93 Pa. St. 129, 39 Am. Rep. 732.

¹⁹ *Philadelphia v. Pennsylvania Hospital*, 143 Pa. St. 367, 22 Atl. 744 [1891].

²⁰ *Wilksburg Borough v. Home for Aged Women*, 131 Pa. St. 109; 6 L. R. A. 531, 18 Atl. 937 [1890].

²¹ *Broad Street; Sewickley Methodist Episcopal Church's Appeal*, 165

Pa. St. 475, 30 Atl. 1007 [1895].

²² *Broad Street; Sewickley Methodist Episcopal Church's Appeal*, 165 Pa. St. 475; 30 Atl. 1007 [1895], quoted in *City of Philadelphia v. Union Burial Ground Society of the City and County of Philadelphia*, 178 Pa. St. 533, 538, 36 L. R. A. 263, 36 Atl. 172 [1896].

²³ *City of Philadelphia v. Union Burial Ground Society of the City and County of Philadelphia*, 178 Pa. St. 533, 36 L. R. A. 263, 36 Atl. 172 [1896]; *Beltzhoover Borough v. Heirs of Beltzhoover*, 173 Pa. St. 213, 33 Atl. 1047 [1896]; *New Castle City v. Jackson*, 172 Pa. St. 86, 33 Atl. 236 [1895].

§ 43. Assessment not tax within provision for equality and uniformity.

In the constitutions of the several states of the union are often found provisions that taxation must be uniform, or uniform and equal, throughout the state. Whether an assessment is a tax within the meaning of these provisions is a question which has often been presented to the courts for decision, and it is held by the great weight of authority that a local assessment is not a tax within the meaning of such constitutional provisions.¹ In some opinions this view is somewhat qualified by the expression

¹Hagar v. Board of Supervisors of Yolo County, 47 Cal. 222 [1874]; Chambers v. Satterlee, 40 Cal. 497 [1871]; Creighton v. Manson, 27 Cal. 614 [1865]; Burnett v. Mayor and Common Council of the City of Sacramento, 12 Cal. 76, 73 Am. Dec. 518 [1859]; Speer v. Mayor and Council of Athens, 85 Ga. 49; 9 L. R. A. 402, 11 S. E. 802 [1890]; Hayden v. City of Atlanta, 70 Ga. 817 [1883]; Bedard v. Hall, 44 Ill. 91 [1867]; Reinken v. Fnehring 130 Ind. 382 30 Am. St. Rep. 247, 15 L. R. A. 624, 37 Am. & Eng. Corp. Cas. 354, 30 N. E. 414 [1891]; Gosnell v. City of Louisville, 104 Ky. 201, 46 S. W. 722, 20 Ky. L. R. 519 [1898]; State ex rel. Hill v. Judges of Court of Appeals, 46 La. Ann. 1292, 16 So. 219; Excelsior Planting & Manufacturing Co. v. Green, 39 La. Ann. 455, 1 So. 873 [1887]; City of New Orleans praying for Opening of Casacaloo and Moreau Streets, 20 La. Ann. 497 [1868]; Richardson v. Morgan, 16 La. Ann. 429 [1862]; Yeatinan v. Crandall, 11 La. Ann. 220 [1856]; Wallace v. Shelton, 14 La. Ann. 498 [1859]; New Orleans Drainage Company praying for the confirmation of a tableau, 11 La. Ann. 338 [1856]; (see opinion on rehearing, 351); Oakey v. Mayor, 1 La. 1 [1830]; Motz v. City of Detroit, 18 Mich. 494 [1869]; Nugent v. City of Jackson, 72 Miss. 1040, 18 So. 493 [1895]; Town of Macon v. Patty, 57 Miss.

378, 34 Am. Rep. 451 [1879]; Vasser v. George, 47 Miss. 713 [1873]; Daily v. Swope, 47 Miss. 367 [1872]; He-man Construction Co. v. Wabash R. Co., 206 Mo. 172, 104 S. W. 67 [1907]; Meier v. City of St. Louis, 180 Mo. 391, 79 S. W. 955 [1903]; City of St. Joseph v. Owen, 110 Mo. 445, 19 S. W. 713 [1892]; Adams v. Lindell, 72 Mo. 198 [1880]. (So Adams v. Lindell, 5 Mo. App. 497 [1878]); Shuford v. Commissioners of Gaston County, 86 N. C. 552 [1882]; Cain v. Commissioners of Davie County, 86 N. C. 8 [1882]; Kadderly v. Portland, 44 Ore. 118, 74 Pac. 710, 75 Pac. 222 [1903]; King v. Portland, 38 Ore. 402, 52 L. R. A. 812, 63 Pac. 2 [1900]; Masters v. City of Portland, 24 Ore. 161, 33 Pac. 540 [1893]; King v. City of Portland, 2 Ore. 146 [1865]; Taylor v. Boyd, 63 Tex. 533 [1885]; Allen v. Galveston, 51 Tex. 302 [1879]; Roundtree v. Galveston, 42 Tex. 612 [1875]; Nalle v. City of Austin, — Tex. Civ. App. —, 103 S. W. 825 [1907]; Davis v. City of Lynchburg, 84 Va. 861, 6 S. E. 230 [1888]; Richmond & Allegheny R. R. Co. v. City of Lynchburg, 81 Va. 473 [1866]; Gilkeson v. Frederick Justices 13 Gratt. (Va.) 577; City of Spokane Falls v. Browne, 3 Wash. 84, 27 Pac. 1077 [1891]; Douglass v. Town of Harrisville, 9 W. Va. 162, 27 Am. Rep. 548 [1876].

of the opinion that if such provision does apply, the assessment may nevertheless be so apportioned that it will conform to the requirement of uniformity as nearly as such a form of tax can.² It "is as uniform as any taxation in relation to the subject could be."³ This view has been expressed both in cases in which it has been said that the constitutional requirement of uniformity applies,⁴ and those in which it is said not to apply.⁵ Analogous provisions are found in some constitutions to the effect that taxes levied upon property must be assessed in proportion to the value of such property. Under provisions of this sort it is ordinarily held that a local assessment is not a tax within the meaning of the term as used in such provision.⁶ This result has been reached under very stringent constitutional provisions, as that "all taxes levied on property shall be assessed in exact proportion to the value of such property"⁷ or that "all property subject to taxation shall be taxed in proportion to its value,"⁸ or that taxes on property shall be "assessed equally, according to the just value thereof."⁹ No matter how clear the constitutional requirement of uniformity may be, the theory, as held by these courts, is that such provisions are intended to apply only to general taxation imposed for the purpose of raising revenue to carry on the government, and not to local assessments for which, in the theory of the law, at least, full compensation is made to the owner of the property assessed, in the form of benefits conferred by the improvement for which the assessment is levied.¹⁰

² *Whiting v. Quackenbush*, 54 Cal. 306 [1880]; *Law v. Madison, Smyrna & Graham Turnpike Co.*, 30 Ind. 77 [1868]; *Oakey v. Mayor*, 1 La. 1 [1830].

³ *Oakey v. Mayor*, 1 La. 1 [1830].

⁴ *Whiting v. Quackenbush*, 54 Cal. 306 [1880].

⁵ *Oakey v. Mayor*, 1 La. 1 [1830].

⁶ *Mayor and Aldermen of Birmingham v. Klein*, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386 [1889]; *Richardson v. Morgan*, 16 La. Ann. 429 [1862]; *City of Auburn v. Paul*, 84 Me. 212, 24 Atl. 817 [1892]; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am.

Dec. 276 [1858]; *Jones v. Holzapfel*, 11 Okl. 405, 68 Pac. 511 [1902]; *Winona & St. P. R. Co. v. City of Watertown*, 1 S. D. 46, 44 N. W. 1072 [1890].

⁷ *Mayor and Aldermen of Birmingham v. Klein*, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386 [1889].

⁸ *Jones v. Holzapfel*, 11 Okl. 405, 68 Pac. 511 [1902].

⁹ *City of Auburn v. Paul*, 84 Me. 212, 24 Atl. 817 [1892].

¹⁰ These questions are considered in connection with specific constitutional provisions. See § 146 *et seq.*

§ 44. Special views of certain states.

In some jurisdictions a different view was taken originally, the courts in these states holding that an assessment was a tax within the meaning of the constitutional provision requiring uniformity; but either by change in judicial decision or by constitutional amendment this view has been abandoned. Thus in Colorado it was held originally that an assessment was a tax and therefore invalid as in violation of the constitutional requirement of uniformity.¹ This theory was subsequently abandoned and the view entertained by the weight of authority, that an assessment was not a tax within the meaning of such constitutional requirement was adopted.² It may be here noted that when the original Colorado rule on this point was in force it was applied to improvements which the court referred to the taxing power such as curbstones and gutters,³ or grading and paving streets,⁴ but not to improvements referred by the court to the doctrine of the police power, such as sewers,⁵ in which case assessments were held to be valid though not uniform. In Illinois a local assessment was held to be a tax within the meaning of the constitutional requirement of uniformity.⁶ This principle, however, was applied so as to invalidate assessments apportioned according to the frontage of the land assessed,⁷ and was not so applied as to invalidate assessments entirely. If apportioned according to actual benefits, an assessment might be valid.⁸ Subsequently on the adoption of the

¹ *In re House Resolutions Concerning Street Improvements*, 15 Colo. 598, 26 Pac. 323 [1890]; *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889]; *Palmer v. Way*, 6 Colo. 106 [1881].

² *City of Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041 [1892], (overruling *Palmer v. Way*, 6 Colo. 106 [1881], and the cases which followed it).

³ *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889].

⁴ *In re House Resolutions Concerning Street Improvements*, 15 Colo. 598, 26 Pac. 323 [1890].

⁵ *City of Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899 [1889]; *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825 [1887].

⁶ *Holbrook v. Dickinson*, 46 Ill. 285

[1867]; *Bedard v. Hall*, 44 Ill. 91 [1867]; *City of Chicago v. Baer*, 41 Ill. 306 [1866]; *City of Ottawa v. Spencer*, 40 Ill. 211 [1866]; *City of Chicago v. Larned*, 34 Ill. 203 [1864].

⁷ "In that case (i. e., *City of Chicago v. Larned*, 34 Ill. 203 [1864]) it was held that in taxation, equality and uniformity were indispensable to its constitutionality, and that the same principle applied to assessments for public improvements, and that an assessment upon the size or width of the front of a lot without reference to its value was invalid, as being in violation of the principle of equality and uniformity." *Holbrook v. Dickinson*, 46 Ill. 285, 287, 288 [1867].

⁸ *Bedard v. Hall*, 44 Ill. 91 [1867].

constitution of 1870 a provision inserted therein⁹ authorized the legislature to "vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property or otherwise." Under this provision it has been held that a local assessment is not within the provision of the constitution requiring uniformity of taxation.¹⁰ This question in Illinois, then, resolves itself into a question of the rule of apportionment, and is discussed in detail under that topic.¹¹ In Minnesota it was held originally that a local assessment is a tax within the provision requiring a tax to be levied according to the valuation of the property assessed.¹² Subsequently a provision was inserted in the new constitution of Minnesota allowing local assessments to be levied according to the benefits conferred by the improvement upon the property assessed, and in some cases, according to the frontage of the property benefited, upon the improvement.¹³ Under such a provision an assessment is not held to be a tax within the meaning of the provision requiring uniformity. In South Carolina the view is now maintained that an assessment is a tax within the meaning of the provision requiring uniformity as far as such assessment is of a kind referable to the taxing power.¹⁴ Whether an assessment, as for a sidewalk, can be referred to the police power, and hence held not to be a tax within the meaning of the provision requiring uniformity is a question upon which there is a conflict of opinion in these jurisdictions, Tennessee holding that such an improvement as a sidewalk is to be referred to the police power and is, therefore, not a tax within the meaning of the provision requiring uniformity,¹⁵ while in South Carolina it has finally been held that such improvements are not so

⁹ Constitution of Illinois 1870, Art. IX., § 9.

¹⁰ *White v. People ex rel. City of Bloomington*, 94 Ill. 604 [1880].

¹¹ See Chapter XIII.

¹² *Bidwell v. Coleman*, 11 Minn. 45; *Stinson v. Smith*, 8 Minn. 366 [1863].

¹³ Constitution of Minnesota, Art. IX., § 9.

¹⁴ *Mauldin v. City Council of Greenville*, 53 S. C. 285, 69 Am. St. Rep. 855, 43 L. R. A. 101, 31 S. E. 252 [1898]; *Stelmeyer v. City Council of Charleston*, 53 S. C. 259, 31 S. E.

322 [1898]; *Mauldin v. City Council of Greenville*, 42 S. C. 293, 46 Am. St. Rep. 723, 27 L. R. A. 284, 20 S. E. 842 [1893]; *State ex rel. Hoelbeck v. City Council of Charlestown*, 12 Rich. 702 [1860].

¹⁵ *Mayor and Aldermen v. Maberry*, 25 Tenn. (6 Humph.) 368, 44 Am. Dec. 315 [1845]; *Whyte v. Mayor and Aldermen of Nashville*, 32 Tenn. (2 Swan.) 364 [1852]; *Washington v. Mayor and Aldermen of Nashville*, 31 Tenn. (1 Swan.) 177 [1851].

within the police power that assessments therefor are not taxes. Accordingly such assessments are held to be taxes within the meaning of the provision requiring uniformity.¹⁶ In Tennessee assessments other than those, there referred to the police power, were for a long time held to be taxes within the rule requiring uniformity of taxation.¹⁷ This view has, however, been abandoned, and in that state a local assessment is held not to be a tax within the meaning of such constitutional provisions.¹⁸ In Wisconsin the provision requiring uniformity in taxation was held of itself to apply to a local assessment on the ground that an assessment is to be regarded as a tax, but under another clause of the constitution of Wisconsin¹⁹ providing that the legislature might "provide for the organization of cities and incorporated villages and (to) restrict their power of taxation, assessment" and the like, it was held that an assessment could be upheld though not complying with the requirement of uniformity.²⁰

§ 45. Assessment as tax within provisions for collection.

Statutes and ordinances often contain provisions of various kinds for the collection of taxes. Whether an assessment is or is not a tax within the meaning of such provisions depends largely on the context and on the way in which the words are employed. No absolute rule can be laid down. In general, however, in the absence of anything to show a contrary intention, an assessment is not a tax within the meaning of these provisions.¹ Thus under

¹⁶ *Mauldin v. City Council of Greenville*, 53 S. C. 285, 69 Am. St. Rep. 855, 43 L. R. A. 101, 31 S. E. 252 [1898], (overruling *dictum* in *Mauldin v. City County of Greenville*, 42 S. C. 293, 46 Am. St. Rep. 723, 27 L. R. A. 284, 20 S. E. 842 [1893]).

¹⁷ *Reelfoot Lake Levee District v. Dawson*, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041 [1896]; *Taylor McBean & Co. v. Chandler*, 56 Tenn. (9 Heisk.) 349, *sub nomine* *McBean v. Chandler*, 24 Am. Rep. 308 [1872]; *State v. Butler*, 79 Tenn. (11 Lea) 418 [1883].

¹⁸ *Arnold v. Mayor and Aldermen of Knoxville*, 115 Tenn. 195, 3 L. R. A. (N. S.) 837, 99 S. W. 469 [1905].

¹⁹ Art. XI., § 3.

²⁰ *Weeks v. City of Milwaukee*, 10 Wis. 242 [1860].

¹ *City of Galveston v. Guaranty Trust Co. of New York*, 107 Fed. 325, 46 C. C. A. 319 [1901]; *City of Highlands v. Johnson*, 24 Colo. 371, 51 Pac. 1004 [1897]; *Sargent & Company v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. 1028 [1895]; *Samuels v. Drainage Commissioners*, 125 Ill. 536, 17 N. E. 829 [1889]; *Leindecker v. People ex rel. Johnson*, 98 Ill. 21 [1881]; *Mix v. Ross*, 57 Ill. 121 [1870]; *City of Chicago v. Colby*, 20 Ill. 614 [1858]; *Gould v. Mayor and City Council of Baltimore*, 59 Md. 378 [1882]; *McCutcheon v. Pacific Railroad Co.*, 72 Mo. App. 271

statutes requiring a claim for taxes to be registered,² or requiring warrants to be issued for the collection thereof,³ or authorizing the collection of interest on unpaid taxes,⁴ or providing for the remission of part of the interest and penalties due on unpaid taxes if paid within a certain time,⁵ or providing a special procedure for foreclosing the liens of taxes,⁶ or providing at what term of court application for judgment for delinquent taxes must be made,⁷ or authorizing a sale of real property⁸ as the right of way of a railway company⁹ in payment of delinquent taxes; or authorizing the sale of personal property for delinquent taxes,¹⁰ or fixing a period of limitations within which the collection of taxes must be enforced,¹¹ or providing specifically that a period of limitations, otherwise applicable, should not apply to the collection of taxes,¹² it is held that assessments are not taxes within the meaning of such provisions. In most of these cases it may be observed, there are other provisions governing assessments as such, or else there have been other provisions, since repealed governing assessments. Thus where separate statutes provided for sales for taxes and sales for assessments, it was held that the repeal of the statute providing for sales for assessments did not authorize a sale for assessments under and by virtue of the provisions authorizing a sale for taxes.¹³ Power to sell "for the non-payment of any taxes" does not confer power to sell for the non-payment of local assessments.¹⁴ A statute providing that assessments

[1897]; *State of Nebraska ex rel. Ransom v. Irey*, 42 Neb. 186, 60 N. W. 601 [1894]; *Pray v. Northern Liberties*, 31 Pa. St. 69 [1850]; *Allen v. City of Galveston*, 51 Tex. 302 [1879]; *City of Seattle v. Whittelsey*, 17 Wash. 292, 49 Pac. 489 [1897].

² *Pray v. Northern Liberties*, 31 Pa. St. 69 [1850].

³ *City of Highlands v. Johnson*, 24 Colo. 371, 51 Pac. 1004 [1897].

⁴ *Sargent & Company v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. 1028 [1895].

⁵ *City of Seattle v. Whittelsey*, 17 Wash. 292, 49 Pac. 489 [1897].

⁶ *Samuels v. Drainage Commission*, 125 Ill. 536, 17 N. E. 829 [1889].

⁷ *Leindecker v. People ex rel. Johnson*, 98 Ill. 21 [1881].

⁸ *City of Chicago v. Colby*, 20 Ill. 614 [1858]; *Allen v. City of Galveston*, 51 Tex. 302 [1879].

⁹ *McCutcheon v. Pacific Railroad Co.*, 72 Mo. App. 271 [1897].

¹⁰ *Mix v. Ross*, 57 Ill. 121 [1870]; *State of Nebraska ex rel. Ransom v. Irey*, 42 Neb. 186, 60 N. W. 601 [1894].

¹¹ *Gould v. Mayor and City Council of Baltimore*, 59 Md. 378 [1882].

¹² *City of Galveston v. Guaranty Trust Co. of New York*, 107 Fed. 325, 46 C. C. A. 319 [1901].

¹³ *City of Chicago v. Colby*, 20 Ill. 614 [1858].

¹⁴ *Paine v. Spratley*, 5 Kan. 525 [1870]; *Burns v. Spratley*, 5 Kan. 551 [1870], (memorandum opinion).

shall be collected as other taxes are collected does not in all respect abrogate the distinction between taxes and assessments. Such a statute entitles the collector to the same commission on assessments collected by him as on taxes.¹⁵ but it does not render assessments subject to the statutory period of limitation which is provided for in case of taxes,¹⁶ nor does it empower the collector to sell personal property in satisfaction of an assessment under and by virtue of provisions applicable to the case of taxes.¹⁷ Even without any words showing specific legislative intent to include an assessment under the term 'tax' an assessment is so far a tax that without clear authority from the legislature it cannot be recovered in *assumpsit* in jurisdictions where common law forms of action exist.¹⁸

§ 46. Assessment as tax within jurisdictional provisions.

Provisions are found limiting the jurisdiction of certain courts to actions involving a certain specified sum, but providing that they shall have jurisdiction of actions involving the validity of a tax, irrespective of the amount in question. Such a provision is found in the constitution of Louisiana.¹ Whether an assessment is a tax within the meaning of such provision is a question upon which there has been some confusion. In the earlier cases it was held that an assessment was not a tax within the meaning of such provision.² Subsequently in a case involving the validity of an assessment to build a levee, it was held that such assessment was a tax within the meaning of this provision,³ the court saying of the earlier cases that they "must in these particular cases yield to the conclusions reached by us if as contended by counsel they

¹⁵ *Mayor and Council of Hagerstown v. Startzman*, 93 Md. 606, 49 Atl. 838 [1901].

¹⁶ *Gould v. Mayor and City Council of Baltimore*, 59 Md. 378 [1882].

¹⁷ *Mix v. Ross*, 57 Ill. 121 [1870].

¹⁸ *McKeesport Borough v. Fidler*, 147 Pa. St. 532, 23 Atl. 799 [1892].

In *Clemens v. Mayor and City Council of Baltimore*, use of *Volkmar*, 16 Md. 208 [1860], it was held that a local assessment might be recovered in *assumpsit*. There was, however, an express promise by the property owner to pay the amount

of the bills less about twenty-five dollars; and the declaration contained a count of *insimul computassent*.

¹ Art. 74, Constitution of Louisiana; Art. 85, Constitution of Louisiana, 1898; Art. 81, Constitution of Louisiana, 1879.

² *Board of Levee Commissioners v. Lorio Brothers*, 33 La. Ann. 276 [1881]; *Rooney v. Brown*, 21 La. Ann. 51 [1869], (an assessment for curbing and guttering).

³ *State ex rel. Hill v. Judges of Court of Appeals*, 46 La. Ann. 1292, 16 So. 219.

would be in conflict with it.”⁴ Subsequently in a case involving the validity of an assessment for a sidewalk it was held that such an assessment was not a tax within the meaning of this provision, on the ground that since the statute required the consent of a majority of the property owners to be affected, the charge was not an involuntary imposition and therefore not a tax.⁵ In a later case, involving the validity of an assessment for the improvement of a street, the assessment was levied under a statute which did not require the assent of the owners of the property to be assessed. The court held that such an assessment was a tax within the meaning of the constitutional provision.⁶ In this case *Fayssoux v. Denis*,⁷ was distinguished from the case at bar on the ground that the earlier case involved an assessment “predicated upon the assent of the property holders” and therefore not a tax, while the later case involved an assessment not so predicated and therefore a tax. In later cases⁸ on this point, *State ex rel Hill v. Judges of Court of Appeals*⁹ has been followed consistently and an assessment has been held to be a tax within the meaning of this provision.

§ 47. Assessment as tax under restrictions upon taxation.

Constitutional provisions are found restricting the rate of taxation which may be levied by municipal corporations. An assessment is not a tax within the meaning of such restrictions, and accordingly an assessment may be valid, although such assessment, together with the general taxes levied exceeds the rate of taxation thus fixed.¹ So an assessment is not a tax within a statutory

⁴ *State ex rel. Hill v. Judges of Court of Appeals*, 46 La. Ann. 1292, 16 So. 219. A similar view was taken in *Vicksburg, Shreveport & Pacific Railroad Co. v. Scott*, 47 La. Ann. 706, 17 So. 249 [1895].

⁵ *Fayssoux v. Denis*, 48 La. Ann. 850, 19 So. 760 [1896].

⁶ *City of Shreveport v. Prescott*, 51 La. Ann. 1895, 46 L. R. A. 193, 26 So. 664 [1899].

⁷ 48 La. Ann. 850, 19 So. 760 [1896].

⁸ *Pleasants v. City of Shreveport*, 110 La. 1046, 35 So. 283 [1903]; *Kelly v. Chadwick*, 104 La. 719, 29

So. 295 [1903], (affirmed, though not on this point in *Chadwick v. Kelly*, 187 U. S. 540, 23 S. 175 [1903]; apparently contra, *Tebault v. City of New Orleans*, 108 La. 686, 32 So. 983.

⁹ 46 La. Ann. 1292, 16 So. 219.

¹ *Dyer v. City of Newport*, — (Ky.) —, 80 S. W. 1127, 26 Ky. L. R. 204 [1904]; *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475 [1894]; *State ex rel. Hill v. Judges of Court of Appeals for the Third Circuit of the State of Louisiana*, 46 La. Ann. 1292, 16 So. 219 [1894]; *Charnock v. Forde & Grosse Tête Special Levee District Company*, 38 La. Ann. 323

provision restricting the power of the council to levy taxes to pay liabilities incurred by the city.² The effect upon the validity of local assessments of restrictions on the power of a city to incur debts, in cases when the city incurs a primary liability for the public improvement for which it expects to be reimbursed by local assessments is a question discussed elsewhere.³ Constitutional provisions are found providing that a law imposing an assessment shall state the tax and its object. Such provisions do not apply to local assessments, as the intent is clearly to regulate general taxation.⁴ An assessment is not a tax within the meaning of a statutory provision that no tax shall be levied upon any district unless the proposition to levy the same has been submitted to the qualified electors thereof.⁵

§ 48. Assessment as tax under other provisions.

Under a provision requiring the value of any mortgages existing on real estate to be deducted from the value thereof in assessing its value for taxation, it is held that a local assessment is not a tax within the meaning of such provision, since the benefits conferred upon the property assessed by the improvement for which the assessment is levied are in no way affected by the existence of mortgages upon such realty.¹ An assessment is a 'tax for local purposes' within the meaning of a statute saving from repeal provisions 'in relation to taxation for local purposes.'² So an assessment is, without any special words showing legislative intent, regarded as a tax in so far that no set-off can be made against it unless the statute expressly authorizes such set-off to be made.³

[1886]; *Barrow v. Helper*, 34 La. Ann. 362 [1882]; *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860 [1898]; *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629 [1898]; *Lamar Water & Electric Light Co. v. City of Lamar*, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W. 756 [1895]; *City of St. Joseph* to use of *Gibson v. Owen*, 110 Mo. 445, 19 S. W. 713 [1892]; *Farrar v. City of St. Louis*, 80 Mo. 379 [1883].

² *Baldwin v. City of Oswego*, 2 Keyes (N. Y. Ct. App.) 132 [1865].

³ See § 507.

⁴ In the matter of the Petition of Ford to Vacate an Assessment for the Regrading of Union Street, etc., in the City of Brooklyn, 6 Lans. (N. Y.) 92 [1872].

⁵ *Holley v. County of Orange*, 106 Cal. 420, 39 Pac. 790 [1895].

¹ *Tregea v. Owens*, 94 Cal. 317, 29 Pac. 643 [1892].

² *Reclamation District No. 3 v. Goldman*, 61 Cal. 205 [1882].

³ *Himmelmann v. Spanagel*, 39 Cal. 389 [1870]. See § 1346.

§ 49. Assessment as tax in conveyances.

Whether a local assessment is a tax within the meaning of a covenant concerning taxes or a provision for the payment thereof in a deed lease, will, or other similar instrument depends upon the intention of the parties as evidenced by the words employed and the context of the instrument. The general rule is that if the covenant or other provision refers only to a 'tax' it does not include local assessments.¹ Thus where the deed contains a covenant of warranty except as to 'taxes,' it is held that a local assessment is not a tax within the meaning of the exception, and the grantor is accordingly liable therefor on his covenant.² Thus a covenant against incumbrances "except taxes assessed for the year 1893" refers only to "general annual taxes,"³ and does not include local assessments. So in a covenant whereby the lessee agrees to pay part or all of the 'taxes' levied on the realty leased to him, the term 'taxes' does not include local assessments and the lessee is not liable therefor.⁴ So in a will a direction to an executor to pay 'annual taxes' on certain realty,⁵ or a direction that the wife of testator shall pay 'all taxes' assessed against realty in which she is devised an estate for life⁶ does not, in either case, include local assessments in the term 'taxes.' In jurisdictions in which the term 'special tax' is used to denote a local assessment, a covenant with reference to 'special taxes' is construed as including local assessments.⁷ Thus a covenant by a

¹ Sanders v. Brown, 65 Ark. 498, 47 S. W. 461 [1898]; De Clereq v. Barber Asphalt Paving Company, 167 Ill. 215, 47 N. E. 367 [1897], (affirming De Clereq v. Barber Asphalt Paving Company, 66 Ill. App. 596 [1896]; Warren v. Warren, 148 Ill. 641, 36 N. E. 611 [1894]; Chamberlin v. Gleason, 163 N. Y. 214, 57 N. E. 487 [1900]; Yoder v. Turner, 8 Ohio N. P. 387 [1901], (affirmed by Ohio Circuit Court); Beals v. Providence Rubber Company, 11 R. I. 381, 23 Am. Rep. 472 [1876]; Love v. Howard, 6 R. I. 116 [1859].

² Sanders v. Brown, 65 Ark. 498, 47 S. W. 461 [1898]; Smith v. Abington Savings Bank, 165 Mass. 285, 42 N. E. 1133 [1896]; Yoder v. Tur-

ner, 8 Ohio N. P. 387 [1901], (affirmed by Ohio Circuit Court).

³ Smith v. Abington Savings Bank, 165 Mass. 285, 42 N. E. 1133 [1896].

⁴ De Clereq v. Barber Asphalt Paving Company, 167 Ill. 215, 47 N. E. 367 [1897], (affirming De Clereq v. Barber Asphalt Paving Company, 66 Ill. App. 596 [1896]; Beals v. Providence Rubber Company, 11 R. I. 381, 23 Am. Rep. 472 [1876].

⁵ Warren v. Warren, 148 Ill. 641, 36 N. E. 611 [1894].

⁶ Chamberlin v. Gleason, 163 N. Y. 214, 57 N. E. 487 [1900].

⁷ Lucas v. McCann, 50 Mo. App. 638 [1892]; Thomas v. Hooker-Colville Steam Pump Company, 22 Mo. App. 8 [1886].

lessee to pay 'special taxes'⁸ or to pay 'all taxes general and special'⁹ prima facie includes local assessments. If the term 'assessment' is used in the instrument in addition to the term 'tax,' the prima facie inference is that 'assessment' in this connection means a local assessment.¹⁰ Thus a covenant in a lease whereby the lessee was to pay "all taxes and assessments of every kind whatever which should be laid or imposed on the premises during said term" imposes on the lessee the duty of paying local assessments.¹¹ So a clause in a mortgage whereby the mortgagee covenants to pay "taxes and assessments" promptly, includes local assessments.¹² So covenants whereby lessee agrees to pay "all taxes and assessments whether in the nature of taxes now is being or not which may be payable or assessed in respect of the premises or any part thereof during said term,"¹³ and to pay "all and singular the taxes, rates, charges and assessments which shall or may from time to time and at any time during said term be levied, assessed or made on the demised premises or in respect of the same for or on account of any matter or cause whatever"¹⁴ include local assessments for benefits. Conversely a covenant in a lease whereby the lessee agrees to "pay all assessments whatsoever levied" does not include general taxes.¹⁵ However, in a long lease, for ninety-five years, containing a covenant whereby the lessee covenanted to "pay or cause to be paid all taxes and assessments that might at any time during the term be assessed upon said lot" it was held that the covenant did not include so much of an assessment for laying out a new street as was assessed against the interest of the reversioner.¹⁶ The theory on which such holding was made was that such a form of assessment was unknown when the lease was executed and not within the contem-

⁸ *Lucas v. McCann*, 50 Mo. App. 638 [1892].

⁹ *Thomas v. Hooker-Colville Steam Pump Company*, 22 Mo. App. 8 [1886].

¹⁰ *National Life Insurance Co. v. Butler*, 61 Neb. 449, 87 Am. St. Rep. 462, 85 N. W. 437 [1901]; *Northwestern Mutual Life Insurance Company v. Butler*, 57 Neb. 198, 77 N. W. 667 [1898]; *Oswald v. Gilfert*, 11 Johns. (N. Y.) 443 [1814].

¹¹ *Oswald v. Gilfert*, 11 Johns. (N. Y.) 443, [1814].

¹² *National Life Insurance Company v. Butler*, 61 Neb. 449, 87 Am. St. Rep. 462, 85 N. W. 437 [1901]; *Northwestern Mutual Life Insurance Company v. Butler*, 57 Neb. 198, 77 N. W. 667 [1898].

¹³ *Codman v. Johnson*, 104 Mass. 491 [1870].

¹⁴ *Walker v. Whittemore*, 112 Mass. 187 [1873].

¹⁵ *Stephani v. Catholic Bishop of Chicago*, 2 Brad. (Ill.) 249 [1878].

¹⁶ *Love v. Howard*, 6 R. I. 116 [1859].

plation of the parties. Words in connection with the word 'tax' may show an intention to include local assessments in such terms.¹⁷ Under a covenant in a coal lease whereby the lessee agreed to pay a certain rent "clear of and over and above all taxes and reprises" it was held that as between the lessor and lessee the lessee was bound to pay local assessments levied for the cost of constructing a sewer.¹⁸ Covenants whereby a lessee agrees to pay, "all taxes and duties levied or to be levied thereon during the term,"¹⁹ or to pay "such sum or sums of money as shall be equal to the amount of the rates, taxes, and duties of every kind that shall be levied or assessed on the demised premises or on the lessors of the same as well as those assessed or levied by the authority of the United States, or those assessed or levied by the authority of the State of Massachusetts, or of the city of Boston, for each year and part of a year,"²⁰ have been held to include local assessments. A direction to pay "the annual taxes and insurance and also all reasonable repairs and improvements" out of rents has been held to include local assessments on the theory that it is payment for an 'improvement.'²¹ An assessment for benefits has been held not to be an incumbrance within the meaning of a contract for the sale of land, where the improvement was made and the assessment levied after the time fixed for performance of such contract, on the theory that the amount of the assessment did not exceed the benefits conferred by such improvement and that the vendee was therefore paying only for what he received.²² In a letter from a business man, not a lawyer, who was a non-resident and was writing with reference to his land the term 'taxes' includes local assessments.²³

¹⁷ *Blake v. Baker*, 115 Mass. 188 [1874]; *Delaware & Hudson Canal Company v. Von Storch*, 196 Pa. St. 102, 46 Atl. 375 [1900].

¹⁸ *Delaware & Hudson Canal Company v. Von Storch*, 196 Pa. St. 102, 46 Atl. 375 [1900].

¹⁹ *Blake v. Baker*, 115 Mass. 188 [1874].

²⁰ *Curtis v. Pierce*, 115 Mass. 186 [1874].

²¹ *Warren v. Warren*, 148 Ill. 641, 36 N. E. 611 [1894].

However, a provision in a will re-

quiring the trustee to pay "all taxes, rates, assessments and expenses for insurance and repairs and other expenses and outgoings of every nature" is held not to require the trustee to pay assessments for streets and sewers; *Rhode Island Hospital Trust Co. v. Babbitt*, 22 R. I. 113, 46 Atl. 403 [1900].

²² *Gotthelf v. Stranahan*, 138 N. Y. 345, 20 L. R. A. 455, 34 N. E. 286 [1893].

²³ *Gibbs v. People's National Bank*, 198 Ill. 307, 64 N. E. 1060 [1902].

§ 50. Special tax.

The term "special tax" is one which is used with several different meanings. In many cases it is used as a synonym of the local assessment.¹ Where this meaning attaches to the term, the charge is often referred to indiscriminately as a "special tax" and as an "assessment."² It is occasionally called by both names at once.³ Another meaning which attaches to the term "special tax" is that of a tax analogous to the general tax, but devoted to a specific purpose and not to be used for the general expenses of the public corporation which levies it.⁴ Thus a local assessment was held not to be a special tax within the meaning of a constitutional provision which imposed a limitation upon the rate of taxation "general or special."⁵ Such a special tax is a branch of the taxing power and not an exercise of eminent domain.⁶

¹ *Tallant v. City of Burlington*, 39 Ia. 543 [1874]; *City of Dubuque v. Harrison*, 34 Ia. 163 [1872]; *Board of Commissioners of County of Monroe v. Harrell*, 147 Ind. 500, 46 N. E. 124 [1896]; *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304 [1885]; *Barber Asphalt Paving Company v. City of St. Joseph*, 183 Mo. 451, 82 S. W. 64 [1904]; *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014 [1895]; *City of Clinton to use of Thornton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893]; *City of St. Joseph to use of Gibson v. Farrell*, 106 Mo. 437, 17 S. W. 497 [1891]; *Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683 [1889]; *City of Springfield to the use of Tuttle v. Baker*, 56 Mo. App. 637 [1894]; *Allen v. Krenning*, 23 Mo. App. 561 [1886]; *Thomas v. Hooker-Colville Steam Pump Company*, 22 Mo. App. 8 [1886]; *Kellerstein v. Holliday*, 3 Mo. App. 570 (appendix) [1877]; *Broeckschmidt v. Cavender*, 3 Mo. App. 568 (appendix) [1877]; *Stadler v. Strong*, 3 Mo. App. 568 (appendix) [1877]; *Creamer v. Allen*, 3 Mo. App. 545 [1877]; *City of Butte v. School District No. 1*, 29 Mont. 336, 74 Pac. 869 [1904]; *Lowden v. City of Cincinnati*, 2 Disney (Ohio) 203 [1858]; *County of Har-*

ris v. Boyd, 70 Tex. 237, 7 S. W. 713 [1888].

² *Tallant v. City of Burlington*, 39 Ia. 543 [1874]; *City of Dubuque v. Harrison*, 34 Ia. 163 [1872]; *City of Butte v. School District No. 1*, 29 Mont. 336, 74 Pac. 869 [1904].

³ Such charges are referred to as "assessments or special taxes." *Milwaukee Electric Railway & Electric Light Company v. City of Milwaukee*, 95 Wis. 42, 69 N. W. 796 [1897].

⁴ *County of San Luis Obispo v. White*, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756 [1891]; *Marion Water Company v. City of Marion*, 121 Ia. 306, 96 N. W. 883 [1903]; *Grunewald v. City of Cedar Rapids*, 118 Ia. 222, 91 N. W. 1059 [1902]; *Swanson v. City of Ottumwa*, 118 Ia. 161, 59 L. R. A. 620, 91 N. W. 1048 [1902]; *Lamar Water & Electric Light Co. v. City of Lamar*, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W. 756 [1895].

⁵ *Lamar Water & Electric Light Co. v. City of Lamar*, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W. 756 [1895].

⁶ *Chicago & Northwestern Railway Company v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437 [1897]; *Chicago & Alton Railroad Company v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077 [1894].

§ 51. Special taxation in Illinois.

The term "special tax" has a distinct and peculiar meaning in Illinois. In this state it was once held that local assessments were within the constitutional requirement of uniformity and that accordingly such assessments could not be apportioned by frontage or by any similar method of apportionment.¹ Subsequently the constitution was so modified as to permit certain public corporations to make local improvements "by special assessment, special taxation or otherwise."² The legislature thereupon conferred upon cities and villages the "power to make local improvements by special assessments, or by special taxation, or both, of contiguous property or general taxation or otherwise as they shall by ordinance, prescribe." This language is substantially that of the constitution and is not regarded as any broader in its effect and meaning,³ and confers the power of making local improvements by special assessment, special taxation or general taxation.⁴ Under this provision the special tax has been held to be distinct from both the general tax and the local assessment.⁵ Under this constitutional provision a special tax must be limited to "contiguous property,"⁶ while a special assessment need not be so limited but may be assessed upon any property benefited. On the other hand a special assessment apportioned according to benefits may be restricted to contiguous or abutting property.⁷ The mere fact that the charge is limited to abutting property is not conclusive that it

¹ See §§ 44, 153.

² Constitution of Illinois, Art. IX., § 9.

³ *Falch v. People ex rel. Johnson*, 99 Ill. 137 [1881].

⁴ *City of Chicago v. Brede*, 218 Ill. 528, 75 N. E. 1044 [1905]; *Miservey v. People ex rel. Raymond*, 208 Ill. 646, 70 N. E. 678 [1904]; *Ronan v. People ex rel. Shafter*, 193 Ill. 631, 61 N. E. 1042; *People ex rel. Miller v. Sherman*, 83 Ill. 165 [1876].

⁵ *Gage v. Waterman*, 121 Ill. 115, 13 N. E. 543 [1889]; *Butler v. Nevin*, 88 Ill. 575 [1878]; *Guild, Jr., v. City of Chicago*, 82 Ill. 472 [1876].

The notice of the tax sale must show whether it is for a special tax or a special assessment. *Gage v.*

Waterman, 121 Ill. 115, 13 N. E. 543 [1889].

The officer making the sale for a special tax must show his authority so to sell, and merely showing authority to sell for special assessments is not sufficient. *Butler v. Nevin*, 88 Ill. 575 [1878].

⁶ *Guild, Jr., v. City of Chicago*, 82 Ill. 472 [1876].

⁷ *Bass v. South Park Commissioners*, 171 Ill. 370, 49 N. E. 549 [1898]; *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898]; *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893]; *City of Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86 [1890]; *Lake v. City of Decatur*, 91 Ill. 596 [1879].

is a special tax as distinguished from an assessment.⁸ The special tax is in most respects like the special assessment. They are both based on the theory of presumed equivalents for the charge or exaction in the form of benefits,⁹ differing in this respect from general taxation. The chief difference between the special tax and the special assessment is in the manner of ascertaining benefits.¹⁰ In special taxation the imposition of the tax is a conclusive determination of the fact of benefit and the apportionment of the expense of the improvement, while in a special assessment the cost must not exceed the actual benefit and must be apportioned in proportion thereto.¹¹ The determination to construct a sidewalk by special taxation has been said to be, "a determination that the property so specially taxed is benefited to

⁸ "It does not follow that because the ordinance confined the assessment to abutting property it was a special tax instead of a special assessment (*Lake v. City of Decatur*, 91 Ill. 596 [1879]; *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898]). In the case at bar the assessment was made according to benefits, and though confined to contiguous property, was a special assessment and not a special tax." *Bass v. South Park Commissioners*, 171 Ill. 370, 372, 373, 49 N. E. 549 [1898].

⁹ *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893].

¹⁰ *Lightner v. City of Peoria*, 156 Ill. 80, 37 N. E. 69 [1894].

¹¹ *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893].

The difference between special assessments and special taxation has been repeatedly pointed out by this court. It lies mainly in the manner of determining the benefits. In special taxation the body enacting the ordinance determines that the benefits are equal to the cost, and before the passage of the amendment to Section 17, Article 9, Chapter 24 of the Revised Statutes in 1895 that determination was conclusive and could

not be reviewed by court or jury, while in special assessments the benefits are assessed by the commissioners and were always reviewable by a jury." *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 159, 49 N. E. 427 [1898].

"Special taxation, as spoken of in our Constitution, is based upon the supposed benefit to the contiguous property and differs from special assessments only in the mode of ascertaining the benefits. In the case of special taxation, the imposition of the tax by the corporate authorities is of itself a determination that the benefits to the contiguous property will be as great as the burden of the expense of the improvement and that such benefits will be so nearly limited or confined in their effect to contiguous property that no serious injustice will be done by imposing the whole expense upon such property. In the case of special assessments the property to be benefited must be ascertained by careful investigation and the burden must be distributed according to the carefully ascertained proportion in which each part thereof will be beneficially affected." *Craw v. Village of Tolono*, 96 Ill. 255, 262, 36 Am. Rep. 143 [1880], quoted in *Enos v. City of Springfield*, 113 Ill. 65, 71 [1886].

the extent of the special tax.”¹² Accordingly in the special tax it has been said to be no objection thereto that the amount of the tax exceeds the amount of the benefits.¹³ This theory of the special tax has been stated in a number of cases.¹⁴ Thus it has been said that the power of levying a special tax is an unqualified one, without restriction as to the benefiting of the contiguous property thus taxed.¹⁵ While the validity of the special tax is regularly recognized,¹⁶ the courts are now inclined to insist that the special tax must be reasonable. “The only difference in special assessments and special taxation as to benefits is that in the latter case

¹² *Harris v. People ex rel. Knight*, 218 Ill. 439, 443, 75 N. E. 1012 [1905]; *Pierson v. People ex rel. Walter*, 204 Ill. 456, 68 N. E. 383 [1903]; *Payne v. Village of South Springfield*, 161 Ill. 285, 44 N. E. 105 [1896]; *Chicago & Alton Railroad Company v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077 [1894]; *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471 [1887]; *Craw v. Village of Tolono*, 96 Ill. 255, 36 Am. Rep. 143 [1880]; *White v. People ex rel. City of Bloomington*, 94 Ill. 604 [1880].

¹³ “The objection that the special tax here exceeds the benefits to the lot implies that the only mode of making the improvement is by special assessment, whereas the broad power is given under the constitution to make it either by special assessment or by special taxation of contiguous property or otherwise.”

* * * This proceeding is in the special taxation of contiguous property, and in the adoption of that mode there is no requirement of benefits received and no respect thereto further than may be had by the city council in determining upon which particular one of the several modes of special taxation of contiguous property open to them shall be resorted to.” *Enos v. City of Springfield*, 113 Ill. 65, 71, 72 [1886], quoting *White v. People ex rel. City of Bloomington*, 94 Ill. 604, 616 [1880].

“Whether or not the special tax exceeds the actual benefit to the lot

is not material. It may be supposed to be based on a presumed equivalent. The city council have determined the frontage to be the proper measure of probable benefits. That is generally considered as a very reasonable measure of benefits in case of such an improvement, and if it does not in fact in the present case represent the actual benefits it is enough that the city council have deemed it the proper rule to apply.” *Enos v. City of Springfield*, 113 Ill. 65, 73 [1886], quoting *White v. People ex rel. City of Bloomington*, 94 Ill. 604, 613 [1880].

¹⁴ *City of Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1893]; *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]; *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471 [1887]; *City of Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686 [1886]; *Enos v. City of Springfield*, 113 Ill. 65 [1886]; *People ex rel. Miller v. Sherman*, 83 Ill. 165 [1876].

¹⁵ *City of Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686 [1886].

¹⁶ *City ex rel. Hanberg v. Peyton*, 214 Ill. 376, 73 N. E. 768 [1905]; *Commissioners of Highways of Town of Dix v. Big Four Drainage District of Ford County*, 207 Ill. 17, 69 N. E. 576 [1904]; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894]; *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893].

the determination of the city council is final—not an arbitrary unreasonable determination, but one which can be seen to be fairly and reasonably made,”¹⁷ and that even a special tax is to be regarded as based upon the theory of an equivalent for benefits in the increased value of the property taxed.¹⁸ Under the doctrine that the special tax must be reasonable, special taxes clearly in excess of the benefits conferred have been held invalid.¹⁹ Whether a special tax is a taking of property without due process of law has been presented for adjudication. In Illinois it has been held that under a statute imposing a special tax, but providing that the property owner may have the question of whether the special tax is in excess of the benefits or not, determined regularly, such a tax is not in violation of the Fourteenth Amendment to the Constitution of the United States.²⁰ The same question has been presented to the Supreme Court of the United States,²¹ but in this case the court refused to pass upon the question on the ground that the Federal question had not been presented to the State Court, to whose decision error was prosecuted. It will thus be seen that the tendency of statutes and recent decisions in Illinois is to bring the special tax more nearly to the local assessment than the original holdings of the Supreme Court seemed to indicate. Similar constitutional provisions are found in a few other states.²²

¹⁷ *City of Bloomington v. Chicago & Alton Railroad Company*, 134 Ill. 451, 459, 26 N. E. 366 [1891].

¹⁸ *Huston v. Tribbetts*, 171 Ill. 547, 63 Am. St. Rep. 275, 49 N. E. 711 [1898]; *Chicago & Alton Railroad Company v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077 [1894]; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894]; *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893].

¹⁹ *City of Bloomington v. Chicago & Alton Railroad Company*, 134 Ill.

451, 26 N. E. 366 [1891]. See § 295 *et seq.*

²⁰ *Job v. City of Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901].

²¹ *Lombard v. West Chicago Park Commissioners*, 181 U. S. 33, 45 L. 731, 21 S. 507 [1901]. (affirming *Cummings v. West Chicago Park Commissioners*, 181 Ill. 136, 54 N. E. 941 [1899]).

²² Sec. 6, Article IX., Constitution of Nebraska: *Darst v. Griffin*, 31 Neb. 608, 48 N. W. 819 [1891]. See § 103.

CHAPTER IV.

FORM OF EXACTION IN ASSESSMENT.

§ 52. Option to owner to construct improvement.

An assessment usually takes the form of a charge or exaction in money.¹ At the same time there is no reason why the charge might not be in the form of requiring the actual construction of the improvement by the party to be charged therewith instead of imposing upon him a charge in money to pay the cost thereof. However, if the party refuses to perform the work thus assigned to him, there is usually no method available of compelling specific performance. He may be coerced into performance by the imposition of a penalty, or in case of his refusal, the work may be done by others and he may be charged with his proportionate share of the expense thereof. The latter of these methods is usually treated as a form of assessment.² It will be noted that, although the charge is by this means originally imposed as a form of work and labor, it is ultimately enforceable as a charge in money. Accordingly, under such statutes the proceedings must provide some means for compelling payment in money. If a road is ordered to be built by the adjoining land owners, but no assessment is levied in proportion to the benefits conferred, so that the road

¹ See Chapter XX. For the question of the power to require payment in certain limited kinds of money or legal tender to the exclusion of others, see § 1086.

² *People ex rel. Hanberg v. Peyton*, 214 Ill. 376, 73 N. E. 768 [1905]; *City of Keokuk v. Independent District of Keokuk*, 53 Ia. 352, 36 Am. Rep. 226, 5 N. W. 503 [1880]; *Scherm v. Garrett's Adm'r.* (Ky.) 80 S. W. 1101, 26 Ky. Law Rep. 186 [1904]; *Board of Councilmen of Frankfort v. Mason & Foard Co.*, 100 Ky. 48, 37 S. W.

290 [1896]; *Mayor and Board of Trustees of Town of New Iberia v. Fontelieu*, 108 La. 460, 32 So. 369 [1901]; *Cuning v. Gleason*, 140 Mich. 195, 103 N. W. 537 [1905]; *Sanford v. Village of Warwick*, 181 N. Y. 20, 73 N. E. 490 [1905]; (reversing 82 N. Y. S. 466, 83 App. Div. 120 [1903]); *City of Wilmington v. Yopp*, 71 N. C. 76 [1874]; *Mt. Pleasant Bor. v. Balt. & O. Ry. Co.*, 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052 [1890]; *Wilson v. Town of Philippi*, 39 W. Va. 75, 19 S. E. 553 [1894].

may be built by assessment if the work is not done, it has been held that the proceedings should be quashed upon *certiorari*.³ If the obligation to construct an improvement is imposed by law upon a public corporation or a *quasi public* corporation such as a railroad company, such corporation may be compelled to construct such improvement by proceedings in mandamus.⁴

§ 53. Power and duty to grant option.

A municipal corporation may by ordinance give to the property owner the option to do the work in front of his property or pay an assessment therefor even if the statute does not provide for such option. Thus a municipal corporation may give to the abutting owner such option to do the work himself under a statute authorizing the council to pass ordinances to require the improvement of the street at the cost of the abutting owner,¹ or even, it has been held, under a statute authorizing the board of trustees to make and pass such resolutions, ordinances and by-laws as may be deemed necessary and proper and to regulate and make improvements to the streets, alleys, sidewalks, public squares, wharves, and other public property and places.² Such option is frequently given to the property owner by statute.³ If the statute provides for an option to the owner to do the work himself or pay an assessment therefor, the municipal corporation must give such option as a condition precedent to levying such assessment.⁴ Other property owners cannot complain because such option is given and advantage is taken of it by some property owners, and because upon assessment, allowance is made to the owners who

³ *Pierce v. County Commissioners of Franklin County*, 63 Me. 252 [1872].

⁴ *Northern Pacific Ry. v. Duluth*, 208 U. S. 583 [1908], (affirming *State ex rel. City of Duluth v. Northern Pacific Ry. Co.*, 98 Minn. 429, 108 N. W. 261). See § 1162.

¹ *Board of Councilmen of City of Frankfort v. Murray*, 99 Ky. 422, 36 S. W. 180 [1896].

² *Mayor and Board of Trustees of the Town of New Iberia v. Fontelieu*, 108 La. 460, 32 So. 369 [1901].

³ *People ex rel. Hanberg v. Pat-*

ton, 223 Ill. 379, 79 N. E. 51 [1906]; *City of Chicago v. Burkhardt*, 223 Ill. 297, 79 N. E. 82 [1906].

⁴ *City of Chicago v. Burkhardt*, 223 Ill. 297, 79 N. E. 82 [1906]; *Pierce v. County Commissioners of Franklin County*, 63 Me. 252 [1872]; *Brewster v. Mayor and Common Council of the City of Newark*, 11 N. J. Eq. (3 Stockt.) 114 [1856]; *Mt. Pleasant Bor. v. Balt. & O. R. Co.*, 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052 [1891]; *Rogers v. City of Milwaukee*, 13 Wis. 610 [1861].

did the work themselves.⁵ Furthermore, if a property owner takes advantage of such option and performs the work in a proper manner, the city cannot levy an assessment without crediting him for such work so done.⁶ If the owner is not given the opportunity to construct such improvement under a statute which provides therefor,⁷ as where a defective notice not giving specifications which would enable him to ascertain what work was to be done, is served on him,⁸ or where the ordinance providing for the improvement does not give the specifications or prescribe the manner of doing the work, but delegates to the city engineer the power to direct the method of doing the work,⁹ or where the statute gives the property owner the option to construct the whole of a sidewalk improvement and thus relieve himself from liability for assessment, and the notice served upon the owner gives him the option to construct the sidewalk except the intersections,¹⁰ the public corporation cannot construct the improvement at the cost of the property owners. Thus under a statute providing for such an option, the municipal corporation cannot construct the sidewalk and assess the cost thereof upon the abutting property owners unless they have been notified in accordance with the terms of the statute and have been given an opportu-

⁵ *City of Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112 [1895].

⁶ *Barber v. Board of Supervisors of the City and County of San Francisco*, 42 Cal. 630 [1872]; *State, Mann, Pros. v. Mayor and Common Council of Jersey City*, 24 N. J. L. (4 Zab.) 662 [1855]; In the matter of the Assessment for Improving East Eighteenth Street in the Town of Flatbush, 75 Hun. (N. Y.) 603, 27 N. Y. Supp. 591 [1894].

⁷ *State v. Foster*, 94 Minn. 412, 103 N. W. 14 [1905]; *City of Westport to use of Hoelzel v. Smith*, 68 Mo. App. 63 [1896]; *Erie City v. Willis*, 26 Pa. Super. Ct. 459 [1903]; *Johnson v. City of Oshkosh*, 21 Wis. 184 [1866]; *Kneeland v. City of Milwaukee*, 18 Wis. 411 [1864].

⁸ *Myrick v. City of La Crosse*, 17 Wis. 442 [1863].

⁹ *Thompson v. Schermerhorn*, 6 N.

Y. 92, 55 Am. Dec. 385 [1851]: a case where the ordinance directed that the owners or occupants of lots fronting on a certain described portion of a given street should cause the street in front of their respective lots to be pitched, leveled and flagged at their own expense in such manner as the city superintendent, under the direction of the committee on roads appointed by the common council, should direct and require; while the statute by virtue of the ordinance was passed, empowered the common council to make by-laws and ordinances directing any street or lane in the city to be pitched, leveled, paved or flagged within such time and in such manner as they might prescribe under the superintendence and direction of the city superintendent.

¹⁰ *City of Chicago v. Burkhardt*, 223 Ill. 297, 79 N. E. 82 [1906].

ity to construct the improvement themselves.¹¹ An insufficient notice such as one served by placing it upon the premises under a stone which covered it entirely,¹² or one requiring the work to be done in seventeen days when the ordinance under which it is given provides that the owner shall be given thirty days in which to do the work,¹³ gives the city no right to construct the improvement and assess the cost thereof upon the abutting property owners. At the same time the right of the owner to do the work is not one which is secured to him by constitutional provisions.¹⁴ It is a mere favor conferred upon him by statute, and accordingly any notice which the statute provides for, is sufficient, such as notice by publication.¹⁵ If the notice is mailed properly the fact that the property owner has not received it, and so has had, in fact, no opportunity to do the work, does not relieve him from liability.¹⁶ In this respect notice to the owner to do the work is to be distinguished from notice of the assessment itself.¹⁷ Accordingly he cannot insist upon an opportunity to do the work himself if the statute makes no provision therefor.¹⁸ If after due notice and opportunity, the owner neglects or refuses to do the work, subsequent proceedings are in the nature of ordinary local assessments. By failing to act in due season the property owner waives his right to do the work himself.¹⁹ Thus, under such a statute, if the owner neglects or refuses to construct a sidewalk in front of his property, the municipal corporation may proceed to do the work or to cause it to be done at the expense of such owner.²⁰ If the abutting owners do not do the work, the city

¹¹ *Schmidt v. Village of Elmwood Place*, 15 Ohio C. C. 351 [1897]; *Mt. Pleasant Bor. v. Balt. & O. R. Co.*, 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052 [1890].

¹² *City of Philadelphia to use of Winmill v. Edwards*, 78 Pa. St. (28 P. F. Smith) 62 [1875].

¹³ *Washington v. Mayor and Aldermen of Nashville*, 31 Tenn. (1 Swan.) 177 [1851]. (In such case the fact that the city delays thirty days before commencing to do the work does not cure the defect in the notice.)

¹⁴ *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533 [1884].

¹⁵ *Fass v. Seehawer*, 60 Wis. 525,

19 N. W. 533 [1884]. Queried in *Brewster v. Mayor and Common Council of the City of Newark*, 11 N. J. Eq. (3 Stockt.) 114 [1856].

¹⁶ *City of Chicago v. Galt*, 225 Ill. 368, 80 N. E. 285 [1907].

¹⁷ See Chapter XIV.

¹⁸ *Clapton v. Taylor*, 49 Mo. App. 117 [1892]; *Bingaman v. City of Pittsburgh*, 147 Pa. St. 353, 23 Atl. 395 [1892].

¹⁹ *Broadway Baptist Church v. McAttee*, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871].

²⁰ *Buell v. Ball*, 20 Ia. 282 [1866]; *Cuming v. Gleason*, 140 Mich. 195, 103 N. W. 537 [1905]; *City of Louisiana v. Shaffner*, 104 Mo. App.

may let the contract therefor as well as do the work itself.²¹ Mere election on the part of the abutting owner to do the work and attempted performance on his part will not be sufficient to discharge his liability for such improvement. He must furthermore comply substantially with the requirements of the ordinance.²² On the other hand, if the owner does the work and it is accepted by competent public authority, the other owners cannot resist payment of their assessments on the ground that such work so done by the owner was defective.²³ If the statute does not give the property owner the option to do the work, the fact that he voluntarily constructs an improvement in front of his land does not prevent the city from making an improvement of the same general character, but of a different material, and levying an assessment therefor.²⁴ Thus where a property owner voluntarily constructed a street surfaced with round cobble stones, the city had power to provide for surfacing such street with asphalt and levying an assessment therefor upon the land owned by such property owner.²⁵ Hence, if the city permits an owner to construct a sidewalk "in front of his property" and is silent as to permitting him to construct intersections, but provides that a pro rata charge for intersections shall be made upon lots in front of which the owner has constructed the sidewalk, the owner cannot relieve himself from liability for assessment for intersections by constructing an intersection at the corner of his lot.²⁶

§ 54. Option to do work in assessment for benefits.

In the case of improvements, the cost of which is made a charge

101, 78 S. W. 287 [1903]; *City of Springfield ex rel. Undergraft v. Mills*, 99 Mo. App. 141, 72 S. W. 462 [1903]; *Inhabitants of the Village of Houstania v. Grubbs*, 80 Mo. App. 433 [1899]; *Paxson v. Sweet*, 13 N. J. L. 196 [1832]; *Bonsall v. Mayor, Recorder and Trustees of the Town of Lebanon*, 19 Ohio 418 [1850]; *Findley v. City of Pittsburgh (Pa.)*, 11 Atl. 678 [1887]; *Mavor and Aldermen v. Maberry*, 25 Tenn. (6 Humph.) 368, 44 Am. Dec. 315 [1845]; *Wilson v. Town of Philippi*, 39 W. Va. 75, 19 S. E. 553 [1894].

²¹ *People ex rel. Hanberg v. Peyton*, 214 Ill. 376, 73 N. E. 768 [1905].

²² *Shrum v. Town of Salem*, 13 Ind. App. 115, 39 N. E. 1050 [1895].

²³ *Whitefield v. Hipple*, — (Ky.) —, 12 S. W. 150, 11 Ky. L. R. 386.

²⁴ *Parsons v. City of Columbus*, 50 O. S. 460, 34 N. E. 677 [1893].

²⁵ *Parsons v. City of Columbus*, 50 O. S. 460, 34 N. E. 677 [1893].

²⁶ *Heman Construction Company v. McManus*, 102 Mo. App. 649, 77 N. W. 310 [1903].

upon the property owner on the theory of benefits, provisions giving to the property owner the option to do the work himself, are not as common as in improvements which it is the legal duty of the land-owner to construct, but such provisions are occasionally found. Similar views are entertained where the statute provides that the owner shall be allowed to do the grading,¹ curbing,² or guttering,³ in the construction of a street; or shall be allowed to construct a road,⁴ or to construct a levee,⁵ or to clean out the bed of a creek.⁶ Charges of this sort are treated as ordinary assessments, subject to the option of the owner of the property to do the work himself. The question of the power of the legislature to apportion the assessment by requiring each owner to pay for the work done in front of his property is not here considered, and is discussed elsewhere.⁷

§ 55. Option to do work in performance of legal duty.

Assessments of this kind are most commonly found in cases involving assessments of the second type, that is assessment for the cost of performing a legal duty which the owner of the realty assessed has omitted or refused to perform. A common example of such a form of assessment exists where the owner of realty is required to construct a sidewalk in front of his property, or contiguous thereto, and in event of his failure so to do, the municipal corporation is authorized, by statute, to do the work or to have it done and to charge such property owner with the expense thereof. This is treated as a form of assessment.¹ Such form of

¹ Myrick v. City of La Crosse, 17 Wis. 442 [1863].

² Childers v. Holmes, 95 Mo. App. 154, 68 S. W. 1046 [1902].

³ Whitefield v. Hipple, — (Ky.) —, 12 S. W. 150, 11 Ky. L. R. 386.

⁴ Pierce v. County Commissioners of Franklin County, 63 Me. 252 [1872].

⁵ Crowley v. Copley, 2 La. Ann. 329 [1847].

⁶ Brown v. Keener, 74 N. C. 714 [1876].

⁷ See § 713.

¹ Winter v. City Council of Montgomery, 83 Ala. 589, 3 So. 235 [1887]; Little Rock v. Fitzgerald,

59 Ark. 494, 28 L. R. A. 496, 28 S. W. 32 [1894]; James v. Pine Bluff, 49 Ark. 199, 4 S. W. 760 [1887]; City of Chicago v. Galt, 225 Ill. 368, 80 N. E. 285 [1907]; People ex rel. Hanberg v. Peyton, 214 Ill. 376, 73 N. E. 768 [1905]; Biggin's Estate v. People ex rel. Tetherington, 193 Ill. 601, 61 N. E. 1124; Town of Greendale v. Suit, 163 Ind. 282, 71 N. E. 658 [1904]; Shrum v. Town of Salem, 13 Ind. App. 115, 39 N. E. 1050 [1895]; City of Keokuk v. Independent District of Keokuk, 53 Ia. 352, 36 Am. Rep. 226, 5 N. W. 503 [1880]; Buell v. Ball, 20 Ia. 282 [1866]; Board of Coun-

assessment for sidewalks has been upheld where ordinary assessments for benefits are held to be unconstitutional.² Other examples of assessments of this type where the owner is required to do the work are found in cases of the construction of sewers,³ or of house connections therefor,⁴ or the construction of drains,⁵ under the alternative provision, in the event that he refuses or neglects to construct such improvement of having the same con-

cilmen of Frankfort v. Mason & Foard Co., 100 Ky. 48, 37 S. W. 290 [1896]; Board of Councilmen of City of Frankfort v. Murray, 99 Ky. 422, 36 S. W. 180; Mayor and Board of Trustees of Town of New Iberia v. Fontelieu, 108 La. 460, 32 So. 369 [1901]; Cumming v. Gleason, 140 Mich. 195, 103 N. W. 537 [1905]; Young v. Village of Waterville, 39 Minn. 196, 39 N. W. 97 [1888]; Inhabitants of Town of Palmyra v. Morton, 25 Mo. 593 [1857]; City of Louisiana v. Shaffner, 104 Mo. App. 101, 78 S. W. 287 [1904]; Heman Construction Company v. McManus, 102 Mo. App. 649, 77 S. W. 310 [1903]; City of Springfield ex rel. Updegraff v. Mills, 99 Mo. App. 141, 72 S. W. 462 [1903]; Inhabitants of the Village of Houstania v. Grubbs, 80 Mo. App. 433 [1899]; State v. Several Parcels of Land, — Neb. —, 107 N. W. 566 [1906]; Morris v. Mayor and Common Council of the City of Bayonne, 25 N. J. Eq. (10 C. E. Gr.) 345 [1874]; Brewster v. Mayor and Common Council of the City of Newark, 11 N. J. Eq. (3 Stockt.) 114 [1856]; Sanford v. Village of Warwick, 181 N. Y. 20, 73 N. E. 490 [1905] (reversing 82 N. Y. S. 466, 83 App. Div. 120.) Thompson v. Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385 [1851]; City of Wilmington v. Yopp, 71 N. C. 76 [1874]; Wilhelm v. City of Defiance, 58 O. S. 56, 65 Am. St. Rep. 745, 40 L. R. A. 294, 50 N. E. 18 [1898]; Schmidt v. Village of Elmwood Place, 15 Ohio C. C. 351 [1897]; Hunt v. Hunter, 11 Ohio C.

C. 69 [1895]; Mt. Pleasant Bor. v. Balt. & O. R. Co., 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052 [1891]; Philadelphia v. Stevenson, 132 Pa. St. 103, 19 Atl. 70 [1890]; Wilkinsburg Bor. v. Home for Aged Women, 131 Pa. St. 109, 6 L. R. A. 531, 18 Atl. 937 [1890]; City of Philadelphia to use of Winnill v. Edwards, 78 Pa. St. (28 P. F. Smith) 62 [1875]; Findlay v. City of Pittsburg (Pa.) 11 Atl. 678 [1887]; Mayor and Aldermen v. Maberry, 25 Tenn. (6 Humph.) 368, 44 Am. Dec. 315 [1845]; Washington v. Mayor and Aldermen of Nashville, 31 Tenn. (1 Swan) 177 [1851]; Mayor and City Council of Nashville v. Berry, 2 Shan. Cas. (Tenn.) 561 [1877]; Sands v. City of Richmond, 31 Gratt. 571, 31 Am. Rep. 742 [1879]; Wilson v. Town of Philippi, 39 W. Va. 75, 19 S. E. 553 [1894]; Fass v. Seehawer, 60 Wis. 525, 19 N. W. 533 [1884].

² Town of Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 45 [1879]; Mayor and Aldermen v. Maberry, 25 Tenn. (6 Humph.) 368, 44 Am. Dec. 315 [1845]; Washington v. Mayor and Aldermen of Nashville, 31 Tenn. (1 Swan.) 177 [1851]; Nashville v. Berry, 2 Shan. Cas. (Tenn.) 561 [1877].

³ State v. Foster, 94 Minn. 412, 103 N. W. 14 [1905].

⁴ Erie City v. Willis, 26 Pa. Super. Ct. 459 [1904].

⁵ Scherm v. Garrett's Adm., 118 Ky. 296, 80 S. W. 1103, 26 Ky. L. R. 186 [1904].

structed by the proper public authorities at the cost of such owner. If the improvement is one the cost of which the land-owner cannot be compelled to pay, either on the theory of benefits or on the theory of the performance of a legal duty, no additional validity can be given to such exaction by requiring the owner to construct the improvement himself.⁶ Thus if a ditch is not necessary to protect the public health or to protect the contiguous land from nuisance it cannot be made the duty of the land-owner to construct it by giving him notice so to do.⁷ So, in Pennsylvania, where no assessment can be levied for a new improvement if the old is in good condition,⁸ the owner cannot be required to take up a curb which is in good condition and replace it with a new and expensive curb as a part of the general plan of turning a street into a boulevard.⁹

§ 56. Primary duty upon city.

Under statutes which permit a city to require property owners to construct improvements in front of their respective lands, the city remains liable to third persons for any damages which may be caused by failure to make such improvement or for defects in its construction. The effect of statutes of this sort is not to transfer liability by reason of such improvement from the city to abutting property owners.¹ Hence the owner is not primarily liable to a traveler for an injury occasioned by the fact that the sidewalk was out of repair.² So, if the owner is required to construct a sidewalk and he constructs it in a negligent manner, the city cannot recover indemnity from such owner by reason of a judgment which a third person, injured by such negligence, has

⁶ *Chicago & Erie Railroad Co. v. Keith*, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902].

⁷ *Chicago & Erie Railroad Co. v. Keith*, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902].

⁸ See §§ 378, 382, 383. In assessments on the theory of benefits, all reconstruction must be at the expense of the city and not at the expense of the property owners.

⁹ *Wistar v. Philadelphia*, 80 Pa. St. 505, 21 Am. Rep. 112 [1876]; [distinguished in *Michener v. City of*

Philadelphia, 118 Pa. St. 535, 12 Atl. 174] [1888].

¹ *City of Keokuk v. Independent District of Keokuk*, 53 Ia. 352, 36 Am. Rep. 226, 5 N. W. 503 [1880]; *Haskell v. Village of Penn. Yan.*, 5 Lans. (N. Y.) 43 [1871]; *Wilhelm v. City of Defiance*, 58 O. S. 56, 65 Am. St. Rep. 745, 40 L. R. A. 294, 50 N. E. 18 [1898]; *Hay v. City of Baraboo*, 127 Wis. 1, 3 L. R. A. (N. S.) 84, 105 N. W. 654 [1906].

² *Hay v. City of Baraboo*, 127 Wis. 1, 3 L. R. A. (N. S.) 84, 105 N. W. 654 [1906].

recovered against the city, although the city could have constructed such sidewalk in a proper manner at the expense of such owner.³ So under a statute which provides that the city may require a land-owner to repair a sidewalk in front of his land, if the city allows the sidewalk to get into defective condition so that the city is held liable for damage caused thereby, it cannot recover indemnity therefor from such land-owner, although it could have recovered from him the cost of putting such sidewalk in good condition.⁴

§ 57. Repairs.

Statutes are found which in case of repairs, give the owner the option to do the work himself, or to permit it to be done at his expense by competent public authority. Thus provisions of this sort are found in the case of the repair of sidewalks.¹ Power to assess if the owner does not perform the work has been found under a statute providing that where any portion of the roadway of any street or alley or any portion of any sidewalk shall be out of repair the board of public works shall require the owners or occupants of the property adjoining to repair such portion. This provision was held to authorize the board, in case of neglect or omission of the owner to make such repairs, to award a contract for the repair of such sidewalk or to take charge of such repairs itself.² The same general principles applicable in cases of original construction are in force in case of repairs. Thus if the owner complies with the notice, commences work within the prescribed time and proceeds in its performance with reasonable diligence, the municipal corporation cannot charge him with the cost of work done by the

³ *Wilhelm v. City of Defiance*, 58 O. S. 56, 65 Am. St. Rep. 745, 40 L. R. A. 294, 50 N. E. 18 [1898]; See to the same effect *City of Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189 [1881]; *Flynn v. Canton Company of Baltimore*, 40 Md. 312, 17 Am. Rep. 603 [1874]; *City of St. Louis v. Connecticut Mutual Life Insurance Company*, 107 Mo. 92, 28 Am. St. Rep. 402, 17 S. W. 637; *City of Rochester v. Campbell*, 123 N. Y. 405, 20 Am. St. Rep. 760, 10 L. R. A. 393, 25 N. W. 937 [1890].

⁴ *City of Keokuk v. Independent District of Keokuk*, 53 Ia. 352, 36 Am. Rep. 226, 5 N. W. 503 [1880].

¹ *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331 [1905]; *Mayor and Board of Trustees of the Town of New Iberia v. Fontelien*, 108 La. 460, 32 So. 369 [1901]; *Heman v. St. Louis Merchants' Land Improvement Company*, 75 Mo. App. 372 [1898].

² *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331 [1905].

corporation after the expiration of the time limit.³ In Illinois a city ordinance required the owners or occupants to repair the sidewalk in front of their respective lots, and provided for a fine or penalty in case of failure so to do. It was held that the ordinance was invalid, on the theory that neither original construction nor repairs can be demanded of the abutting owner or occupant at his own expense.⁴ This view of such an ordinance turns chiefly on the Illinois theory of local improvements,⁵ and not solely on the ground that the duty to repair was enforceable only by fine or penalty. Under the general principles in force in most states it is held that a statute providing for the allotment of the work of maintaining, cleaning and repairing a public ditch after notice and a hearing, and for an assessment if the work is not done as allotted, neither allotment nor assessment to exceed the benefits, is constitutional;⁶ though under such statute an allotment without notice is invalid.⁷ If due notice is given and the trustee of the township personally promises the land-owner that the latter will be permitted to make such repairs after the expiration of the time fixed by the notice, such promise is invalid, and if repairs are made by the township trustee after the expiration of such time so limited, the owner cannot resist such assessment.⁸

§ 58. Removal of ice and snow.

Statutes or ordinances provide in some cases that the owner or occupant of land shall remove ice, snow and the like from the sidewalk in front of his land within a certain period of time after it is formed or deposited there. The question of the power of the legislature to impose such charges is one upon

³ *Heman v. St. Louis Merchants' Land Improvement Company*, 75 Mo. App. 372 [1898]. The owner was to do the work within five days. Notice was sent on the thirteenth of the month; received on the fourteenth; work was begun on the sixteenth; and completed on the eighteenth. Subsequently the work was torn up and done again by the contractor to whom the city had let the contract. It was held that the owner was not liable for such second improvement,

his work having been done according to the requirements of the ordinance.

⁴ *City of Chicago v. Crosby*, 111 Ill. 538 [1885].

⁵ See § 377.

⁶ *Roundenbush v. Mitchell*, 154 Ind. 616, 57 N. E. 510 [1900].

⁷ *Hille v. Neale*, 32 Ind. App. 341, 69 N. E. 713 [1904].

⁸ *Davison v. Campbell*, 28 Ind. App. 688, 63 N. E. 779 [1901].

which there is a sharp conflict of authority. Exactions of this sort are rarely based upon any theory of benefits, the owner being required to remove the ice or snow upon the assumption that a legal duty rests upon him so to do. Some of the cases holding such statutes and ordinances invalid proceed upon the assumption that the charges thus imposed are assessments of the first class, based upon the theory of benefits. If it is assumed or granted that these charges are to be upheld, if at all, on the theory of benefits it is usually easy to show that the statute or ordinance is invalid as it rarely purports either to limit the exaction to the benefit or to apportion it with reference thereto. Thus an act of Congress applicable to the District of Columbia, imposing a fine of five dollars for the first day's default and a further fine of five dollars thereafter for each day not exceeding five days,¹ or a city ordinance imposing a similar fine in case of default in removing snow within six hours after it ceases falling, or within six hours after sunrise if it falls during the night,² have each been held invalid. It is an attempt to enforce the collection of local assessments by criminal proceedings. Furthermore, if regarded as an attempt to enforce a legal duty, irrespective of the theory of assessment for benefits, the very existence of the legal duty has been denied, the courts in some cases holding that such duty rests upon the public corporation and that it cannot be transferred from the public corporation to the property owner.³ In accordance with these views we find that in some jurisdictions the power to compel the property owner to remove ice and snow is denied entirely.⁴ A different view is, however, entertained in many jurisdictions, and it is held that a legal duty rests upon the owner of realty to remove such ice and snow, and that such legal duty may

¹McGuire v. District of Columbia, 24 App. D. C. 22 [1904].

²Gridley v. City of Bloomington, 88 Ill. 554, 30 Am. Rep. 566 [1878].

³McGuire v. District of Columbia, 24 App. D. C. 22 [1904]; Holtzman v. United States, 14 App. D. C. 454 [1899]; Gridley v. City of Bloomington, 88 Ill. 554, 30 Am. Rep. 566 [1878].

⁴McGuire v. District of Columbia, 24 App. D. C. 22 [1904]; Holtzman v. United States, 14 App. D. C. 454 [1899]; City of Chicago v. O'Brien, 111 Ill. 532, 53 Am. Rep. 640 [1884]; Gridley v. City of Bloomington, 88 Ill. 554, 30 Am. Rep. 566 [1878]; State v. Jackman, 69 N. H. 318, 42 L. R. A. 438, 41 Atl. 347 [1898].

be enforced by fines or penalties.⁵ Language is occasionally found in the cases upholding such statutes which seems to indicate that the charge is regarded as a benefit. Thus the work of removing the snow is said to be "a slight burden, insignificant in comparison with the benefit secured."⁶ At the same time, such statutes are really treated, where held valid, as operations of the police power, imposing criminal liability and not as providing for an assessment. The penalty imposed has usually no relation either to the cost of the work,⁷ or to the benefits derived therefrom by the owner of the realty,⁸ but is imposed solely to coerce performance. "It is not speaking strictly to characterize this city ordinance as a law levying a tax, the direct or principal object of which is the raising of revenue. It imposes a duty upon a large class of persons the performance of which requires some labor and expense, and therefore indirectly operates as a law creating a burden. But we think it is rather to be regarded as a police regulation requiring a duty to be performed, highly salutary and advantageous to the citizens of a populous and closely built city and which is imposed upon them because they are so situated as that they can most promptly and conveniently perform it, and it is laid, not upon a few, but upon a numerous class, all those who are so situated and equally upon all who are within the description composing the class."⁹ Thus provisions have been upheld imposing fines of from one to four dollars per day¹⁰ or one to fifty dollars per day¹¹ for each day that the snow or ice is allowed to remain upon the sidewalk; or imposing a fine of ten dollars,¹² or a fine of from one to ten dollars¹³ for each offense. Even a provision that the owner in case of his neglect or omission to remove the snow

⁵ *State v. McMahon*, 76 Conn. 97, 55 Atl. 591 [1903]; *Goddard v. Petitioner*, 33 Mass. (16 Pick.) 504, 28 Am. Dec. 259 [1835]; *City of Helena v. Kent*, 32 Mont. 279, 80 Pac. 258 [1905]; *Village of Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490, 10 L. R. A. 178, 25 N. E. 480 [1890]; *State v. McCrillis*, — R. I. —, 66 Atl. 301 [1907].

⁶ *State v. McMahon*, 76 Conn. 97, 106, 55 Atl. 591 [1903].

⁷ See §§ 713, 717.

⁸ See § 651 *et seq.*, § 717.

⁹ *Goddard, Petitioner*, 33 Mass. (16 Pick.) 504, 509, 28 Am. Dec. 259 [1835].

¹⁰ *Goddard, Petitioner*, 33 Mass. (16 Pick.) 504, 28 Am. Dec. 259 [1835].

¹¹ *City of Helena v. Kent*, 32 Mont. 279, 80 Pac. 258 [1905].

¹² *State v. McMahon*, 76 Conn. 97, 55 Atl. 591 [1903].

¹³ *Village of Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490, 10 L. R. A. 178, 25 N. E. 480 [1890].

or ice shall be liable for the expense of clearing the same off and also for a penalty of two dollars, is not regarded as imposing an assessment.¹⁴ Under such provisions the primary duty of keeping the sidewalk free from ice and snow still rests on the city. The owner who neglects to remove the ice and snow from the sidewalk is not liable to a person injured thereby,¹⁵ even if by the provisions of the statute the owner is liable over to the city for any injury caused by such neglect.¹⁶ Such a statute does not apply until the city has been held liable to the person injured, and then seeks to be reimbursed by the owner. The manner of removing snow may be regulated by the city. Thus an ordinance requiring a street railway to remove snow from the tracks only as directed by the superintendent of streets has been upheld as valid.¹⁷ If the ordinance requires snow to be removed by the tenant occupying the adjoining premises and in case there is no tenant, the owner, an owner who has let the two parts of the premises to two different tenants and who occupies rooms there as a boarder with one of his tenants is not liable.¹⁸

§ 59. Lighting.

Some statutes provide that railway companies must maintain lights at the crossings of the tracks of such railways with the public streets of municipal corporations. Such statutes are upheld as a valid exercise of the police power of the state.¹ If the statute provides that the municipal corporation shall light the crossing and collect the cost thereof from the railway company, in case such company refuses to light it, we have what is

¹⁴ *Flynn v. Canton Company of Baltimore*, 40 Md. 312, 17 Am. Rep. 603 [1874].

¹⁵ *Flynn v. Canton Company of Baltimore*, 40 Md. 312, 17 Am. Rep. 603 [1874]; *Kirby v. Boylston Market Association*, 80 Mass. (14 Gray) 249, 74 Am. Dec. 682 [1859].

¹⁶ *Taylor v. Lake Shore & Michigan Southern Railroad Company*, 45 Mich. 74, 40 Am. Rep. 457, 7 N. W. 728 [1881].

¹⁷ *Union Railway Company v. Mayor and Aldermen of the City of Cambridge*, 93 Mass. (11 All.) 287 [1865].

¹⁸ *Commonwealth v. Watson*, 97 Mass. 562 [1867].

¹ *Chicago, Indianapolis & Louisville Railway Company v. City of Crawfordsville*, 164 Ind. 70, 72 N. E. 1025 [1904]; *Village of St. Marys v. Lake Erie and Western Railroad Company*, 60 O. S. 136, 53 N. E. 795 [1899]; *Cincinnati, Hamilton & Dayton R. R. Co. v. Village of Bowling Green, Ohio*, 57 O. S. 336, 41 L. R. A. 422, 49 N. E. 121 [1897]; *Cincinnati, Hamilton and Dayton Railroad Company v. Sullivan*, 32 O. S. 152 [1877].

substantially an assessment.² It is, however, held that this is not a local assessment within the provision of the statute for collection of local assessments.³ This means that such assessment cannot be placed upon the tax duplicate, but must be collected by suit. If, however, the ordinance imposes a penalty upon the railway company for refusing to maintain the light, thereby intending to coerce obedience, and does not provide for assessing the cost of maintaining such light upon the railway company, we have a provision which, though valid, is not regarded as an assessment in this sense.⁴

§ 60. Liability of street railway company for paving between tracks.

A form of assessment in which the liability is voluntarily incurred by the owner of the property assessed is found where a street railway company accepts a charter or franchise by the terms of which it is bound to pave and keep in repair a certain part of the street upon which the rails of such surface road are laid. It is evident that if the railway company declines to accept such charter or franchise, it does not incur any liability under the terms thereof. On the other hand, it cannot lay or operate its track without accepting such charter or franchise, including the burdens as well as the benefits thereof. A charge of this sort differs from charges for water, gas, or other commodities furnished for use upon certain realty. As we have already seen, charges of this sort are really contracts and nothing more, since it is possible at any time to discontinue the use of such commodity, and thus terminate all liability in the future. In the case of the street railway, on the other hand, once the franchise or charter is accepted, the railway company becomes liable for the paving and repairing therein specified. It may be accordingly a case of assessment and not a case of contractual relation merely, although the liability is assumed by a contract,

² Village of St. Marys v. Lake Erie and Western Railroad Company, 60 O. S. 136, 53 N. E. 795 [1899]; Cincinnati, Hamilton & Dayton R. R. Co. v. Village of Bowling Green, Ohio, 57 O. S. 336, 41 L. R. A. 422, 49 N. E. 121 [1897].

³ Cincinnati, Hamilton and Dayton Railroad Company v. Sullivan, 32 O. S. 152 [1877].

⁴ Chicago, Indianapolis & Louisville Railway Company v. City of Crawfordsville, 164 Ind. 70, 72 N. E. 1025 [1904].

or something analogous thereto.¹ In some of these cases, the street railway company is liable to do the work itself, and the assessment assumes the form of a money charge only if the railway company neglects or omits so to do.² Assessments of this sort resemble closely the other forms of assesment in which the property is bound primarily to do the work, and is liable to a charge in money only in the event of his refusing or omitting to do such work. Under other forms of charter or franchises the street railway company is required to pay the cost of such paving or repairing, which is to be done by the city or other public corporation.³ Assessments of this sort resemble the ordinary type of assessment in which the property owner has no option, but is required to pay the amount of a valid assessment against his property for the work done. An obligation to pave and keep in good repair has been held not to show any liability to repave.⁴ The street railway cannot be compelled to pay the increase in cost due to a guaranty of repairs, the bond for which does not enure to the benefit of such railway company.⁵ A subsequent change of charter or statute diminishing or modifying

¹ *City of Worcester v. Worcester Consolidated Street Railway Company*, 196 U. S. 539, 25 S. 327 [1905]; (affirming *City of Worcester v. Worcester Consolidated Street Railway Company*, 182 Mass. 49, 64 N. E. 581 [1902]); *New Orleans City & Lake Railroad Co. v. Louisiana ex rel. New Orleans*, 157 U. S. 219, 39 L. 679, 15 S. 581 [1895]; (Affirming, *State ex rel. City of New Orleans v. New Orleans City & Lake Railroad Co.*, 42 La. Ann. 550 [1890]); *Fair Haven and Westville Railroad Company v. City of New Haven*, 75 Conn. 442, 53 Atl. 960 [1903]; *American Hide and Leather Company v. City of Chicago*, 203 Ill. 451, 67 N. E. 979 [1903]; *City of Benton Harbor v. St. Joseph and Benton Harbor Street Railway Co.*, 102 Mich. 386, 26 L. R. A. 245, 60 N. W. 758 [1894]; *Wales v. Warren*, 66 Neb. 455, 92 N. W. 590 [1902]; *City of Rochester v. Rochester Railway Company*, 182 N. Y. 99, 70 L. R. A. 773, 74 N. E. 953

[1905]; *Storrie v. Houston City Street Railway Co.*, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898].

² *New Orleans City and Lake Railroad Company v. Louisiana ex rel. City of New Orleans*, 157 U. S. 219, 39 L. 679, 15 S. 581 [1895]; (Affirming *State ex rel. City of New Orleans v. New Orleans City and Lake Railroad Co.*, 42 La. Ann. 550 7 So. 606 [1890]; *Fair Haven and Westville Railroad Company v. City of New Haven*, 77 Conn. 219, 58 Atl. 703 [1904]; *City of Springfield v. Springfield Street Ry. Co.*, 182 Mass. 41, 64 N. E. 577 [1902].

³ *City of Rochester v. Rochester Railway Company*, 182 N. Y. 99, 70 L. R. A. 773, 74 N. E. 953 [1905].

⁴ *Western Paving and Supply Company v. Citizens' Street Railroad Company*, 128 Ind. 525, 25 Am. St. Rep. 462, 10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88 [1891].

⁵ *Fair Haven and Westville R. Co. v. City of New Haven*, 77 Conn. 219, 58 Atl. 703 [1904].

the burden which is acquiesced in by the railway company is valid as against the objection of the city,⁶ and a change increasing the burden upon the railway is valid as against it and its pre-existing mortgages if by the constitution such franchises remain subject to legislative control.⁷ The city may assess the abutting property owners even if by contract the railway company which occupies part of the street is bound to regrade and gravel it and keep it in repair.⁸ In some cases, however, the fact that the liability is assumed voluntarily is regarded as preventing it from being a true assessment.⁹ If the charter of the railway company imposes such liability on the street railway, but the charter of the borough does not confer any power upon the borough to levy an assessment except on "lands and buildings," the borough cannot enforce the liability of the railway company by an assessment.¹⁰

§ 61. Appropriation of expense between public corporations.

A form of exaction or forced contribution which presents some resemblance to assessment, and some to general taxation, is found where the expense of certain public improvements is apportioned among public corporations.¹ An exaction of this sort resembles

⁶ Worcester v. Worcester Consolidated Steel Railway Co., 182 Mass. 49, 64 N. E. 581 [1902].

⁷ Storrie v. Houston City Street Railway Co., 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898].

⁸ Cason v. City of Lebanon, 153 Ind. 567, 55 N. E. 768.

⁹ "Street railway companies are sometimes required as a condition for enjoying the franchise to contribute to the expense of street improvements. In that manner they sustain a contractual relation to the city, but that is altogether different from the attempt to levy and enforce an assessment against anything so intangible as the mere right to operate cars upon a street owned by the public." *In re City of Seattle*. — Wash. —, 94 Pac. 1075, 1079 [1908].

¹⁰ Farmers Loan and Trust Co. v. Ansonia, 61 Conn. 76, 23 Atl. 705.

See also *People ex rel. Troy and Lansingburg R. R. Co. v. Coffey*, 66 Hun. 160, 21 N. Y. Supp. 34 [1892].

¹ Williams v. Eggleston, 170 U. S. 304, 42 L. 1047, 18 S. 617 [1898]: (*Affirming State ex rel. Bulkeley v. Williams*, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 421 [1896]); *Commissioners of Highways of Town of Dix v. Big Four Drainage District of Ford County*, 207 Ill. 17, 69 N. E. 576 [1904]; *Kingman, Petitioner*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778 [1891]; *Maltby v. Tautges*, 50 Minn. 248, 52 N. W. 858 [1892]; *Guilder v. Town of Otsego*, 20 Minn. 74, 20 Gil. 59 [1873]; *Town of Underhill v. Town of Essex*, 64 Vt. 28, 23 Atl. 617 [1891]; *Town of Wardsboro v. Town of Jamaica*, 59 Vt. 514, 9 Atl. 11 [1887]; *Town of Tinbridge v. Town of Roy-alton*, 58 Vt. 212, 1 Atl. 487 [1885]:

an assessment because such apportionment is, in theory at least, made upon the basis of the benefits received by each public corporation. It differs from a local assessment in that the benefits conferred are not those conferred upon real property owned by the public corporation, but are those which are conferred upon the inhabitants thereof, as members of the general public living in that locality, and without reference to their ownership of real estate benefited by such improvement. The principles involved in the discussion of cases of this sort are often those applied in local assessments.² Such a charge, however, is often referred to as a "tax,"³ and the right of making such apportionment is said to rest in eminent domain.⁴ Among the purposes for which such contributions have been levied upon municipal corporations are the construction of bridges,⁵ expenses of drainage,⁶ and sewerage systems.⁷

§ 62. Deduction of benefits from damages an indirect form of assessment.

Principles analogous to those involved in the subject of local assessments are often found in the subject of eminent domain. When the question is presented of the right to deduct benefits accruing to the owner of certain realty by reason of a given improvement from the damages which he, as owner of such realty has sustained by reason of such improvement, and for which he is entitled to receive compensation; and to pay him as damages merely the difference thus ascertained, we have a question involving many of the principles of the law of local assessments in the determination of the fact, amount and apportionment of

² *Williams v. Eggleston*, 170 U. S. 304, 42 L. 1047, 18 S. 617 [1898]; [*Affirming State ex rel. Bulkeley v. Williams*, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 421 [1896]; *Kingman, Petitioner*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778 [1891].

³ *Maltby v. Tautges*, 50 Minn. 248, 52 N. W. 858 [1892].

⁴ *Town of Underhill v. Town of Essex*, 64 Vt. 28, 23 Atl. 617 [1891].

⁵ *Williams v. Eggleston*, 170 U. S. 304, 42 L. 1047, 18 S. 617 [1898]; [*Affirming State ex rel. Bulkeley v. Williams*, 68 Conn. 131, 48 L. R. A.

465, 35 Atl. 24, 421 [1896]; *Maltby v. Tautges*, 50 Minn. 248, 52 N. W. 858 [1892]; *Guilder v. Town of Otsego*, 20 Minn. 74, 20 Gil. 59 [1873]; *Town of Underhill v. Town of Essex*, 64 Vt. 28, 23 Atl. 617 [1891].

⁶ *Commissioners of Highways of Town of Dix v. Big Four Drainage District, of Ford County*, 207 Ill. 17, 69 N. E. 576 [1904].

⁷ *Kingman, Petitioner*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778 [1891].

benefits. If the improvement is made by a municipal corporation or other public corporation and the question presented is of the right to charge the property holder for the amount that the aggregate of the benefits exceeds the aggregate of the damages, in case the benefits are greater in value we have a question of local assessments differing merely in form from the ordinary assessment. If the proceeding is one in eminent domain in which damages and benefits are to be estimated together and the damages apportioned among the owners of property benefited in proportion to such benefits, we have another example of local assessments differing from ordinary assessments merely in the peculiar and complicated form in which they are presented. That such estimate of benefits is a form of local assessment is well recognized¹ and the general theory of benefits invoked in the one case is repeated in the other.² Failure to consider the damages resulting from the improvement or to make any deduction from the gross benefits for the damage thus caused invalidates the assessment.³

§ 63. Combination of eminent domain and special assessment.

Eminent domain and local assessments are not infrequently combined in one proceeding in which net damages and net benefits are both to be estimated and the total of the damages is to be assessed upon the property benefited in proportion to the benefits thereto.¹ A proceeding of this sort has a twofold nature. It is in part a proceeding in eminent domain and in part a pro-

¹ *City of Seattle v. Board of Home Missions of Methodist Protestant Church*, 138 Fed. 307, 70 C. C. A. 597 [1905]; *Bassett v. City of New Haven*, 76 Conn. 70, 55 Atl. 579 [1903]; *Bartram v. City of Bridgeport*, 55 Conn. 122, 10 Atl. 470 [1887]; *Hall v. Meriden*, 48 Conn. 416; *City of Joliet v. Spring Creek Drainage District*, 222 Ill. 441, 78 N. E. 836 [1906]; *City of Kansas v. Hill*, 80 Mo. 523 [1883]; *McDowell v. City of Asheville*, 112 N. C. 747, 17 S. E. 537 [1893]; *Gaston v. Portland*, 41 Or. 373, 69 Pac. 34, 445 [1902]; *Penrose Ferry Avenue*, 27 Pa. Super. Ct. 341 [1905]; *City of San Antonio v. Sullivan*, 23 Tex. Cir. App. 658, 57 S. W. 45 [1900]; *Pabst*

Brewing Company v. City of Milwaukee, 126 Wis. 110, 105 N. W. 563 [1905]; *Holton v. City of Milwaukee*, 31 Wis. 27 [1872]. Deduction of benefits is said to be in effect an assessment; *Newby v. Platte County*, 25 Mo. 258 [1857].

² *Village of North Alton v. Dorsett*, 59 Ill. App. 612 [1895]; *City of Savanna v. Loop*, 47 Ill. App. 214 [1892]; *Sage v. City of Brooklyn*, 89 N. Y. 189 [1882].

³ *Pittelkow v. City of Milwaukee*, 94 Wis. 651, 69 N. W. 803 [1897]; *Liebermann v. City of Milwaukee*, 89 Wis. 336, 61 N. W. 1112 [1895].

¹ *People of the State of California ex rel. Macpherson v. Board of Supervisors of City and County of San*

ceeding in the nature of a local assessment to pay the expenses of the proceeding in eminent domain.² Whether such a purpose is one for which the power of local assessment may be exercised is a question discussed elsewhere.³ The combination of the two proceedings in one renders the subject more difficult than either proceeding would be separately.⁴ So antagonistic

Francisco, 43 Cal. 91 [1872]; In the matter of the proceedings to change the grade of Beale Street, in the City and County of San Francisco, 39 Cal. 495 [1870]; *Roper v. City of New Britain*, 70 Conn. 459, 39 Atl. 850 [1898]; *Wilkinson v. District of Columbia*, 22 App. D. C. 289 [1903]; *Elnore v. Drainage Commissioners*, 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010 [1892]; *City of Chicago v. Wright*, 32 Ill. 192 [1863]; *City of Chicago v. Wheeler*, 25 Ill. 396, 79 Am. Dec. 342 [1861]; *Gas Light and Coke Company v. City of New Albany*, 158 Ind. 268, 63 N. E. 458 [1901]; *Municipality No. Two, for opening Euphrosine Street*, 7 La. Ann. 72 [1852]; *Paul v. City of Detroit*, 32 Mich. 108 [1875]; In the matter of the Appeal of Powers, 29 Mich. 504 [1874]; *McKusick v. City of Stillwater*, 44 Minn. 372, 46 N. W. 769 [1890]; *City of St. Paul v. Nickl*, 42 Minn. 262, 44 N. W. 59 [1890]; *City of St. Louis v. Lawton*, 189 Mo. 474, 88 S. W. 80 [1905]; *City of St. Louis v. Nelson*, 169 Mo. 461, 69 S. W. 466 [1902]; *State, Stewart Pros. v. Mayor and Common Council of the City of Hoboken*, 57 N. J. L. (28 Vr.) 330, 31 Atl. 278 [1894]; *State, Central Railroad Company of New Jersey, Pros. v. Mayor, etc., of Bayonne*, 51 N. J. L. (22 Vr.) 428, 17 Atl. 971 [1889]; *State, Simmons, Pros. v. City of Passaic*, 38 N. J. L. (9 Vr.) 60 [1875]; *In re White Plains Road of City of New York*, 94 N. Y. S. 110, 106 App. Div. 133 [1905]; *City of Asheville v. Wachovia Loan and Trust Co.*, 143 N. C. 360, 55 S. E. 800 [1906]; *Gaston v. Portland*, 41 Or. 373, 69 Pac. 34, 445 [1902]; In re

opening of Park Avenue, *Huidekoper's Appeal*, 83 Pa. St. 167 [1876]; *Fenelon's Petition*, 7 Pa. St. 173 [1848]; *State of Washington, on the Relation of Matson v. Superior Court for Skagit County*, 42 Wash. 491, 85 Pac. 264 [1906]; In the matter of Pike Street, *Seattle*, 42 Wash. 551, 85 Pac. 45 [1906].

²The proceeding is one of a "duplex character." "The purpose of the act is to compensate the owners of property damaged by a public improvement out of a fund to be raised by the assessment of the amount of such damage against the city and the property that will be benefited thereby. To accomplish this purpose in one proceeding, two assessments are provided for, by one set of commissioners, by one of which the aggregate amount of damages to be paid as ascertained, as well as the amount to be paid to each individual owner and by the other the aggregate amount to be assessed for benefits as well as the amount to be paid by the city and each property owner is ascertained, and these aggregate amounts must be precisely the same, however apportioned. This equilibrium can only be established by a final decree, and such a decree can only be rendered after the amount of each individual owner's damage has been finally determined." *City of St. Louis v. Nelson*, 169 Mo. 461, 469, 470, 69 S. W. 466 [1902].

³See § 308 *et seq.*, § 426 *et seq.*

⁴"The questions are more complex and the difficulties are multiplied by this condition of things." In the matter of the Appeal of Powers, 29 Mich. 504, 506 [1874].

are the interests of the corporation which is seeking to condemn land and those of the property owners, that a statute which provides that the city attorney shall aid the jury, give them legal advice and prepare the form of the report is "fatally objectionable" as requiring and providing for "relations which are illegal and grossly improper."⁵

§ 64. Deduction of benefits from compensation for land taken in eminent domain.

Of these forms assumed by the special assessment we will consider first that in which it is sought to deduct benefits accruing from an improvement for which it is sought to take land in eminent domain, from the damages to which the property owner is entitled. This rule in its origin presents little resemblance to the subject of local assessments, since it is primarily a rule of law concerning the measure of damages.¹ Substantially the same principles, however, control in the one case as in the other.

⁵ *Paul v. City of Detroit*, 32 Mich. 108, 117 [1875].

¹ "All these last cited cases [referring to *Stanwood v. City of Malden*, 157 Mass. 17, 16 L. R. A. 591, 31 N. E. 702 [1892]; *Benton v. Inhabitants of Brookline*, 151 Mass. 250, 23 N. E. 846 [1890]; *Abbott v. Inhabitants of Cottage City*, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325 [1887]; *Cross v. County of Plymouth*, 125 Mass. 557 [1878]; *Parks v. County of Hampden*, 120 Mass. 395 [1876]; *Hilbourne v. County of Suffolk*, 120 Mass. 393, 21 Am. Rep. 522 [1876]; *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870]; *Smith v. City of Boston*, 61 Mass. (7 Cush.) 254 [1851]; *Dorgan v. City of Boston*, 94 Mass. (12 All.) 223 [1866]; start from *Meacham v. Fitchburg Railroad*, 4 Cush. 291, 297, 298, and it is said that this distinction between special and general benefits had its beginning in a mere rule of damages for determining the sum to be deducted from the amount to be paid when land was taken for a public improvement. It is argued that

constitutional difficulties have no place in a case of that sort, but arise only when the special benefits are made the subject of an assessment. A suggestion that the deduction of benefits may be referred to the right of eminent domain will be found in *Harvard College v. Boston*, 104 Mass. 470, 490, 491. See *Sears v. Board of Aldermen of the City of Boston*, 173 Mass. 71, 76, 43 L. R. A. 834, 53 N. E. 138 [1899]. The distinctions of constitutional law must be pretty technical if taking a man's money is unlawful in the latter case and is not equally so in the former. It may be that the line between special and general benefits is fixed by a somewhat rough estimate of differences. But all legal lines are more or less arbitrary as to the precise place of their incidence, although the distinctions of which they are the inevitable outcome are plain and undeniable. This one we regard as sanctioned by legislation and judicial determination": *Lincoln v. Board of Street Commissioners of City of Boston*, 176 Mass. 210, 213 57 N. E. 356 [1900].

If the owner of realty is charged with the benefits which enure thereto by reason of a public improvement, it makes no difference to him outside of questions of proper procedure whether he is to receive his damages in full and then pay for his benefits in full or whether he is to receive merely the excess of damages over benefits.² In determining whether such benefits can be deducted from the damages sustained the following distinctions must be noted.

§ 65. Distinction between general and special benefits.

General benefits must be distinguished from special benefits, though the exact line of demarcation is difficult to draw.¹ General benefits are those which enure to the benefit of the entire neighborhood or locality.² They are the general intangible bene-

² "The damages under the two acts are substantially the same. Under the one benefits are set off against damages; under the other they are separately assessed"; *Benton v. Inhabitants of Brookline*, 151 Mass. 250, 261, 23 N. E. 846 [1890]; "Complete compensation is secured although the condemnation judgment is paid either in whole or in part by setting off against it the special benefits received by the property from the improvement"; *Waggeman v. Village of North Peoria*, 155 Ill. 545, 548, 40 N. E. 485 [1895]; *Mandamus* has been awarded to compel the payment of damages into court, when held as a set-off against an assessment; *Fisher v. Mayor of New York*, 4 Lansing 451 [1871].

¹ See quotation from *Lincoln v. Board of Street Commissioners of City of Boston*, 176 Mass. 210, 57 N. E. 356 [1900], *ante*, § 64.

² *Chicago & Evanston Railroad Company v. Blake*, 116 Ill. 163 [1886]; *Roberts v. Board of County Commissioners of Brown County*, 21 Kan. 247 [1878]; *Childs v. New Haven & Northampton Company*, 133 Mass. 253 [1882]; *Meachem v. Fitchburg Railroad Company*, 58 Mass. (4 Cush.) 291 [1849]; *Dickenson v.*

Inhabitants of Fitchburg, 79 Mass. (13 Gray) 546 [1859]; *Wyandotte, Kansas City & Northwestern Railway Company v. Waldo*, 70 Mo. 629 [1879]; *City of South Omaha v. Ruthjen*, 71 Neb. 545, 99 N. W. 240 [1904]; *City of Omaha v. Schaller*, 26 Neb. 522, 42 N. W. 721 [1889]; *Sullivan v. North Hudson County Railroad Company*, 51 N. J. L. 518, 18 Atl. 689 [1889]; *City of Allegheny v. Black's Heirs*, 99 Pa. St. 152 [1881]; *City of Houston v. Bartels*, 36 Tex. Civ. App. 498, 82 S. W. 323 [1904], rehearing denied, 82 S. W. 469 [1904]; *Railroad Company v. Foreman*, 24 W. Va. 662, 20 Am. & Eng. R. Cases 215 [1884].

"The benefits which the petitioners offered to prove were those common to all lands in the vicinity, and these, it is settled, are not to be regarded as special." *Lincoln v. Board of Street Commissioners of City of Boston*, 176 Mass. 210, 213, 57 N. E. 356 [1900]; (citing *Stanwood v. City of Malden*, 157 Mass. 17, 16 L. R. A. 591, 31 N. E. 702 [1892]); *Benton v. Inhabitants of Brookline*, 151 Mass. 250, 23 N. E. 846 [1890]; *Abbott v. Inhabitants of Cottage City*, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325 [1887];

fits which are supposed to flow to the general public from a public improvement.³ Special benefits are those which enure to certain specific realty in a manner different from that in which the general neighborhood is benefited, and which operate to increase the value of such realty.⁴ Some difficulty has been experienced by the court in cases where peculiar benefit has been received by many different tracts of realty, as for example, by all the realty abutting upon the improvement in question, which benefit does not enure to the rest of the realty in the same neighborhood. Whether such a benefit is general because there is so much other property which shares in it, or special because there is so much other property which does not share in it, is a question of some difficulty. The courts generally hold that benefits of this sort are special benefits within the meaning of the rule.⁵ The contrary opinion has, however, been occasionally expressed.⁶

§ 66. Effect of distinction between general and special benefits.

The importance of the distinction between general and spe-

Cross v. County of Plymouth, 125 Mass. 557 [1878]; *Parks v. County of Hampden*, 120 Mass. 395 [1876]; *Hilbourne v. County of Suffolk*, 120 Mass. 393, 21 Am. Rep. 522 [1876]; *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870]; *Smith v. City of Boston*, 61 Mass. (7 Cush.) 254 [1851]; *Dorgan v. City of Boston*, 94 Mass. (12 All.) 223 [1866].

³*Metropolitan West Side Elevated Railway Company v. Stickney*, 150 Ill. 362, 26 L. R. A. 773, 37 N. E. 1098 [1894].

⁴*City of Denver v. Bayer*, 7 Colo. 113, 2 Am. & Eng. Corp. Cases 465 [1883]; *Shurtleff v. City of Chicago*, 190 Ill. 473, 477, 60 N. E. 870 [1901]; *Fahnestock v. City of Peoria*, 171 Ill. 454, 49 N. E. 496 [1898]; *Metropolitan West Side Elevated Railway Company v. Stickney*, 150 Ill. 362, 26 L. R. A. 773, 37 N. E. 1098 [1894]; *Lincoln v. Board of Street Commissioners of City of Boston*, 176 Mass. 210, 57 N. E. 356

[1900]; *Winona & St. Peter R. R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100 [1865]; *Kirkendall v. City of Omaha*, 39 Neb. 1, 57 N. W. 752 [1894]; *City of Omaha v. Schaller*, 26 Neb. 522, 42 N. W. 721 [1889]; *Railroad Company v. Foreman*, 24 W. Va. 662 [1884].

⁵*Metropolitan West Side Elevated Railway Company v. Stickney*, 150 Ill. 362, 26 L. R. A. 773, 37 N. E. 1098 [1894]; *Chase v. City of Portland*, 86 Me. 362, 29 Atl. 1104 [1894]; *Hilbourne v. County of Suffolk*, 120 Mass. 393, 21 Am. Rep. 522 [1876]; *Allen v. City of Charlestown*, 109 Mass. 243 [1872]; *Kirkendall v. City of Omaha*, 39 Neb. 1, 57 N. W. 752 [1894]; *City of Dallas v. Kahn*, 9 Tex. Civ. App. 19, 29 S. W. 98 [1894]; *Stowell v. Milwaukee*, 31 Wis. 523 [1872].

⁶*City of Houston v. Bartels*, 36 Tex. Civ. App. 498, 82 S. W. 323, rehearing denied, 82 S. W. 469 [1904].

cial benefits lies in the fact that general benefits cannot be deducted from damages under any circumstances.¹ Thus it is said that the "vague general indefinite benefit which all inhabitants of a particular locality are said to derive from a great public improvement" cannot be deducted from damages sustained.² Still less can general benefits be deducted under a constitutional provision requiring compensation to be made in money irrespective of any benefit from the proposed improvement, when the

¹City of Chicago v. Le Moyne, 119 Fed. 662, 56 C. C. A. 278 [1902]; Little Rock & Ft. Smith Railway Company v. Allister, 68 Ark. 600, 60 S. W. 953 [1901]; St. Louis, Arkansas & Texas Railroad v. Anderson, 39 Ark. 167 [1882]; Ferguson v. Borough of Stamford, 60 Conn. 432, 22 Atl. 782 [1891]; City of Chicago v. Lonergan, 196 Ill. 518, 63 N. E. 1018 [1902]; Ginn v. Moultrie, Coles & Douglas Drainage District, 188 Ill. 305, 58 N. E. 988 [1900]; Metropolitan West Side Elevated Railway Company v. Stickney, 150 Ill. 362, 26 L. R. A. 773, 37 N. E. 1098 [1894]; Village of Hyde Park v. Washington Ice Company, 117 Ill. 233, 7 N. E. 523 [1886]; Roberts v. Board of County Commissioners of Brown County, 21 Kan. 186 [1878]; Lincoln v. Board of Street Commissioners of City of Boston, 176 Mass. 210, 57 N. E. 356 [1900]; Childs v. New Haven & Northampton Company, 133 Mass. 253 [1882]; Cross v. County of Plymouth, 125 Mass. 557 [1878]; Clark v. City of Worcester, 125 Mass. 226 [1878]; Old Colony & Fall River Railroad Company v. Inhabitants of the County of Plymouth, 80 Mass. (14 Gray) 155 [1859]; Dickenson v. Inhabitants of Fitchburg, 79 Mass. (13 Gray) 546 [1859]; Proprietors of Locks and Canals v. Nashua & Lowell Railroad Corporation, 64 Mass. (10 Cush.) 385 [1852]; Upton v. South Reading Branch Railroad Company, 62 Mass. (8 Cush.) 600 [1851]; Meacham v. Fitchburg Railroad Company, 58 Mass. (4 Cush.)

291 [1849]; Cole v. City of St. Louis, 132 Mo. 633, 34 S. W. 469 [1895]; City of South Omaha v. Ruthjen, 71 Neb. 545, 99 N. W. 240 [1904]; Chicago, Rock Island & Pacific Railway Company v. Buel, 56 Neb. 205, 76 N. W. 571 [1898]; Dayton v. City of Lincoln, 39 Neb. 74, 57 N. W. 754 [1894]; Woodman v. Northwood, 67 N. H. 307, 53 Atl. 255 [1892]; Adden v. White Mts. N. H. Railroad, 55 N. H. 413, 20 Am. Rep. 220 [1875]; Sullivan v. North Hudson Railroad Company, 51 N. J. L. 518, 18 Atl. 689 [1889]; Commissioners of Asheville v. Johnston, 71 N. C. 398 [1874]; Southport, Wilmington & Durham Railroad Company v. Owners of Platt Land, 133 N. C. 266, 45 S. E. 589 [1903]; Guthrie & Western Railway Company v. Faulkner, 12 Okl. 532, 73 Pac. 290 [1903]; Shimer v. Easton Railway Company, 205 Pa. St. 648, 55 Atl. 769 [1903]; Mahaffey v. Beech Creek R. R., 163 Pa. St. 158, 29 Atl. 881 [1894]; Mayor and Aldermen of Chattanooga v. Geiler, 81 Tenn. (13 Lea.) 611, 7 Am. & Eng. Corp. Cases 534 [1884]; City of Houston v. Bartels, 36 Tex. Civ. App. 498, 82 S. W. 323, rehearing denied, 82 S. W. 469 [1904]; Pochila v. Calvert, Waco & Brazos Valley Railway Company, 31 Tex. Civ. App. 398, 72 S. W. 255 [1903]; Eastern Texas Railroad Company v. Eddings, 30 Tex. Civ. App. 170, 70 S. W. 98 [1902].

²Dickenson v. Inhabitants of Fitchburg, 79 Mass. (13 Gray) 546, 558 [1859].

improvement is made by any corporation other than a municipal corporation.³ It is only the special benefits peculiar to the property in question which can be so deducted. Accordingly if benefits are to be deducted it will be assumed in the absence of a showing to the contrary that special, and not general benefits are to be deducted.⁴ If, however, the theory on which the case is tried in the trial court and in which the property owner acquiesces, is that the measure of the damage done to the property is the decrease caused in the market value thereof, the property owner cannot complain in the Supreme Court because by such theory general benefits have been deducted and that the true rule is that only "benefits which are peculiar and special to the property in question and not common or general to properties generally can be considered or taken into account."⁵ Special benefits can be deducted from the damages sustained,⁶ subject to the restrictions hereinafter discussed.⁷

§ 67. Benefits chargeable but once.

Whatever method of exacting compensation from the property owner for benefits ensuing to him is adopted, the property owner cannot be charged twice for the same benefit.¹ Thus benefits used as a set-off in condemnation proceedings cannot be used

³ *Beveridge v. Lewis*, 137 Cal. 619, 92 Am. St. Rep. 188, 59 L. R. A. 581, 70 Pac. 1083 [1902].

⁴ *Ferguson v. Borough of Stamford*, 60 Conn. 432, 22 Atl. 782 [1891].

⁵ *Fuess v. Kansas City and the Brooklyn Avenue Railway Company*, 191 Mo. 692, 90 S. W. 1029 [1905].

⁶ *City of Seattle v. Board of Home Missions of Methodist Protestant Church*, 138 Fed. 307, 70 C. C. A. 597 [1905]; *City of Omaha v. Schaller*, 26 Neb. 522, 42 N. W. 721 [1889]; *City of Dallas v. Kahn*, 9 Tex. Civ. App. 19, 29 S. W. 98 [1894].

See § 67, *et seq.*

¹ *Pauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897], (reversing *District of Columbia v. Armes*, 8 App. D. C. 393 [1896]; *Bauman v. Ross*, 9 App. D. C. 260

[1896]); *Garvey v. Inhabitants of Revere*, 187 Mass. 545, 73 N. E. 664 [1905]; *State of Minnesota ex rel. Merchant v. District Court of St. Louis County*, 66 Minn. 161, 68 N. W. 860 [1896]; *State ex rel. City of St. Paul v. District Court of Ramsey County*, 75 Minn. 292, 77 N. W. 968 [1899]; *Carroll v. City of Marshall*, 99 Mo. App. 464, 73 S. W. 1102 [1903]; *Davis v. Mayor and Common Council of the City of Newark*, 54 N. J. L. (25 Vr.) 595, 25 Atl. 336 [1892]; *State, Rettinger, Pros. v. City of Passaic*, 45 N. J. L. (16 Vr.) 146 [1883]; *Betts v. City of Williamsburg*, 15 Barb. (N. Y.) 255 [1853]; *Lamb v. Elizabeth City*, 131 N. C. 241, 42 S. E. 603 [1902]; *City of Norfolk v. Chamberlain*, 89 Va. 196, 16 S. E. 730 [1892].

"It is obvious that benefits which

again as a set-off in an action for damages to the buildings removed from the land thus condemned.² So if, under the local statute, certain benefits may be made the basis of a local assessment against the property, such benefits cannot be set off against damages as the property owner can subsequently be compelled to pay therefor in such assessment proceedings.³ So if benefits have once been deducted from damages, they cannot thereafter be made the basis of an assessment for benefits.⁴ Where the commissioners did not strike a balance between the damages and benefits as required by the city charter, but assessed the land for the full amount of benefits without any deduction for damages and the land was sold to pay such assessment it was held in an action by the land-owner against the city to recover the value of the land taken for the improvement as determined by the commissioners, that the city could not set off the amount of benefits assessed.⁵ However, it is not a double charge for the same improvement where an assessment has been levied for a part of the improvement upon the supposition that the cost of the residue of such improvement would be donated, and subsequently, upon finding that such donation would not be made an assessment is levied for the cost of the residue of such improvement.⁶ If the benefits exceed the damages, such benefits may be used in part as a set-off against the damages and the excess of benefits over damages may be the basis of a local assessment.⁷ So if an improvement is made the basis of a special assessment, the excess, if any, of the benefits over the amount

have been set off against damages cannot be also assessed as betterments; and that either no benefits which can be set off against damages can be assessed as betterments or that in any assessment for betterments it must be competent to prove what benefits had been set off against damages." *Benton v. Inhabitants of Brookline*, 151 Mass. 250, 261, 23 N. E. 846 [1890].

² *Lamb v. Elizabeth City*, 131 N. C. 241, 42 S. E. 603 [1902].

³ *Garvey v. Inhabitants of Revere*, 187 Mass. 545, 73 N. E. 664 [1905].

⁴ *State of Minnesota ex rel. Merchant v. District Court for St. Louis*

County, 66 Minn. 161, 68 N. W. 860 [1896]; *Davis v. Mayor and Common Council of the City of Newark*, 54 N. J. L. (25 Vr.) 595, 25 Atl. 336 [1892].

⁵ *Koller v. City of La Crosse*, 106 Wis. 369, 82 N. W. 341 [1900].

⁶ *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901].

⁷ *Bauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]. (*reversing District of Columbia v. Armes*, 8 App. D. C. 393 [1896]; *Bauman v. Ross*, 9 App. D. C. 260 [1896]; *State, Rettinger, Pros. v. City of Passaic*, 45 N. J. L. (16 Vr.) 146 [1883];

of the assessment may be deducted from the damages sustained.⁸ So it has been held proper to deduct the amount of the special tax levied for a given improvement, from the amount of the benefits received from such improvement, and to treat the amount thus obtained as the net amount of benefits to be deducted from the amount of damages.⁹

§ 68. Right to deduct benefits not dependent on statute.

In many jurisdictions specific statutory provision is made for deducting benefits from damages. In the absence of such specific provision it is assumed that such deduction of benefits from damages may be made, as the proper method of estimating the amount to be paid to the party whose land is taken or injured.¹ It is said to be a "doctrine . . . so well founded in reason and justice and . . . so strongly fortified by the decisions in other states and the uniform practice in this state that it no longer presents a question for discussion;" and it is said to be implied in the term "just compensation."² However, the commissioners, acting under a statute requiring them to estimate benefits and damages, cannot impose additional conditions to the right of the property owner to receive his award for damages.³ Thus they cannot require that buildings upon the land taken shall be removed before the award is paid.⁴

§ 69. Doctrine that special benefits cannot be deducted from value of land taken.

The right to deduct special benefits from damages is a question calling for further distinctions. If the entire tract of land belonging to a specific owner is taken it is evident that he has

⁸ *Carroll v. City of Marshall*, 99 Mo. App. 464, 73 S. W. 1102 [1903].

⁹ *Village of Grant Park v. Trah*, 218 Ill. 516, 75 N. E. 1040 [1905], affirming *Village of Grant Park v. Trah*, 115 Ill. App. 291 [1904]. (This rule applies where the property owner concedes the validity of the tax in question.)

¹ *Chase v. City of Portland*, 86 Me. 367, 29 Atl. 1104 [1894]; *Commonwealth v. Justices of the Court of Sessions for the County of Norfolk*, 5 Mass. 435 [1809].

² *Chase v. City of Portland*, 86 Me. 367, 29 Atl. 1104 [1894]. In this case benefits from filling up mud holes and obtaining a more convenient access by reason of a change of grade were set off against the expense of raising the house to the grade thus established.

³ *Riker v. Mayor, Aldermen, and Commonalty of the City of New York*, 3 Daly (N. Y.) 174 [1869].

⁴ *Riker v. Mayor, Aldermen and Commonalty of the City of New York*, 3 Daly (N. Y.) 174 [1869].

out of such tract nothing left to be benefited by the improvement and nothing left to be damaged. Accordingly in such a case there can be no question of setting off benefits against damages. The measure of damages is merely the value of the land taken. If, however, a part of a given tract is taken, and a part thereof is retained by the original owner the question of the deduction of benefits from damages is necessarily presented. This question may arise in several different ways. It may be sought to deduct the special benefits to the part retained by the owner from the value of the part taken. In states where there is no specific constitutional provision on this point, but merely a general direction that just compensation shall be made, we find a hopeless conflict of authority upon this question. In some jurisdictions it is held that the owner cannot be required to accept compensation for land taken from him in the form of benefits conferred against his will to the residue of the original tract left with him, and that accordingly such deduction cannot be made.¹ This rule has been adopted by statute in some jurisdictions,² and in some this rule has by statute been made applicable to cases where a railroad takes land for its purposes

¹ *City of Atlanta v. Green*, 67 Ga. 386 [1881]; *Mayor and Council of the City of Atlanta v. Central Railroad & Banking Company*, 53 Ga. 120 [1874]; *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588 [1898]; *Gordon v. Commissioners of Highways of Road District No. 3*, 169 Ill. 510, 48 N. E. 45 [1897]; *Washington Ice Company v. City of Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378 [1894]; *Village of Hyde Park v. Washington Ice Company*, 117 Ill. 233 [1886]; *Haggard v. Independent School District of Algona*, 113 Ia. 486, 85 N. W. 777 [1901]; *Chicago, St. L. & New Orleans R. Co. v. Rottgering*, — Ky. —, 83 S. W. 584, 26 Ky. L. R. 1167; *Louisville & Nashville Railroad Co. v. Thompson*, 57 Ky. (18 B. Mon.) 735 [1857]; *Sutton's Heirs v. City of Louisville*, 35 Kv. (5 Dana) 28 [1837]; *Shipley v. Baltimore & Potomac Railroad Company*, 34 Md. 336 [1871]; *City of Detroit v. Daly*,

68 Mich. 503, 37 N. W. 11 [1888]; *City of Omaha v. Cochran*, 30 Neb. 637, 46 N. W. 920 [1890]; *City of Omaha v. Howell Lumber Co.*, 30 Neb. 633, 46 N. W. 919 [1890]; *Guthrie & Western Railway Company v. Faulkner*, 12 Okl. 532, 73 Pac. 290 [1903]; *Mitchell v. Thornton*, 21 Gratt. 164 [1871].

² *Bookman v. New York Elevated Railroad Company*, 137 N. Y. 302, 33 N. E. 333 [1893]; *Bohm v. Metropolitan Elevated Railway Company*, 129 N. Y. 576, 14 L. R. A. 344, 29 N. E. 802 [1892]; *Quirk v. City of Seattle*, 38 Wash. 25, 80 Pac. 207 [1905].

³ *Grand Rapids & Indiana Railroad Company v. Horn*, 41 Ind. 479 [1873]; *New Castle & Richmond Railroad Company v. Brumbaek*, 5 Ind. 543 [1854]; *Oregon Central R. Co. v. Wait*, 3 Ore. 91 [1869]; *Bowen v. Atlantic & French Broad Valley R. R. Company*, 17 S. C. 574, 14 Am. & Eng. R. Cases 332 [1882].

by proceedings in eminent domain.³ This rule is intended for the protection of the land-owner. If he is willing to allow the amount due to him for the value of his land taken to be applied in reduction of the amount assessed against him for benefits, and pays the amount of the excess of such benefits over the value of such land, he cannot thereafter complain that he was not paid in cash for such land.⁴ In some states it is said that the incidental damage which results from the use to which the land is to be applied cannot be taken into consideration or deducted from the benefits.⁵

§ 70. Doctrine that special benefits can be deducted from value of land taken.

In other jurisdictions it is held that if the owner of the part of the tract not taken has received special and peculiar benefits to such part arising out of the improvement, he has no right to demand full compensation for the part taken in addition to the benefits to the part retained as this is giving him more than the value of the land taken. Where this view prevails, it is held that benefits to that part of the tract which is not taken may be deducted from the value of the part which is taken.¹ Bene-

⁴ *Elgin, Joliet & Eastern Railway Company v. Hohenshell*, 193 Ill. 159, 61 N. E. 1102 [1901].

⁵ *Memphis v. Bolton*, 9 Heisk. (Tenn.) 598.

¹ *Bauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897], (reversing *District of Columbia v. Armes*, 8 App. D. C. 393 [1896], and *Bauman v. Ross*, 9 App. D. C. 260 [1896]); *Kennedy v. Indianapolis*, 103 U. S. 599, 26 L. 559 [1880], (affirming *Kennedy v. Indianapolis*, 14 F. C. 314, 11 Bis. 13 [1878]; (decided under Indiana law); *San Francisco, Alameda & Stockton Railroad Company v. Caldwell*, 31 Cal. 367 [1866]; *City of Denver v. Bayer*, 7 Colo. 113, 2 Am. & Eng. Corp. Cases 465 [1883]; *Wilcox v. City of Meriden*, 57 Conn. 120, 17 Atl. 366 [1889]; *Trinity College v. City of Hartford*, 32 Conn. 452 [1865], (following *Nichols v. City of Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636 [1854]; *Nicholson v. New York &*

New Haven Railroad Company, 22 Conn. 74 [1852]); *Terry v. City of Hartford*, 39 Conn. 286 [1872]; *Fulton v. Town of Dover*, 8 Houst. (Del.) 78, 6 Atl. 633, 12 Atl. 394, 31 Atl. 974 [1888]; *Whiteman's Ex'x v. Wilmington & Susquehanna Railroad Company*, 2 Harr. (Del.) 514, 33 Am. Dec. 411 [1839]; *Clapp v. Macfarland*, 20 App. D. C. 224 [1902]; *Dorman v. City of Jacksonville*, 13 Fla. 538, 7 Am. Rep. 253 [1870]; *Waggeman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895], (distinguishing *City of Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1893], as a case where a deduction was not permitted because the proceeding was one of special taxation under the Constitution of Illinois, and not assessment; special taxation, under the statute then in force being regarded as not based upon benefits). *Andrews v. People ex rel. Rumsey*, 84 Ill. 28 [1876]; *Pittsburgh, Cincin-*

fits may be set off against the value of land taken to widen a street, although an equal benefit enures to land on the other

nati, Chicago & St. Louis Railway Company v. Town of Wolcott, 162 Ind. 399, 69 N. E. 451 [1903]; Gas Light & Coke Company v. City of New Albany, 158 Ind. 268, 63 N. E. 458 [1902]; Wilson v. Talley, 144 Ind. 74, 42 N. E. 362, 1009 [1895]; Forsyth v. Wilcox, 143 Ind. 144, 41 N. E. 371 [1895]; Watson v. Crow-sore, 93 Ind. 220 [1883]; Hagaman v. Moore, 84 Ind. 496 [1882]; McIntire v. State, 5 Blackf. (Ind.) 384 [1840]; Bennett v. City of Marion, 106 Ia. 628, 76 N. W. 844 [1898]; Duke v. O'Bryan, 100 Ky. 710, 39 S. W. 444, 824, 19 Ky. L. R. 81 [1897]; Butchers' Slaughtering & Melting Association v. Commonwealth, 169 Mass. 103, 47 N. E. 599 [1897]; Abbott v. Inhabitants of Cottage City, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325 [1887]; Parks v. County of Hampden, 120 Mass. 395 [1876]; Wood v. Inhabitants of Hudson, 114 Mass. 513 [1874]; Green v. City of Fall River, 113 Mass. 262 [1873]; Howe v. Ray, 113 Mass. 88 [1873]; Whitney v. City of Boston, 98 Mass. 312 [1867]; Dorgan v. City of Boston, 94 Mass. (12 All.) 223 [1866]; State of Minnesota ex rel. Merchant v. District Court for St. Louis County, 66 Minn. 161, 68 N. W. 860 [1896]; Whitely v. Mississippi Water Power & Boom Company, 38 Minn. 523, 36 Am. & Eng. R. Cases 624, 38 N. W. 753 [1888]; Winona & St. Peter R. R. Co. v. Waldron, 11 Minn. 515, 11 Gil. [392], 88 Am. Dec. 100 [1866]; Bennett v. Hall, 184 Mo. 407, 83 S. W. 439 [1904]; McElroy v. Kansas City & Independence Air Line, 172 Mo. 546, 72 S. W. 913 [1903]; Daugherty v. Brown, 91 Mo. 26, 3 S. W. 210 [1886]; State ex rel. Chicago, Burlington & Quincy Railroad Company v. City of Kansas City, 89 Mo. 34, 14 S. W. 515 [1886]; Jackson County v. Waldo, 85 Mo. 637

[1885]; Combs v. Smith, 78 Mo. 32, 20 Am. & Eng. R. Cases 209 [1883]; Garrett v. City of St. Louis, 25 Mo. 505, 69 Am. Dec. 475 [1857]; Newby v. Platte County, 25 Mo. 258 [1857]; Adden v. White Mts. N. H. Railroad, 55 N. H. 413, 20 Am. Rep. 220 [1875]; State, Randolph, v. Union County Freeholders, 63 N. J. (34 Vr.) 155, 41 Atl. 960; Loweree v. City of Newark, 38 N. J. L. (9 Vr.) 151 [1875]; Baldwin v. City of Newark, 38 N. J. L. (9 Vr.) 158 [1875]; Genet v. City of Brooklyn, 99 N. Y. 296, 1 N. E. 777 [1885]; Lowerre v. Mayor, Aldermen and Commonalty of the City of New York, 46 Hun (N. Y.) 253 [1887]; Betts v. City of Williamsburg, 15 Barb. (N. Y.) 255 [1853]; Southport, Wilmington & Durham Railroad Company v. Owners of the Platt Land, 133 N. C. 266, 45 S. E. 589 [1903]; Wilmington & Weldon Railroad Company v. Smith, 99 N. C. 131, 5 S. E. 237 [1888]; Commissioners of Asheville v. Johnston, 71 N. C. 398 [1874]; Gaston v. Portland, 41 Or. 373, 69 Pac. 34, 445 [1902]; Setzler v. Pennsylvania Schuylkill Valley Railroad Company, 112 Pa. St. 56, 24 Am. & Eng. R. Cases 280, 4 Atl. 370 [1886]; Pittsburgh, Bradford & Buffalo Railway Company v. McCloskey, 110 Pa. St. 436, 1 Atl. 555 [1885]; City of Allegheny v. Black's Heirs, 99 Pa. St. 152 [1881]; Pusey's Appeal, In the matter of Charles Street, 83 Pa. St. 67 [1876]; Greenville & Columbia R. R. Company v. Partlow, 5 Rich. L. (S. Car.) 428 [1852]; Texas & St. Louis R. R. Co. v. Matthews, 60 Tex. 215 [1883]; Adams v. St. Johnsbury & Lake Champlain R. R. Co., 57 Vt. 240, 25 Am. & Eng. R. Cases 172 [1884]; Jones v. City of Seattle, 23 Wash. 753, 63 Pac. 553 [1901]; Board of Education v. Kanawha & M. R. Co., 44 W. Va. 71,

side of the street no part of which is taken.² In Illinois special benefits received by that part of the realty which is not taken can be set off against the value of the land taken if the proceeding is one in which the assessment upon the realty is proportioned to the benefits received and limited by them, such as an assessment proceeding in the narrower sense in which the term is used in Illinois law;³ but such set-off cannot be made in a proceeding in which the amount of the assessment is not so proportioned to the benefits received and limited by them, such as a proceeding in what is known in Illinois law as special taxation.⁴ An assessment levied against the property before the condemnation proceedings may be deducted from the amount awarded in such proceedings.⁵

§ 71. Special benefits deducted from damages to land not taken.

It may be sought to deduct the special benefits to the part retained by the original owner from the damages sustained by such part by reason of the improvement in question. In the absence of any specific constitutional provision on the subject, and under constitutional provisions for compensation to the

29 S. E. 503 [1897]; *Koller v. City of La Crosse*, 106 Wis. 369, 82 N. W. 341 [1900]; *Holton v. City of Milwaukee*, 31 Wis. 27 [1872].

"Complete compensation is secured, although the condemnation judgment is paid either in whole or in part by setting off against it the special benefit received by the property from the improvement." *Waggeman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895].

"Committees, in the assessment of damages, are not restricted to the value of the land taken for the highway; but they may award more or less, or no damages at all, to an individual, because the highway, as they have laid it out, will be promotive to him of greater benefits than the value of his land." *Town of Winchester v. Hinsdale*, 12 Conn. 85, 95, [1837], (citing on right to set off benefits, *Inhabitants of the Town of Windsor v. Field*, 1 Conn. 279 [1814]; *Commonwealth v. Jus-*

tices of the Sessions for the County of Middlesex, 9 Mass. 388 [1812]; *Commonwealth v. Justices of the Court of Sessions for the County of Norfolk*, 5 Mass. 435 [1809]).

"In most cases damages are a result obtained by a comparison of the injury and the benefit accruing to the party." *Pusey's Appeal*. In the matter of *Charles Street*, 83 Pa. St. 67, 70 [1876].

² *Abbott v. Inhabitants of Cottage City*, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325 [1887].

³ *Waggeman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895].

⁴ *City of Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1893].

⁵ *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107 [1904]. To the same effect see *In re Spring Valley Park in Kansas City*, — Mo. —, 106 S. W. 531 [1907].

owner, it is held by the great weight of authority that the special benefits may in such cases be deducted from such damages. This is not, however, so much a setting off of benefits against damages as it is a determination, whether or not the improvement, taken as a whole, has caused damage or not.¹ In Mississippi, however, it is held that under a constitutional provision "just compensation first to be made," special benefits to that part of the land which is left cannot be deducted either from the value of the land which is taken or from the amount of the damage to that part which is left.² Earlier cases holding that benefits cannot be set off and that no compensation for damages can be made except in money have been overruled in some juris-

¹ *Hurt v. City of Atlanta*, 100 Ga. 274, 28 S. E. 65 [1896]; *Guess v. Stone Mountain Granite, etc., Company*, 72 Ga. 320, 28 Am. & Eng. R. Cases 236 [1884]; *Mayor and Council of the City of Atlanta v. Central Railroad & Banking Company*, 53 Ga. 120 [1874]; *West Chicago Masonic Association v. City of Chicago*, 215 Ill. 278, 74 N. E. 159 [1905]; *Davis v. Northwestern Elevated Railroad Company*, 170 Ill. 595, 48 N. E. 1058 [1897]; *Gordon v. Commissioners of Highways of Road District No. 3*, 169 Ill. 510, 48 N. E. 451 [1897]; *Metropolitan West Side Elevated Railway Company v. Stickney*, 150 Ill. 362, 26 L. R. A. 773, 37 N. E. 1098 [1894]. (not following *Keithsburg & Eastern Railroad Company v. Henry*, 79 Ill. 290 [1875]); *Washington Ice Company v. City of Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222; 35 N. E. 378 [1894]; *Andrews v. People ex rel. Rumsey*, 84 Ill. 28 [1876]; *Louisville & Nashville Railroad Company v. Thompson*, 57 Ky. (18 B. Mon.) 735 [1857]; *Abney v. Texarkana, Shreveport & Natchez Railroad Company*, 105 La. 446, 29 So. 890 [1901]; *Cushman v. Smith*, 34 Me. 247 [1852]; *Shipley v. Baltimore & Potomac Railroad Company*, 34 Md. 336 [1871]; *Meacham v. Fitchburg Railroad Company*, 58 Mass. (4

Cush.) 291 [1849]; *St. Louis, Keokuk & Northwestern Railroad Company v. Knapp-Stout & Company*, 160 Mo. 396, 61 S. W. 300 [1900]; *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045 [1900]; *St. Louis, Oak Hill and Carondelet Railway Company v. Fowler*, 142 Mo. 670, 10 Am. & Eng. R. Cases N. S. 405, 44 S. W. 771 [1890]; *Smith v. City of Omaha*, 49 Neb. 883, 69 N. W. 402 [1896]; *City of Omaha v. Howell Lumber Co.*, 30 Neb. 663, 46 N. W. 919 [1890]; *Clark v. City of Elizabeth*, 61 N. J. L. (32 Vr.) 565, 40 Atl. 616, 737 [1898]; *Davis v. Mayor and Common Council of the City of Newark*, 54 N. J. L. (25 Vr.) 595, 25 Atl. 336 [1892]; *Odell v. New York Elevated Railroad Company*, 130 N. Y. 690, 29 N. E. 993 [1892]; *Carlisle v. City of Cincinnati*, 29 Ohio C. C. 91 [1906]; *Paducah & Memphis Railroad Company v. Stovall*, 59 Tenn. (12 Heisk.) 1 [1879]; *Neilson v. Chicago, Milwaukee & Northwestern Railway Company*, 58 Wis. 516; 14 Am. & Eng. R. Cases 239, 17 N. W. 310 [1883].

² *New Orleans, Jackson & Great Northern Railroad Company v. Moye*, 39 Miss. 374 [1860]; *Isom v. Mississippi Central Railroad Co.*, 36 Miss. 306 [1858]; *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389 [1857].

dictions. Thus in Pennsylvania this view was expressed in an early case,³ but in a later case it was pointed out that the case was not one involving such rule, the court saying of the earlier opinion, that it is "not easy to determine whether the misapprehension of the facts in the cause or the misapplication of the law to the facts is the most conspicuous."⁴ Similar considerations apply where no part of the land has been taken, but it has been injured by a neighboring improvement in such a way as to entitle the owner to compensation. In such cases the benefits received from such improvement must be deducted from the damages caused thereby.⁵ Thus where realty has been injured by a change in the grade of the adjoining street or road,⁶ or by the construction of a viaduct⁷ or by the construction of a tunnel for the use of a street railroad,⁸ and the owner of the realty thus injured is entitled to recover damages therefor, the special benefits enuring to such realty by reason of such improvement are to be deducted from the damages caused thereby. This, too, is not regarded so much as a set-off, as an application of the principle that "if the market value of the property is not decreased there is no damage and there can be no recovery."⁹

³ Vanhorne's Lessee v. Dorrance, 2 Dall. 304, 315 [1795].

⁴ Satterlee v. Matthewson, 16 Serg. & Raw. 169 [1827].

⁵ Juvinall v. Jamesburg Drainage District, 204 Ill. 106, 68 N. E. 440 [1903]; City of Chicago v. Webb, 102 Ill. App. 232 [1902]; Gas Light & Coke Company v. City of New Albany, 158 Ind. 268, 63 N. E. 458 [1901].

⁶ City of Seattle v. Board of Home Missions of Methodist Protestant Church, 138 Fed. 307, 70 C. C. A. 597 [1905]; Cook v. City of Ansonia, 66 Conn. 413, 34 Atl. 183 [1895]; Schroeder v. City of Joliet, 189 Ill. 48, 52 L. R. A. 634, 59 N. E. 550 [1901]; City of Bloomington v. Pollock, 141 Ill. 346, 31 N. E. 146 [1893]; City of Louisville v. Louisville Rolling Mill Company, 66 Ky. (3 Bush.) 416, 96 Am. Dec. 243 [1867]; Chase v. City of Portland, 86 Me. 367, 29 Atl. 1104 [1894];

Widman Investment Co. v. City of St. Joseph, 191 Mo. 459, 90 S. W. 763 [1905]; Grover v. Cornet, 135 Mo. 21, 35 S. W. 1143 [1896]; Kent v. City of St. Joseph, 72 Mo. App. 42 [1897]; Clark v. City of Elizabeth, 61 N. J. L. (32 Vr.) 565, 40 Atl. 616, 737 [1898]; Inhabitants of the Town of Lambertville v. Clevinger, 30 N. J. L. (1 Vr.) 53 [1862]; Chambers v. South Chester Bor., 140 Pa. St. 510, 21 Atl. 409 [1891]; Mayor and Aldermen of Chattanooga v. Geiler, 81 Tenn. (13 Lea.) 611 [1884]; Friedrich v. City of Milwaukee, 114 Wis. 304, 90 N. W. 174 [1902].

⁷ Lehigh Valley Coal Co. v. City of Chicago, 26 Fed. 415 [1886].

⁸ Kaufman v. Tacoma, Olympia & Gray's Harbor Railroad Company, 11 Wash. 632, 40 Pac. 137 [1895].

⁹ Schroeder v. City of Joliet, 189 Ill. 48, 52 L. R. A. 634, 59 N. E. 550 [1901].

§ 72. Deduction not allowed if tracts distinct.

Assessments are for many purposes regarded as being levied against specific tracts of property irrespective of the ownership thereof. If two distinct tracts of property owned by the same person are affected by the same improvement, each is ordinarily considered by itself, irrespective of the effect of such improvement upon the other tract so owned. Accordingly if the owner of land which is taken, either in whole or in part, by proceedings in eminent domain, owns another distinct and separate tract of land, benefits conferred upon one of such distinct tracts cannot be set off against damages to the tract which is taken.¹

§ 73. Deduction of damages from special assessment for benefits.

In the classes of cases thus far considered in connection with this subject benefits have been deducted from damages, and the corporation which has appropriated property by proceedings in eminent domain has urged such deduction. A different principle applies where a local assessment has been levied for the benefits received by the realty in question, and the owner thereof seeks to set off the damage received by such property by reason of such improvement against such assessment for benefits. In the absence of specific statutory provision, no set-off can be allowed against a claim of the state or of a municipal corporation for taxes.¹ A local assessment is a tax within the

¹Sharp v. United States, 191 U. S. 341, 48 L. 211, 24 S. 114 [1903]; (affirming Sharpe v. United States, 112 Fed. 893, 57 L. R. A. 932, 50 C. C. A. 597 [1902]; Todd v. Kankakee & Illinois River Railroad Company, 78 Ill. 530 [1875]; White Water Valley Railroad Company v. McClure, 29 Ind. 536 [1868]; State v. Digby, 5 Blackf. (Ind.) 543 [1841]; Koestenbader v. Peiree, 41 Ia. 204 [1875]; Whitaker v. Phoenixville Bor., 141 Pa. St. 327, 21 Atl. 604 [1891]. See also Nicholson Borough, Main Street, 27 Pa. Super. Ct. 570 [1905].

¹McVey v. Lanier, 50 Ark. 384, 8 S. W. 141 [1887]; Himmelmann v. Spanagel, 39 Cal. 389 [1870]; Morgan v. Pueblo & Arkansas Valley Railroad Company, 6 Colo. 478

[1883]; Finnegan v. City of Fernandina, 15 Fla. 379, 21 Am. Rep. 292 [1875]; Cartersville Water Works Company v. Mayor and Aldermen of Cartersville, 89 Ga. 689, 16 S. E. 70 [1892]; Hawkins v. County of Sumter, 57 Ga. 166 [1876]; Seobey v. Decatur County, 72 Ind. 551 [1880]; Newport & Cincinnati Bridge Co. v. Douglass, 75 Ky. (12 Bush.) 673 [1877]; City of New Orleans v. New Orleans Water Works Company, 36 La. Ann. 432 [1884]; Morris v. Lalaurie, 39 La. Ann. 47 [1887]; Seibert v. Tiffany, 8 Mo. App. 33 [1879]; Gatling v. Commissioners of Carteret County, 92 N. C. 536, 53 Am. Rep. 432 [1885]; Miller v. Wisener, 45 W. Va. 59, 30 S. E. 237 [1898].

application of this principle² and while the city may be liable for damages due to the construction of such improvement,³ no set-off can be allowed against such assessment in the absence of some statutory authority therefor.⁴ Accordingly if the legislature sees fit to provide for the estimate and payment of damages to the property owner in one proceeding and the estimate and payment of a local assessment for benefits by the property owner in another proceeding, the property owner has no right to set off the damages due to him against the assessment due from him,⁵ nor can he resist payment of the assessment on the ground that damages are unpaid.⁶ Thus damages sustained by

² See § 1346.

³ *Town of Entw v. Botnick*, — Ala. —, 43 So. 739 [1907]; *Averill v. City of Boston*, 193 Mass. 488, 80 N. E. 583 [1907]; *Coyne v. City of Memphis*, 118 Tenn. 651, 102 S. W. 355 [1907]; *Crowe v. Corporation of Charlestown*, — W. Va. —, 57 S. E. 230 [1907]; *Godbey v. City of Bluefield*, — W. Va. —, 57 S. E. 45 [1907]. Damages cannot be recovered for the same facts by successive vendees. *In re Sedgley Avenue*, 217 Pa. 313, 63 Atl. 546 [1907].

⁴ *Fitzhugh v. Levee District*, 54 Ark. 224, 15 S. W. 455 [1891]; *Draper v. City of Atlanta*, 126 Ga. 649, 55 S. E. 929 [1906].

⁵ *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904]; *German Savings & Loan Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902]; *Hornung v. McCarthy*, 126 Cal. 17, 58 Pac. 303 [1899]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894]; *Whiting v. Mayor and Aldermen of the City of Boston*, 106 Mass. 89 [1870]; *St. Paul, Minneapolis & Manitoba Railway Company v. City of Minneapolis*, 35 Minn. 141, 27 N. W. 500 [1886]; *Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683 [1889]; *McQuiddy v. Smith*, 67 Mo. App. 205 [1896]; *Fisher v. Mayor, Aldermen and Commonalty of the City of New York*, 67 N. Y. 73 [1876], (reversing *Fisher v. The Mayor, etc., of City of New York*, 3

Hun. 648 [1875]; *People of the State of New York ex rel. Dean v. Board of Assessors of the City of New York*, 59 Hun. 407, 13 N. Y. Supp. 404 [1891]; *Watt v. Mayor, etc., of the City of New York*, 3 N. Y. Sup. Ct. 23 [1847]; *Smith v. City of Allegheny*, 92 Pa. St. 110 [1879]; *Quirk v. City of Seattle*, 38 Wash. 25, 80 Pac. 207 [1905].

⁶ *White v. City of Alton*, 149 Ill. 225, 36 N. E. 1008.

"We do not propose to consider whether such a claim of damages could be maintained against the city or against the mayor and aldermen in any form. Even if a liability to such damages could be substantiated in accordance with the principles laid down in *Child v. Boston*, 4 All. 41, we do not think that it can be set up against an assessment required for paying the expenses of a public improvement with which the mayor and aldermen are charged as public officers. It is a statute proceeding. The assessment is authorized, not merely as a means of enforcing a municipal claim in the nature of a private right; it is prescribed as a public duty. The whole proceeding, including the assessment and collection of the amount of the expenses, depends upon the provisions of the statute and must be regulated entirely by them. Those provisions neither contemplate nor admit of such investigations as would be nec-

a delay in commencing to construct an improvement cannot be set off against an assessment for benefits levied to meet the cost of such improvement,⁷ nor can damages claimed for defective performance be set off.⁸ Damages for the wrongful appropriation of road material by the contractor cannot be set off against an assessment.⁹ Still less can payment of assessment be resisted entirely on the ground that compensation for the damages sustained has not been first made, if the statute does not provide for such payment as a condition precedent to any liability for such assessment.¹⁰ If, however, damages are allowed for a change of grade the amount of the assessment for making such change has been held to be an element of damage.¹¹ Where damages have been estimated in one proceeding and a local assessment for benefits has been levied in another proceeding, the legislature may authorize the one to be set off against the other.¹² Even after an assessment of damages and a local assessment for benefits have been made, it is within the power of the legislature to provide that they may both be enforced in one action by setting off the one against the other.¹³ In Kentucky, how-

essary to enable parties assessed to avail themselves of any counterclaims they may have, growing out of the mode in which the power has been exercised. To require the collection of the assessment to be delayed for that purpose would be a serious obstruction and embarrassment to the discharge of a public duty and inconsistent with the limited period allowed for the continuance of the lien upon the land." *Whiting v. Mayor and Aldermen of the City of Boston*, 106 Mass. 89, 93, 94 [1870].

⁷ *Whiting v. Mayor and Aldermen of the City of Boston*, 106 Mass. 89 [1870]. To the same effect see *Lavery v. State ex rel. Hill*, 109 Ind. 217, 9 N. E. 774.

⁸ *Lux & Talbott Stone Co. v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1904]; *Darnell v. Keller*, 18 Ind. App. 103, 45 N. E. 676. Such judgment cannot be rendered against the city where it is only a nominal party, the contractor being the real party in interest. *St. Louis to use of Dep-*

pelheuer v. Newman, 45 Mo. 138 [1869].

⁹ *Sims v. Hines*, 121 Ind. 534, 23 N. E. 515 [1889].

¹⁰ *Duncan v. Rami*, 142 Cal. 686, 76 Pac. 661 [1904]; *Hornung v. McCarthy*, 126 Cal. 17, 58 Pac. 303 [1899]; *Louisville Steam Forge Co. v. Mehler*, 112 Ky. 438, 64 S. W. 396, 652, 23 Ky. Law Rep. 1335 [1901]; *McQuiddy v. Smith*, 67 Mo. App. 205 [1896].

¹¹ *Stowell v. Milwaukee*, 31 Wis. 523 [1872].

¹² *Genet v. City of Brooklyn*, 94 N. Y. 645 [1884]; *People ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; *Livingston v. Mayor, etc., of New York*, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622 [1831]; *City of Cleveland v. Wick*, 18 O. S. 303 [1868]. (For the present Ohio rule as to the power of the legislature to allow a local assessment in such a case see § 308).

¹³ *Baldwin v. City of Newark*, 38 N. J. L. (9 Vr.) 158 [1875].

ever, it is held that the legislature cannot authorize a local assessment to be set off against damages in such cases, on the theory that the owner must be compensated before his property is taken and that the benefits received do not constitute compensation.¹⁴ If suit is brought on the assessment by the contractor it has been held that a set-off of his individual debt on another transaction may be had.¹⁵ Under an ordinance which provided that a property owner who wished to set off damages against benefits might do so by receipting on the docket for the amount of damages and obtaining a certificate of such receipt, the amount of which should be credited upon the assessment, it has been held that the fact that the property owner took warrants for payment to him of the damages did not operate as a waiver of his right of set-off.¹⁶

§ 74. Special contract for set-off.

A contract between a municipal corporation and owners of property whereby the property owners release their right for damages resulting from the improvement in consideration of which the municipal corporation assumes local assessments to be levied on such realty has been upheld,¹ especially under a statute providing for such a contract.² Thus a contract whereby a property owner assented to the change of location of a boulevard through his land and released damages therefor in consideration of which the municipal corporation assumed assessments for such improvements and agreed to take care of any sewer assessments and surface water, was held valid, even though the municipal corporation would be thereby obliged to obtain the right to go upon the land of others and to go upon such land in order to perform its agreement to care for the surface water, the statute authorizing a settlement on such terms as may be agreed upon.³

¹⁴ *City of Covington v. Worthington*, 88 Ky. 206, 27 Am. & Eng. Corp. Cases, 187, 11 S. W. 1038, 10 S. W. 790 [1889].

¹⁵ *Bodley v. Finley*, 111 Ky. 618; 64 S. W. 439, 23 Ky. L. Rep. 851 [1901]. (This question was raised but not decided in *Purdy v. Drake*, (Ky.), 32 S. W. 939, 17 Ky. L. R. 819.

¹⁶ *State ex rel. Guye v. City of*

Seattle, — Wash. —, 94 Pac. 656 [1908].

¹ *Shelby v. City of Burlington*, 125 Ia. 343, 101 N. W. 101 [1904]. (A case in which the property owners had paid for one prior improvement of the street in question, and probably for two such improvements.)

² *Bell v. City of Newton*, 183 Mass. 481, 67 N. E. 599 [1903].

³ *Bell v. City of Newton*, 183 Mass. 481, 67 N. E. 599 [1903].

In this last case the contract was made by the mayor under authority from the city council, had been recognized by the city by a recital in the instrument in which it assumed the local assessment and the city council had ratified and confirmed all settlements heretofore effected on account of such improvement. It was held, accordingly, that such contract was binding on the city, and that the owner could maintain an action for breach of the covenants to take care of the sewer assessments and the surface water.⁴ If property owners agree that the assessment for benefits shall be deducted from the damages due to them and that the assessment shall be delayed until the amount of damages can be determined, they cannot recover until the assessment is levied, even in case of delay, as long as they have not requested the levy of the assessment.⁵ A different question may be presented if the contract for exemption from assessment operates to transfer to other property owners the burden of the assessment of which the realty in question has been relieved.⁶ An assessment is void as to the other property owners if a given tract of land is relieved from assessment in consideration of a waiver of damages by such property owner, since the benefits may greatly exceed the damages and such contract may thus be unfair to the other property owners.⁷

§ 75. Statutory provision for deduction of value of land donated.

In the absence of specific statutory provision therefor, a landowner who has donated land for a street cannot have the value of such land deducted from a subsequent assessment for benefits arising from the improvement of such street. Statutes are occasionally found, however, which provide that the value of the land so donated shall be deducted from such assessment. The right of the owner to deduct the value of the land donated by him is limited by and restricted to the terms of such statutes. Thus under a statute authorizing a city to accept donations of land for use as a street, and providing that if the land is so used, the land of the donor shall not be assessed for such

⁴ *Bell v. City of Newton*, 783 Mass. 481, 67 N. E. 599 [1903].

⁵ *Boston Water Power Co. v. City of Boston*, 194 Mass. 571, 80 N. E. 598 [1907].

⁶ See § 616 *et seq.*, § 639 *et seq.*

⁷ *In re City of Seattle*. — Wash. —, 94 Pac. 1075 [1908]; (citing *Ayer v. City of Chicago*, 149 Ill. 262, 37 N. E. 57 [1894]; *City of Chicago v. Shepard*, 8 Ill. App. 602 [1881]).

street, it was held that if land is donated which is not used for the particular street for which the assessment is levied, the land of the donor is liable for such assessment.¹ If, however, the owner of land has donated a part thereof for a street under such statute, and subsequently proceedings are instituted to widen such street, it is held that the value of the land so donated should be appraised and applied as a set-off to benefits assessed against land of such owner, who was the grantee of such donor, abutting on such strip of land so donated.²

§ 76. Deduction of certain benefits and assessment for others.

It is within the power of the legislature to provide that certain kinds of benefit to property may be deducted from the damages thereto while other kinds of benefit are not to be deducted, but are to be made the basis of a special assessment.¹ Thus under a Massachusetts statute for laying out highways, it was said that benefits must be classified as (1) those directly occasioned to an estate bounding on the highway, peculiar to the estate itself as distinguished from other estates not bounding thereon; (2) those shared by such estate in common with other estates in the neighborhood; and (3) those extending to all estates in the same city; and it was held that under such statute benefits of the first class could be allowed only by way of set-off for damages; benefits of the second class could not be set-off, but could be assessed for under the betterment acts; and for benefits of the third class no compensation could be exacted from the owner.² So the legislature may provide for a proceeding under one statute in which benefits cannot be set off, but must be assessed and also for a proceeding under another statute in which benefits are to be set-off.³ Thus under the betterment acts⁴ benefits are not to be set off against damages, but

¹ *Shurtleff v. City of Chicago*, 190 Ill. 473, 60 N. E. 870 [1901].

² *Espert v. City of Chicago*, 201 Ill. 264, 66 N. E. 212 [1903], (distinguishing *Shurtleff v. City of Chicago*, 190 Ill. 473, 60 N. E. 870 [1901]).

³ *Carvey v. Inhabitants of Revere*, 187 Mass. 545, 73 N. E. 664 [1905]; *French v. City of Lowell*, 117 Mass. 363 [1875]; *Bancroft v. City of Bos-*

ton, 115 Mass. 377 [1874]; *Upham v. City of Worcester*, 113 Mass. 97 [1873]; *Allen v. City of Charleston*, 109 Mass. 243 [1872].

² *Upham v. City of Worcester*, 113 Mass. 97 [1873].

³ *Godbold v. City of Chelsea*, 111 Mass. 294 [1873].

⁴ Statutes 1866, c. 174; 1868, c. 75, 216; 1869, c. 169.

are to be the basis of an assessment in a separate proceeding.⁵ while under another statute⁶ such benefits are to be set off.⁷ Accordingly if the record leaves it in doubt which method was followed a ruling of the court will be presumed to be correct and it will be presumed that the method was followed under which such ruling would be correct.⁸

§ 77. Method of computation of benefits and damages.

Where benefits are to be deducted from damages the question whether the amount of each is to be found or whether the net amount merely is to be found is one of some difficulty, one which depends upon the wording and interpretation of the statutes which control, and one upon which several different views have been entertained. Where the statute provides that the jury in a proceeding to open a street shall determine the benefits or enhanced value that will accrue from the improvements to the portion or portions not taken, and deduct the same from the damages or compensation they would otherwise award to the owner or owners it has been held that the jury must concur on both the items of damage and the items of benefit and accordingly that the jury must report each separately.¹ A general verdict has been said to be insufficient, on the ground that it should show either the amount of the benefits separately or at least the dif-

⁵ "These acts provide for the assessment of the full damages at one stage of the proceedings and the assessment of the benefit and advantage to the land owner at a subsequent stage and by an independent act." *Godbold v. City of Chelsea*, 111 Mass. 294, 295 [1873]. To the same effect see *Edmands v. City of Boston*, 108 Mass. 535 [1871].

⁶ General Statutes, Chap. 43, 44.

⁷ In *Benton v. Inhabitants of Brookline*, 151 Mass. 250, 23 N. E. 846 [1890], it was pointed out that opposite results in similar cases had been reached in Massachusetts under different statutes. In proceedings under the betterment acts (Statutes 1866, Chap. 174) benefits cannot be set off against damages, and under this statute the right of set-off was denied in, *Boston Seamen's Friend*

Society v. Mayor and Aldermen of Boston, 116 Mass. 181, 17 Am. Rep. 153 [1874]; *Baneroff v. City of Boston*, 115 Mass. 377 [1874]; *Godbold v. City of Chelsea*, 111 Mass. 294 [1873]; *Prince v. City of Boston*, 111 Mass. 226 [1872], while under the highway acts (Statutes 1871, Chap. 382) benefits can be set off against damages and only those benefits which cannot be so set off can be assessed as betterments. Under this statute the right of set-off was upheld in *Green v. City of Fall River*, 113 Mass. 262 [1873]; *Upham v. City of Worcester*, 113 Mass. 97 [1873].

⁸ *Godbold v. City of Chelsea*, 111 Mass. 294 [1873].

¹ *Duffield v. City of Detroit*, 15 Mich. 474 [1867].

ference between such amounts, showing that the jury has considered both.² On the other hand, if the statute requires commissioners to consider the damages and benefits and to report the amount that the realty concerned will be damaged or benefited, it has been held not to be necessary, as far as concerns the owners of land taken, that the commissioners should assess damages and benefits separately. It is sufficient if the report shows that in making the assessment both were duly considered.³ Even if the statute requires the damages and benefits to be assessed separately, it is not necessary to enter them separately in the absence of a specific constitutional requirement, and it will be presumed that the amounts inserted in the column of benefits represent the amount of net benefits where no entry is made in the column of damages and damages are shown to exist in fact.⁴ If the jury finds the amount of damages and the amount of benefits, it makes no difference whether the jury or the court performs the mathematical operation of subtracting the one from the other.⁵ In a Wisconsin case⁶ it seems to have been held that the commissioners in making the appraisement should strike a balance between benefits and damages. The real objection, however, was that the land was sold for non-payment of the assessment for benefits without deduction for damages.

² *City of Portland v. Kamm*, 5 Or. 362 [1874].

³ *State, Wilkinson. Pros. v. City of Trenton*, 35 N. J. L. (6 Vr.) 485 [1872].

Huston v. Clark, 112 Ill. 344 [1885].

⁵ *Miller v. City of Asheville*, 112 N. C. 769, 16 S. E. 765 [1893].

⁶ *Koller v. City of La Crosse*, 106 Wis. 369, 82 N. W. 341 [1900].

CHAPTER V.

CONSTITUTIONAL RESTRICTIONS APPLICABLE TO ASSESSMENT.

§ 78. Justice and fairness of local assessments.

The attitude of the courts toward local assessment is inevitably affected by considerations of fairness and justice. There are, however, in practice two sides to this question. If, in fact, and not merely in theory, assessments are apportioned according to actual benefits and are limited to the amount of actual benefits, and if by actual benefits is meant the increase in the value of the realty assessed which is caused by the improvement for which the assessment is levied, the local assessment is the most fair and just system of taxation imaginable.¹ On the other hand

¹ *City of New Albany v. Cook*, 29 Ind. 220 [1867]; *Woodhouse v. City of Burlington*, 47 Vt. 300 [1875]; *Allen v. Drew*, 44 Vt. 174 [1872]; "Experience has shown that by a judicious exercise of this power where it has been conferred, a nearer approach to equality of taxation has been arrived at than where the entire burden has been permitted to rest upon the property of the municipality without regard to special benefits conferred." *Woodhouse v. City of Burlington*, 47 Vt. 300, 303 [1875]; "Would it be just that all should be taxed alike and that the owner of property in a remote part of the city be compelled to contribute as much towards the particular improvement as those whose lands are thus peculiarly benefited? This would savor very much of the "forced contributions" of the olden time which are so generally denounced as

obnoxious to the principles of free government, and the bare statement of the proposition shocks all sense of justice and furnishes its own refutation. It is therefore but pre-eminently just, as well as the duty of the law-making power, to provide for an equitable adjustment of such burdens in proportion to the benefits conferred, and it is for the very purpose, as we have seen, of accomplishing this end, and of preventing so great a perversion of the taxing power, that these local or special assessments are almost universally resorted to." *Arnold v. Mayor and Aldermen of Knoxville*, 115 Tenn. 195, 220, 3 L. R. A. (N. S.) 837, 90 S. W. 469 [1905]; "Their intrinsic justice strikes every one. If an improvement is to be made, the benefit of which is local, it is but just that the property benefited should bear the burden. While the few ought

the local assessment is subject to great and undeniable abuses.² Improvements may be made either as a speculation in the hope that the market value of the realty assessed will be increased greatly by the improvement in question; or as a part of a scheme of beautifying the city without any real reference to the benefit to be conferred upon the property assessed. Cities, like people, often believe that they can afford anything that they can get, without much regard to the means of paying for it. If the determination of the legislature or of the public corporation levying the assessment is regarded as final as to the amount of benefits, the constructive and theoretical benefits are not infrequently found to exceed any increase in market price due to the improvement in question and occasionally found to exceed the market value of the property assessed, benefits and all.³

§ 79. Rule for determining constitutionality of statute.

The states of the Union are governments which possess power, general and unlimited in character, except where limited by some provision of the constitution of that state or of the United States, either expressly or by necessary implication.¹ The legislature is presumed to know the limits of its authority and to respect them. It is presumed that it obeys the state constitution, a law higher than statute, since it is the direct expression of the supreme power of each state, the people thereof. Accordingly an assessment statute passed by a state legislature cannot be held unconstitutional unless it is clearly shown to be inconsistent² with some specific provision in either the state or federal constitution,³ and a doubt as to the validity of a statute

not to be taxed for the benefit of the whole, the whole ought [not] to be taxed for the few. A single township in the county ought not to bear the whole county expenses, neither ought the whole county to be taxed for the benefit of a single township: and the same principle requires that taxation for a local object, beneficial only to a portion of a town or city should be upon that part only. General taxation for a mere local purpose is unjust, it burdens those not benefited, and benefits those who are exempt from the burden." Lock-

wood v. City of St. Louis, 24 Mo. 20, 22 [1856].

² Reed v. Erie, 79 Pa. St. (29 P. F. Smith) 346 [1875].

³ See discussion in Reed v. Erie, 79 Pa. St. (29 P. F. Smith) 346 [1875].

¹ Carson v. St. Francis Levee District, 59 Ark. 513, 27 S. W. 590 [1894].

² Carson v. St. Francis Levee District, 59 Ark. 513, 27 S. W. 590 [1894].

³ Carson v. St. Francis Levee District, 59 Ark. 513, 27 S. W. 590

must be resolved in its favor.⁴ Conversely of two or more different possible constructions of a statute, that one will be preferred which will render such statute constitutional.⁵ Furthermore the question of the constitutionality of the statute has nothing to do with its wisdom or lack of wisdom. It is possible and proper for the court to uphold as constitutional a statute, which, it may think, is unwise and impolitic.⁶ At the same time, rational action is *prima facie* to be expected of the legislature, and acceding to a statute will not be so construed as to be unreasonable unless such intention is indicated in express terms.⁷

§ 80. Effect of unconstitutional statute.

If a statute is enacted in violation of one or more constitutional provisions no rights can exist thereunder as a general rule.¹ Even the act of a majority of property holders in vot-

[1894]; In the matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 166, 14 L. R. A. 755, 28 Pac. 272, 675 [1891]; Hagar v. Board of Supervisors of Yolo County, 47 Cal. 222 [1874]; Creighton v. Manson, 27 Cal. 614 [1865].

⁴Carson v. St. Francis Levee District, 59 Ark. 513, 27 S. W. 590 [1893]; In the matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 166, 14 L. R. A. 755, 28 Pac. 272, 675 [1891]; Hagar v. Board of Supervisors of Yolo County, 47 Cal. 222 [1874]; Wilson v. Board of Trustees of the Sanitary District of Chicago, 133 Ill. 443, 27 N. E. 203 [1891]; Campbell v. Dwiggin, 83 Ind. 473 [1882]; White v. Gove, 183 Mass. 333, 67 N. E. 359 [1903]; State ex rel. Merrick v. District Court of Hennepin County, 33 Minn. 235, 22 N. W. 625 [1885]; State, Estate of Brown. Pros. v. Town of Union, 62 N. J. L. (33 Vr.) 142, 40 Atl. 632 [1898]; Village of Passaic v. State, Delaware, Lackawanna and Western Railroad Company, Pros., 37 N. J. L. (8 Vr.) 538 [1875]; Ireland v. City of Rochester, 51 Barb. (N. Y.) 414 [1868]; City of Raleigh v. Peace,

110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; Walsh v. Barron, 61 O. S. 15, 76 Am. St. Rep. 354, 55 N. E. 164 [1899]; Hill v. Higdon, 5 O. S. 243, 67 Am. Dec. 289 [1855]; "The action of the legislature shall be upheld unless palpably in contravention of the organic law," City of Atchison v. Bartholow, 4 Kan. 124, 141 [1866].

⁵Johnson v. City of Milwaukee, 88 Wis. 383, 60 N. W. 270 [1894]; To the same effect see Sage v. City of Brooklyn, 89 N. Y. 189 [1882].

⁶Praigg v. Western Paving & Supply Company, 143 Ind. 358, 42 N. E. 750 [1895]; "If the matter were left to me I should say that the law is unwise and absolutely incapable of any beneficial operation; but those are questions exclusively for the legislature," Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057 [1896]; See also State ex rel. Merrick v. District Court of Hennepin County, 33 Minn. 235, 22 N. W. 625 [1885].

⁷Neenan v. Smith, 50 Mo. 525 [1872].

¹State, Mayor and Council of the City of Newark, Pros. v. Inhabitants of the Township of Verona in the County of Essex, 58 N. J. L. (29 Vr.)

ing in favor of such tax does not make such statute valid as against the dissenting minority.² This rule is said to be even more stringent in the case of local assessments than in the case of general taxation. General taxation is said to rest upon the antecedent duty of the citizen to support the government, and accordingly it has been said that to restrain the collection of a general tax in equity, the plaintiff must show that the tax is not merely invalid but inequitable.³ In the case of the local assessment it is said that there is "no antecedent duty or burden even in the most general sense," and that accordingly it is necessary only to show that the statute which authorizes the assessment is itself unconstitutional, without also showing that the assessment is inequitable.⁴ An assessment made by a public corporation acting under an unconstitutional law, is until set aside, a subsisting assessment.⁵ Accordingly the party who has paid in such assessment cannot recover in some jurisdictions until it is set aside; and the public corporation which has collected it cannot legally repay it in the absence of statutory authority. So an improvement which is constructed under an unconstitutional statute is one constructed under the laws of the state.⁶

§ 81. Effect of partial unconstitutionality.

If part of a statute is unconstitutional while the rest, considered by itself, does not violate any statutory provision, the effect of such unconstitutional provision upon the validity of the entire act depends upon whether it appears to be the intention of the legislature to unite the different provisions in one entire and inseverable act which must stand or fall as a whole; or whether it is the intention of the legislature to enact such provisions as distinct and severable rules, some of which may be valid, and some invalid. If it appears to be the intention of the legislature to enact a number of distinct and severable provi-

595, 33 Atl. 959 [1896]; *State, New York and Greenwood Lake Railway Company, Pros. v. Board of Township Committee of Township of Kearney*, 55 N. J. L. (26 Vr.) 463, 26 Atl. 800 [1893]; *Beckert v. City of Allegheny*, 85 Pa. St. (4 Norris) 191 [1877].

² *Anderson v. Hill*, 54 Mich. 477, 20 N. W. 549 [1884].

³ *Hixon v. Oneida County*, 82 Wis. 515, 52 N. W. 445 [1892].

⁴ *Dietz v. City of Neenah*, 91 Wis. 422, 64 N. W. 299, 65 N. W. 509 [1895].

⁵ *State, Norris, Pros. v. City of Elizabeth*, 51 N. J. L. (22 Vr.) 485, 18 Atl. 302 [1889].

⁶ *Blake v. People for use of Caldwell*, 109 Ill. 504 [1884].

sions with reference to the same subject matter, the invalidity of some provisions will not destroy the validity of the remaining provisions.¹ This is especially true if the proceedings in question are based exclusively upon the valid provisions of the statute.² Thus the invalidity of a grant of power to levy a local assessment does not render invalid other provisions which concern the laying out of streets,³ the appropriation of property by eminent domain,⁴ the power to pave streets,⁵ or the issuing of bonds.⁶ If, on the other hand, the unconstitutional provision is so closely connected in effect and meaning with the remainder of the statute that it cannot be presumed that the legislature would have passed the valid part of such statute without the invalid provision, the invalidity of such integral part of the statute invalidates the entire statute.⁷ This is especially true where the only authority for doing the work for which the assessment is to be levied is found in that part of the statute which is unconstitutional. Thus where a commissioner of public works is appointed for a city under a statute which is invalid because of a local option clause therein whereby it is to take effect in cities only on adoption by each,⁸ and an attempt is made to levy assessments to pay for the cost of improvements ordered by such commissioner⁹ the invalidity of the statute au-

¹ *Edwards v. Bruorton*, 184 Mass. 529, 69 N. E. 328 [1904]; *McKusick v. City of Stillwater*, 44 Minn. 372, 46 N. W. 769 [1890]; *State, Watrous, Pros. v. City of Elizabeth*, 40 N. J. L. (11 Vr.) 278 [1878]; *Horn v. Town of New Lots*, 83 N. Y. 100, 38 Am. Rep. 402 [1880]; *Adkins v. Toledo*, 27 Ohio C. C. 417 [1905].

² *McKusick v. City of Stillwater*, 44 Minn. 372, 46 N. W. 769 [1890]; *Adkins v. Toledo*, 27 Ohio C. C. 417 [1905].

³ *Edwards v. Bruorton*, 184 Mass. 529, 69 N. E. 328 [1904].

⁴ *McKusick v. City of Stillwater*, 44 Minn. 372, 46 N. W. 769 [1890].

⁵ *State, Watrous, Pros. v. City of Elizabeth*, 40 N. J. L. (11 Vr.) 278 [1878].

⁶ *Horn v. Town of New Lots*, 83 N. Y. 100, 38 Am. Rep. 402 [1880].

⁷ *Loeb v. Trustees of Columbia Tp., Hamilton County, Ohio*, 91 Fed. 37

[1899]; *State of Minnesota ex rel. City of St. Paul v. District Court of Ramsey County*, 72 Minn. 226, 71 Am. St. Rep. 480, 75 N. W. 224 [1898]; (Statute held unconstitutional in *State of Minnesota ex rel. Childs v. Copeland*, 66 Minn. 315, 69 N. W. 27 [1896]); *Wright v. Thomas*, 26 O. S. 346 [1875]; (Act held unconstitutional in *Smith v. Atlantic and Great Western Railroad Company*, 25 O. S. 91 [1874]); *Pittsburg's Petition, for Board of Viewers*, 138 Pa. St. 401, 21 Atl. 757, 759, 761 [1891]; *Paving, etc., of Wyoming Street*, 137 Pa. St. 494, 21 Atl. 74 [1891].

⁸ *State of Minnesota ex rel. Childs v. Copeland*, 66 Minn. 315, 69 N. W. 27 [1896].

⁹ *State of Minnesota ex rel. City of St. Paul v. District Court of Ramsey County*, 72 Minn. 226, 71 Am. St. Rep. 480, 75 N. W. 224 [1898].

thorizing the improvement invalidates the assessment. So if the authority to make the improvement and levy the assessment is derived from a statute which is invalid as being special legislation¹⁰ the assessment cannot be levied.¹¹ If, however, the legislature is forbidden to pass special legislation only in certain enumerated cases and in such other cases "which in its judgment may be provided for by general laws," a wide discretion is to be given to the legislature to determine in what cases general laws are suitable; and its decision that a specific drainage system is necessary in a region where the streams are polluted by sewerage to an unusual extent, which condition will probably not occur elsewhere, and that such condition should be remedied by special legislation, is to be followed if not clearly erroneous.¹²

§ 82. Constitutionality as affected by facts of specific case.

The legislature may enact a statute which under some circumstances may not operate as a violation of any constitutional rights of the parties affected thereby, while under other circumstances, it may operate as authority for such violation. The question whether such a statute is to be regarded as unconstitutional because it is not always bound to operate in a constitutional manner or whether it is to be regarded as constitutional except under circumstances in which it operates in fact in an unconstitutional manner, is a question upon which there is some conflict of authority, although the conflict is chiefly in obiter. According to the weight of authority a statute which may operate in an unconstitutional manner, but which under the circumstances of the particular case does not operate to violate any constitutional rights is to be regarded as valid.¹ Thus if a statute is framed as not to afford sufficient safeguards against a possible abuse of power on the part of the

¹⁰ See § 176 *et seq.*

¹¹ *Gilmore v. Norton*, 10 Kan. 491 [1872]; *Pittsburgh's Petition for Board of Viewers*, 138 Pa. St. 401, 21 Atl. 757, 759, 761 [1891]; *Paving, etc., of Wyoming Street*, 137 Pa. St. 494, 21 Atl. 74 [1891].

¹² *Van Cleve v. Passaic Valley Sewerage Commissioners*, 71 N. J. L. (42 Vr.) 183, 58 Atl. 571 [1904].

¹ *Horton v. Town of Avondale*, 147

Ala. 458, 41 So. 934 [1906]; *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309 [1901]; *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500 [1900]; *City of Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; *Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Hays*, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597 [1896].

public authorities, but under the circumstances of the particular case there is in fact no abuse of power, such statute is to be held valid.² If a statute is so drawn as to permit an apportionment which is not according to benefits and not limited by benefits, but in the particular case of apportionment has been made according to benefits and limited to the total amount thereof, such statute is held to be valid.³ Where notice is held to be a constitutional right and the statute does not require the giving of notice as a condition precedent to the validity of the assessment, but notice has in fact been given, it is held by many authorities that such assessment is to be regarded as valid.⁴ The question of the effect of such a statute in a particular case is therefore said not to be one of its constitutionality, but rather of its construction and application, as far as such question is involved in determining jurisdiction of courts of error.⁵ A bond issued under such a statute is valid, and hence may be the subject of forgery, even though under special circumstances the law may operate so as to be unconstitutional.⁶ There is some authority for the proposition that a statute in order to be constitutional must be so framed that it does not permit the public officers while acting in compliance with its terms to violate constitutional rights.⁷ Thus a statute which leaves it to the discretion of commissioners to decide what proportion of the expense is to be assessed on each parcel of land is unconstitutional without

² *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309 [1901].

³ *Harton v. Town of Avondale*, 147 Ala. 458, 41 So. 934 [1906]; *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500 [1900]. See § 668.

⁴ See § 732.

⁵ *Pittsburg, Cincinnati, Chicago and St. Louis Railway Company v. Hays*, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597 [1896].

⁶ *Bowles v. State of Ohio*, 37 O. S. 35 [1881].

⁷ *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903]; *Dexter v. City of Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379 [1900]; *State, Mayor and Council of the City of Newark, Pros. v. Inhabitants of the*

Township of Verona in the County of Essex, 58 N. J. L. (29 Vr.) 595, 33 Atl. 959 [1896]; *State, New York and Greenwood Lake Railway Company, Pros. v. Board of Township Committee of Trustees of Township of Kearney*, 55 N. J. L. (26 Vr.) 463, 26 Atl. 800 [1893]; "In determining whether a statute is unconstitutional the question is not whether the result is harmful in the particular case, but whether the statute, according to its terms, will violate the provisions of the constitution in its application to cases which may be expected to arise." *Dexter v. City of Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379 [1900]; Quoted in *White v. Gove*, 183 Mass. 333, 338, 67 N. E. 359 [1903].

reference to the propriety of the specific assessment made by virtue of such statute.⁸ So a statute by the terms of which it may be possible for the total amount assessed to exceed the total benefits has been held to be unconstitutional, irrespective of its effect in the particular case.⁹ So according to some authorities a statute which does not provide for notice where notice is a constitutional right has been held to be unconstitutional even though notice was given in the particular case.¹⁰

§ 83. By whom question of constitutionality can be raised.

As a general rule only one who will be affected prejudicially by the operation of the statute, if such statute is constitutional and valid, can be permitted to raise the question of the constitutionality thereof.¹ Thus the owner of certain land which is clearly in the drainage district cannot raise the question of constitutionality of the drainage act as to other classes of land in which he has no interest.² A party who is offered compensation for land taken in eminent domain cannot raise any question as to the validity of the proceeding by which said assessment was levied.³ If the provisions which affect the party who interposes the objection are constitutional, such party cannot escape liability because other provisions are unconstitutional.⁴ One whose

⁸ *State, Mayor and Council of the City of Newark, Pros. v. Inhabitants of the Township of Verona, in the County of Essex*, 58 N. J. L. (29 Vr.) 595, 33 Atl. 959 [1896]; *State, New York and Greenwood Lake Railway Company, Pros. v. Board of Township Committee of Township of Kearney*, 55 N. J. L. (26 Vr.) 463, 26 Atl. 800 [1893].

⁹ *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903]; (However an assessment was levied subsequently under the same statute, apparently. The benefits in this case exceeded the amount of the assessment, there was probably some contract between the city and the owner at that time of such land, and the grantee of such owner omitted to attack such assessment for almost six years, when he applied for a writ of certiorari to quash said assessment. His applica-

tion for such writ was denied. *Harwood v. Donovan*, 188 Mass. 487, 74 N. E. 914 [1905]); *Lorden v. Coffey*, 178 Mass. 489, 60 N. E. 124 [1901].

¹⁰ See § 732.

¹ *Laguna Drainage District v. Charles Martin Co.*, 144 Cal. 209, 77 Pac. 933 [1904]; *Edgerton v. Mayor and Aldermen of Town of Green Cove Springs*, 19 Fla. 140 [1882]; *Blake v. People for use of Caldwell*, 109 Ill. 504 [1884]; *Zeliff v. Bog and Fly Meadow Company*, 68 N. J. L. (39 Vr.) 200, 56 Atl. 302 [1902].

² *Zeliff v. Bog and Fly Meadow Company*, 68 N. J. L. (39 Vr.) 200, 56 Atl. 302 [1902].

³ *Edgerton v. Mayor and Aldermen of the Town of Green Cove Springs*, 19 Fla. 140 [1882].

⁴ *Laguna Drainage District v. Charles Martin Co.*, 144 Cal. 209, 77 Pac. 933 [1904].

land it is sought to condemn for drainage purposes, cannot interpose the objection that the statute providing for an assessment to meet the cost of such expense is unconstitutional if such land is outside of the drainage district and is not liable for such assessment.⁵

§ 84. Estoppel to attack constitutionality of statute.

Whether a property owner or a public corporation can so act as to estop himself from attacking a statute upon the ground of unconstitutionality is a question upon which there is some conflict of authority. It is held in some jurisdictions that such an estoppel may exist so as to prevent an attack upon a statute as unconstitutional, although such statute would be itself of no validity if it were not for the existence of such grounds of estoppel.¹ Thus, where this theory obtains, a party who petitions for certiorari and bases his application upon the theory of the validity of a certain statute cannot be allowed in the same proceeding to raise the question of the validity of such statute.² In other jurisdictions it is held that if a statute is invalid as being in violation of constitutional provisions, it cannot be made valid by reason of the conduct of the parties.³

§ 85. Effect of change in constitutional provisions.

A change in a constitutional provision is regarded as prospective merely, in the absence of some evidence of intention that such provision is to have a retrospective effect.¹ Thus the adoption of a provision requiring taxation to be equal and uniform throughout the state has no retrospective effect and does not operate to repeal any law in force when such constitutional provision was adopted.² Whether the change in constitutional provisions can be retrospective in scope and effect is considered else-

⁵ *Laguna Drainage District v. Charles Martin Co.*, 144 Cal. 209, 77 Pac. 933 [1904].

¹ See § 1019.

² *Barnes v. Drainage Commissioners of Drainage Dist. No. 1, etc.*, 221 Ill. 627, 77 N. E. 1124 [1906].

³ See § 1019.

¹ *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853]; *Cass v.*

Dillon, 2 O. S. 607 [1853]; *Douglass v. Town of Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548 [1876]; (Citing *Groves v. Slaughter*, 40 U. S. (15 Pet) 449 [1841]; *Slack v. Maysville and Lexington Railroad Company*, 13 B. Mon. 1 [1882]).

² *Douglass v. Town of Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548 [1876].

where.³ If the new provision takes effect after the passage of an improvement ordinance, but before any action is taken thereunder, such new constitutional provisions control.⁴

§ 86. Assessment not prohibited by American constitutions.

The special assessment, as has been already stated,¹ antedates many of the constitutional provisions which might be regarded as restricting or preventing the exercise of such power, and indeed, its very existence; and antedates the general discussion by the courts of the meaning and scope of such provisions—a discussion which has extended the operation of many of the constitutional provisions far beyond the scope originally attributed to them. Accordingly we find that in almost all the American states the special assessment has become intrenched in a position from which it has proved impossible to dislodge it as an essential and integral part of our system of taxation.²

³ See § 165 et seq.

⁴ *City of St. Louis v. Lang*, 131 Mo. 412, 33 S. W. 54 [1895].

¹ See Chapter II.

² *Wight v. Davidson*, 181 U. S. 371, 45 L. 900, 21 S. 616 [1901]; (Reversing *Davidson v. Wight*, 16 App. D. C. 371 [1900]); *French v. Barber Asphalt Paving Company*, 181 U. S. 324, 45 L. 879, 21 S. 625 [1901]; (Affirming *Barber Asphalt Paving Company v. French*, 158 Mo. 534, 58 S. W. 934 [1900]); *Wilson v. Lambert*, 168 U. S. 611, 42 L. 599, 18 S. 217 [1898]; (Reversing *Craighill v. Van Riswick*, 8 App. D. C. 185 [1893]); *Bauman v. Ross*, 167 U. S. 518, 42 L. 270, 17 S. 966 [1897]; (Reversing *District of Columbia v. Armes*, 8 App. D. C. 393 [1896]; *Bauman v. Ross*, 9 App. D. C. 260 [1896]; *Abbott v. Ross*, 9 App. D. C. 289 [1896]); *Kennedy v. Indianapolis*, 103 U. S. 599, 26 L. 550 [1880]; *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057 [1896]; In the matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891]; *Bixler v. Board of Supervisors of the*

County of Sacramento, 59 Cal. 698 [1881]; *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222 [1874]; *Burnett v. Mayor and Common Council of the City of Sacramento*, 12 Cal. 76, 73 Am. Dec. 518 [1859]; *City of Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467 [1905]; *Nichols v. City of Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636 [1854]; *Murphy v. Mayor and Council of the City of Wilmington*, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345 [1880]; *English v. Mayor and Council of Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158 [1896]; *Edgerton v. Mayor and Aldermen of the Town of Green Cove Springs*, 19 Fla. 140 [1882]; *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898]; *Green v. City of Springfield*, 130 Ill. 515, 22 N. E. 602 [1890]; *Falch v. People ex rel. Johnson*, 99 Ill. 137 [1881]; *Wright v. City of Chicago*, 46 Ill. 44 [1867]; *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fish*, 158 Ind. 525, 63 N. E. 454 [1901]; *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1901]; *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004 [1902]; *Leeds v. Defrees*, 157 Ind.

Even at the outset, there was an occasional expression of doubt as to the validity of local assessments based on the theory of

- 392, 61 N. E. 930 [1902]; *Forsyth v. Wilcox*, 143 Ind. 144, 41 N. E. 371 [1895]; *Brown v. Eagle Creek and Little White Lick Gravel Road Company*, 78 Ind. 421 [1881]; *State ex rel. Monroe Gravel Road Co. v. Stout*, 61 Ind. 143 [1878]; *Turpin v. Eagle Creek and Little White Lick Gravel Road Company*, 48 Ind. 45 [1874]; *Palmer v. Stumph*, 29 Ind. 329 [1868]; *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468 [1861]; *McIntire v. State*, 5 Blackford (Ind.) 384 [1840]; *City of Burlington v. Quick*, 47 Ia. 222 [1877]; *City of Kansas City v. Gibson*, 66 Kan. 501, 72 Pac. 222 [1903]; *Moore v. City of Paola*, 63 Kan. 867, 66 Pac. 1040 [1901]; *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. Law R. 128, 63 S. W. 964 [1901]; *Abraham v. City of Louisville (Ky.)*, 23 Ky. Law R. 375, 62 S. W. 1041 [1901]; *Dunlap v. Gosnell*, 18 Ky. Law R. 8, 35 S. W. 108 [1896]; *City of Covington v. Worthington*, 88 Ky. 206, 10 S. W. 790, 11 S. W. 1038 [1889]; *Bradley v. McAtee*, 70 Ky. (7 Bush.) 667, 3 Am. Rep. 309 [1870]; *City of Louisville v. Hyatt*, 41 Ky. (2 B. Mon.) 177, 36 Am. Dec. 594 [1841]; *City of Lexington v. McQuillan's Heirs*, 9 Dana (39 Ky.) 513, 35 Am. Dec. 159 [1839]; *Brooks v. Mayor and City Council of Baltimore*, 48 Md. 265 [1877]; *Howard v. First Independent Church of Baltimore*, 18 Md. 451 [1862]; *Henderson v. Mayor and City Council of Baltimore*, use of Eschbach, 8 Md. 352 [1855]; *Moale v. Mayor and City Council of Baltimore*, 5 Md. 314, 61 Am. Dec. 276 [1854]; *Alexander v. Mayor and City Council of Baltimore*, 5 Gill. (Md.) 383, 46 Am. Dec. 630 [1847]; *Stark v. City of Boston*, 180 Mass. 293, 62 N. E. 375 [1902]; *Hall v. Street Commissioners of Boston*, 177 Mass. 434 [1901]; *Masonic Building Association v. Brownell*, 164 Mass. 306, 41 N. E. 306 [1895]; *Holt v. City Council of Somerville*, 127 Mass. 408 [1879]; *Boston Seamen's Friend Society v. Mayor and Aldermen of Boston*, 116 Mass. 181, 17 Am. Rep. 153 [1874]; *Howe v. City of Cambridge*, 114 Mass. 388 [1874]; *Boylston Market Association v. City of Boston*, 113 Mass. 528 [1873]; *Butler v. City of Worcester*, 112 Mass. 541 [1873]; *Prince v. City of Boston*, 111 Mass. 226 [1872]; *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870]; *Grand Rapids School Furniture Company v. City of Grand Rapids*, 92 Mich. 564, 52 N. W. 1028 [1892]; *Hoyt v. City of East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76 [1869]; *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853]; *State v. Trustees of Macalester College*, 87 Minn. 165, 91 N. W. 484 [1902]; *State ex rel. Ryan v. District Court of Ramsey County*, 87 Minn. 146, 91 N. W. 300 [1902]; *Lien v. Board of County Commissioners of Norman County*, 80 Minn. 58, 82 N. W. 1094 [1900]; *State of Minnesota ex rel. City of Duluth v. District Court of St. Louis County*, 61 Minn. 542, 64 N. W. 190 [1895]; *Smith v. Corporation of Aberdeen*, 25 Miss. 458 [1853]; *Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683 [1889]; *Buchan v. Broadwell*, 88 Mo. 31 [1885]; *City of Kansas v. Johnson*, 78 Mo. 661 [1883]; *State of Missouri ex rel. Cavender v. City of St. Louis*, 52 Mo. 574 [1873]; *Uhrig v. City of St. Louis*, 44 Mo. 458 [1869]; *City of St. Louis to use of McGrath v. Clemens*, 36 Mo. 467 [1865]; *Garrett v. City of St. Louis*, 25 Mo. 505, 69 Am. Dec. 475 [1857]; *Wheeler v. City of Plattsmouth*, 7 Neb. 270 [1878]; *Paxson v. Sweet*, 13 N. J. L. (1 Green) 196 [1832]; *Loweree v. City of Newark*, 38 N. J. L. (9 Vroom) 151 [1875]; *In the matter of the*

special benefits,³ although such doubts were not regarded as of sufficient weight to justify the court in holding the law to be unconstitutional.⁴ On the other hand, as the objections which might be made upon constitutional grounds have become more noticeable, the very existence of the power of the legislature to authorize and provide for the levy and collection of local assessments based on the theory of special benefits has been very sharply attacked and the question of the existence of that power

City of New York, 190 N. Y. 350, *sub nomine In re Water Front in City of New York*, 83 N. E. 299 [1907]; modifying 105 N. Y. S. 750, 120 App. Div. 849; *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104 [1891]; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]; (*Affirmed Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]); *Hassan v. City of Rochester*, 67 N. Y. 528 [1876]; *People ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; *City of Wilmington v. Yopp*, 71 N. C. 76 [1874]; *Roberts v. First National Bank of Fargo*, 8 N. D. 504, 79 N. W. 1049 [1899]; *Raymond v. Cleveland*, 42 O. S. 522 [1885]; *Gest v. City of Cincinnati*, 26 O. S. 275 [1875]; *Corry v. Campbell*, 25 O. S. 134 [1874]; *Thompson v. Treasurer of Wood County*, 11 O. S. 678 [1860]; *Northern Indiana Railroad Company v. Connelly*, 10 O. S. 160 [1859]; *Hill v. Higdon*, 5 O. S. 243, 67 Am. Dec. 289 [1855]; *City of Toledo for the use of Gates v. Lake Shore & Michigan Southern Railway Company*, 4 Ohio C. C. 113 [1889]; *Wilson v. City of Salem*, 24 Or. 504, 34 Pac. 9, 691 [1893]; *Masters v. City of Portland*, 24 Or. 161, 33 Pac. 540 [1893]; *King v. City of Portland*, 2 Or. 146 [1865]; *Oil City v. Oil City Boiler Works*, 152 Pa. St. 348, 25 Atl. 549 [1893]; *City of Harrisburg v. Segelbaum*, 151 Pa. St. 172, 20 L. R. A. 834, 24 Atl. 1070 [1892]; *Michener v. City of Philadelphia*, 118 Pa. St. 535, 12 Atl. 174

[1888]; *In re Vacation of Centre Street*, 115 Pa. St. 247, 8 Atl. 56 [1886]; *Wray v. Mayor, etc., of Pittsburg for use, etc.*, 46 Pa. St. (10 Wright) 365 [1863]; *In the Matter of Dorrance Street*, 4 R. I. 230 [1856]; *Arnold v. Mayor and Aldermen of Knoxville*, 115 Tenn. 195, 3 L. R. A. (N. S.) 837, 90 S. W. 469 [1905]; *Washington v. Mayor and Aldermen of Nashville*, 1 Swan (31 Tenn.) 177 [1851]; *Mayor and Aldermen v. Maberry*, 6 Humph. (25 Tenn.) 368 [1845]; *Mayor and City Council of Nashville v. Berry*, 2 Shan. Cas. (Tenn.) 561 [1877]; *Connor v. City of Paris*, 87 Tex. 32, 27 S. W. 88 [1894]; *Woodhouse v. City of Burlington*, 47 Vt. 300 [1875]; *Allen v. Drew*, 44 Vt. 174 [1872]; *Davis v. City of Lynchburg*, 84 Va. 861, 6 S. E. 230 [1888]; *Sands v. City of Richmond*, 31 Grattan (72 Va.) 571, 31 Am. Rep. 742 [1879]; *Norfolk City v. Ellis*, 26 Grattan (67 Va.) 224 [1875]; *McNamee v. City of Tacoma*, 24 Wash. 591, 64 Pac. 791 [1901]; *City of Parkersburg v. Tavenner*, 42 W. Va. 486, 26 S. E. 179 [1896]; *Wilson v. Town of Philippi*, 39 W. Va. 75, 19 S. E. 553 [1894]; *Sanderson v. Herman*, 108 Wis. 662, 84 N. W. 890, 85 N. W. 141 [1901]; *Watkins v. Zwietusch*, 47 Wis. 513, 3 N. W. 35 [1879]; *Johnson v. City of Milwaukee*, 40 Wis. 315 [1876].

³ *Hill v. Higdon*, 5 O. S. 243, 67 Am. Dec. 289 [1855].

⁴ *Hill v. Higdon*, 5 O. S. 243, 67 Am. Dec. 289 [1855].

has received careful consideration by the courts. The result of such deliberations has been that by the great weight of authority it is held that the legislature has power to provide for the levy and collection of such assessments.⁵ The earlier cases which held that a local assessment based upon the theory of benefits was necessarily unconstitutional have been reversed or overruled.⁶ A discussion of these contrary doctrines is to be found elsewhere.⁷ The one state which now seems to hold that local assessments, based upon the theory of benefits, are necessarily unconstitutional is South Carolina.⁸ In other states, like Virginia,⁹ constitutional provisions exist specifically forbidding local assessments for many of the purposes for which such assessments are generally made. While the power of levying local assessments is recognized by the great weight of authority and the great majority of jurisdictions, state legislatures are very far from possessing absolute and unrestricted authority in the exercise of the power of providing for the levy of local assessments. The

⁵ *French v. Barber Asphalt Paving Company*, 181 U. S. 324, 45 L. 879, 21 S. 625 [1901]; (*Affirming Barber Asphalt Paving Company v. French*, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]); *Crane v. Siloam Springs*, 67 Ark. 30, 55 S. W. 955 [1899]; *James v. Pine Bluff*, 49 Ark. 199, 4 S. W. 760 [1887]; *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]; *Reclamation District No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945 [1884]; *Chambers v. Satterlee*, 40 Cal. 497 [1871]; *Emery v. San Francisco Gas Company*, 28 Cal. 346 [1865]; *Burnett v. Mayor and Common Council of the City of Sacramento*, 12 Cal. 76, 73 Am. Dec. 518 [1859]; *Fair Haven and Westerville Railroad Company v. City of New Haven*, 75 Conn. 442, 53 Atl. 960 [1903]; *Ton v. City of Chicago*, 216 Ill. 331, 74 N. E. 1044 [1905]; (*Chicago Title and Trust Company v. Town of Lake View*, 187 Ill. 622, 58 N. E. 597 [1900]); *Surget v. Chase*, 33 La. Ann. 833 [1881]; *Mayor and City Council of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1 [1880]; *Daily v. Swope*, 47 Miss 367 [1872];

Heman v. Allen, 156 Mo. 534, 57 S. W. 559 [1900]; *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104 [1891]; *Ireland v. City of Rochester*, 51 Barb. (N. Y.) 414 [1868]; *Northern Indiana Railroad Company v. Connelly*, 10 O. S. 160 [1859]; (followed without opinion *Daniels v. Keeler*, 10 O. S. 169 [1859]; *Fitch v. Keeler*, 10 O. S. 169 [1859]); *Ernst v. Kunkle*, 5 O. S. 521 [1856]; *Hill v. Higdon*, 5 O. S. 243, 67 Am. Dec. 289 [1855]; *Vacation of Howard St., Philadelphia*, 142 Pa. St. 601, 21 Atl. 974 [1891]; *City of Seattle v. Yesler*, 1 Wash. Terr. 571 [1878].

⁶ *People ex rel. Griffing v. Mayor and Common Council of the City of Brooklyn*, 9 Barb. (N. Y.) 535 [1850]; *People ex rel. Post v. Mayor, etc., of Brooklyn*, 6 Barb. (N. Y.) 209 [1849].

⁷ See § 33.

⁸ *Mauldin v. City Council of Greenville*, 53 S. C. 285, 69 Am. St. Rep. 855, 43 L. R. A. 101, 31 S. E. 252 [1898]; *Stehmeyer v. City Council of Charleston*, 53 S. C. 259, 31 S. E. 322 [1898].

⁹ See § 161.

provisions of the Federal and state constitutions limit the exercise of this power in a great variety of ways, and these provisions must be considered in detail.

§ 87. Nature of power of assessment—In general.

As a step preliminary to determining what constitutional provisions restrict the exercise of this power, the nature of the power and the basis upon which it is to be placed and on which it can be justified must first be considered. As is often pointed out by the courts, however, if an assessment is not in violation of any constitutional provisions, it makes but little difference to which branch of governmental power it may be referred.¹ The question of the branch of governmental power to which a local assessment is to be referred and upon which it is to be based is in such cases a theoretical rather than a practical question. On the other hand, if certain constitutional provisions, which if applicable would avoid the assessment, are in fact applicable or not according to the nature of the governmental power upon which the right of local assessment is based, the question of the power to which local assessments may be referred becomes of the greatest practical importance.

§ 88. Classes of assessments.

With reference to the nature and basis of the power of assessment, the fact must be recognized that, in many jurisdictions at least, assessments are to be divided into three broad classes. One class consists of assessments in the modern accurate sense of the term; that is, those assessments which are levied upon property especially benefited by a local improvement of a public character, upon the basis of the benefits conferred by such improvement.¹ The second class consists of those charges upon property which are imposed to reimburse the public for the cost of doing certain things with reference to such property, which

¹ "The act is clearly within the sphere of legitimate legislation and it is immaterial as to what particular emanation of the sovereign power it will be referred. Having run the gauntlet of constitutional tests under the rules applicable to eminent domain it will be readily sustained

when referred to the police power. For the power of police is more comprehensive in its application and the limitations upon its exercise are not so imperious and exacting." *Cribbs v. Benedict*, 64 Ark. 555, 562, 44 S. W. 707 [1897].

¹ See § 4.

it is the duty of the owner thereof to do, but which he omits or refuses to do.² Such assessments therefore are based, not primarily upon the theory of benefit to the realty, but upon the theory of the legal duty of the owner, irrespective of benefit; and in effect afford a method of compelling compensation for doing the act in question where performance is not rendered voluntarily by the owner. The accuracy of this classification of assessments is impaired by several considerations. There are cases found in which the act done is not merely the legal duty of the owner, but also one which confers a benefit upon the property, and it may well be that if the amount of the assessment does not exceed the amount of the benefits thus conferred, the assessment can be referred as well to the first class as to the second.³ Furthermore in some jurisdictions the courts have changed their views upon this classification of assessments and have finally placed in one class assessments of types which in the earlier cases they had placed in the other class. The third class of assessments consists of charges for goods of some kind furnished for use upon certain realty. As has been pointed out before, such charges are not, properly speaking, assessments, but are contracts of sale, often with special remedies added by the legislature.⁴ Where an assessment is held to be a branch of the taxing power, it follows that the constitutional questions, outside of special provision concerning assessments specifically, which can be raised in objecting to the validity of statutes authorizing assessments may, as a rule, be reduced to one of two classes; first, is the assessment levied for a public purpose, so as to be really a tax and not a method of confiscation;⁵ and second, if a tax, is it apportioned in a manner permitted by the provisions of the constitution.⁶

§ 89. Assessments on basis of benefits referred to power of taxation.

By the great weight of authority assessments of the first class, that is, assessments, which are to be justified upon the theory

² See § 5.

³ See § 13.

⁴ See § 6.

⁵ For the discussion of this question see Chapter VIII.

⁶ In *Emery v. San Francisco Gas*

Company, 28 Cal. 346 [1865], it was said that if levied for a proper purpose the only possible ground of attack as far as constitutional questions are concerned was upon the method of apportionment.

of benefits, are held to be referable to the power of taxation; and to be a special form of the exercise of that power.¹ How-

¹ *Sioux City Street Railway Company v. Sioux City*, 138 U. S. 98, 34 L. 898 [1891]; *Willard v. Presbury*, 14 Wall. (81 U. S.) 676, 20 L. 719 [1869]; *City of Little Rock v. Board of Improvements, etc.*, 42 Ark. 152 [1883]; *Hornung v. McCarthy*, 126 Cal. 17, 58 Pac. 303 [1899]; *Appeal of Houghton*, 42 Cal. 35 [1871]; *Emery v. San Francisco Gas Company*, 28 Cal. 346 [1865]; *Palmer v. Way*, 6 Colo. 106 [1881]; *Wolff v. City of Denver*, 20 Colo. App. 135, 77 Pac. 364 [1904]; *City of New London v. Miller*, 60 Conn. 112, 22 Atl. 499 [1891]; *City of Bridgeport v. The New York & New Haven Railroad Company*, 36 Conn. 255, 4 Am. Rep. 63 [1869]; *Nichols v. City of Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636 [1854]; *Huston v. Tribbetts*, 171 Ill. 547, 63 Am. St. Rep. 275, 49 N. E. 711 [1898]; *Chicago and Northwestern Railway Company v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437 [1897]; *The Chicago & Alton Railroad Company v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077 [1894]; *City of Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1893]; *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761 [1891]; *Elmore v. Drainage Commissioners*, 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010 [1892]; *Wabash Eastern Railway Company of Illinois v. Commissioners of East Lake Fork Special Drainage District*, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781 [1890]; *Churchman v. City of Indianapolis*, 110 Ind. 259, 11 N. E. 301 [1886]; *Law v. Madison, Smyrna and Graham Turnpike Company*, 30 Ind. 77 [1868]; *Edwards & Walsh Construction Company v. Jasper County*, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902]; *Todd v. City of*

Atchison, 9 Kans. App. 251, 59 Pac. 676 [1900]; *Bradley v. McAtee*, 7 Bush (70 Ky.) 667, 3 Am. Rep. 309 [1870]; *Cypress Pond Draining Company v. Hooper*, 2 Mete. (59 Ky.) 350 [1859]; *Oakey v. Mayor*, 1 La. 1 [1830]; *Munson v. Board of Commissioners of The Atchafalaya Basin Levee District*, 43 La. Ann. 15, 8 So. 906 [1891]; *Mayor and City Council of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1 [1880]; *Mayor and City Council of Baltimore v. Hughes' Adm'r*, 1 Gill & Johnson. (Md.) 480, 19 Am. Dec. 243 [1829]; *Mayor, etc., of Baltimore v. Moore*, 6 Harris & Johnson, (Md.) 375 [1825]; *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903]; *Trustees of Phillip's Academy v. Inhabitants of Andover*, 175 Mass. 118, 48 L. R. A. 550, 55 N. E. 841 [1900]; *Sears v. Board of Aldermen of City of Boston*, 173 Mass. 71, 43 L. R. A. 834, 1 Mun. Corp. Cas. 497, 53 N. E. 138 [1899]; *Proprietors of the Cemetery of Mount Auburn v. Mayor and Aldermen of Cambridge*, 150 Mass. 12, 4 L. R. A. 836, 22 N. E. 66 [1889]; *President and Fellows of Harvard College v. Board of Aldermen of the City of Boston*, 104 Mass. 470, 482 [1870]; *Dorgan v. City of Boston*, 12 All. (94 Mass.) 223 [1866]; *People on the Relation of Butler v. Board of Supervisors of Saginaw County*, 26 Mich. 22 [1872]; *Motz v. City of Detroit*, 18 Mich. 494 [1869]; *Stinson v. Smith*, 8 Minn. 366 [1863]; *McComb v. Bell*, 2 Minn. 295 [1858]; *Daily v. Swope*, 47 Miss. 367 [1872]; *Heman Construction Co. v. Wabash R. Co.*, 206 Mo. 172, 104 S. W. 67 [1907]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014 [1895]; *City of St. Joseph to use of*

ever, the view has been expressed that if the precedent application of the property owners to be assessed is necessary, as it so often is,² to the validity of the assessment, such assessment is not a tax.³ This remark was obiter, however, as the result was held to be the same whether it was regarded as a tax or not.

Gibson v. Farrell, 106 Mo. 437, 17 S. W. 497 [1891]; City of St. Louis v. Speck, 67 Mo. 403 [1878]; Garrett v. City of St. Louis, 25 Mo. 505, 69 Am. Dec. 475 [1857]; Zeeller v. Kellogg, 4 Mo. App. 163 [1877]; Wilson v. City of Auburn, 27 Neb. 435, 440, 43 N. W. 257 [1889]; Shaler v. McAleese, — N. J. Eq. —, 68 Atl. 416 [1907]; State, McClosky, Pros. v. Chamberlin, 37 N. J. L. (8 Vr.) 388 [1875]; State, Agens, Pros. v. Mayor and Common Council of the City of Newark, 35 N. J. L. (6 Vr.) 168 [1871]; State, Sigler, Pros. v. Fuller, 34 N. J. L. (5 Vr.) 227 [1870]; City of Rochester v. Rochester Railway Company, 182 N. Y. 99, 70 L. R. A. 773, 74 N. E. 953 [1905]; Genet v. City of Brooklyn, 99 N. Y. 296, 1 N. E. 777 [1885]; In the Matter of the Application of Van Antwerp to Vacate an Assessment, 56 N. Y. 261 [1874]; Brewster v. City of Syracuse, 19 N. Y. 116 [1859]; People ex rel. Griffin v. Mayor, etc., of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; Astor v. Mayor, Aldermen and Commonalty of the City of New York, 37 N. Y. Sup. Ct. Rep. 539 [1874]; Moran v. City of Troy, 9 Hun. 540 [1877]; In the Matter of the Report of the Commissioners of Assessment for Grading, Paving, etc., Sackett Street in the City of Brooklyn, 4 Hun. 92 [1875]; Ireland v. City of Rochester, 51 Barb. 414 [1868]; Litchfield v. McComber, 42 Barb. 288 [1864]; City of Wilmington v. Yopp, 71 N. C. 76 [1874]; Jones v. Holzapfel, 11 Okla. 405, 68 Pac. 511 [1902]; Cincinnati, Lebanon & Northern Ry. Co. v. City of Cincinnati, 62 O. S. 465, 49 L. RR. A. 566,

57 N. E. 229 [1900]; Northern Indiana Railway Company v. Connelly, 10 O. S. 160 [1859]; Foster v. Commissioners of Wood County, 9 O. S. 540 [1859]; Ernst v. Kunkle, 5 O. S. 521 [1856]; Hill v. Higdon, 5 O. S. 243; 67 Am. Dec. 289 [1855]; Seovill v. City of Cleveland, 1 O. S. 126 [1853]; King v. Portland, 38 Ore. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]; Pittsburgh v. Sterrett, Sub-district School, 204 Pa. St. 635, 61 L. R. A. 183, 54 Atl. 463 [1903]; Scranton v. Jermyn, 156 Pa. 107, 27 Atl. 66 [1893]; Vacation of Howard St., Philadelphia, 142 Pa. St. 601, 21 Atl. 974 [1891]; *In re Vacation of Centre Street*, 115 Pa. St. 247, 8 Atl. 56 [1886]; Wolf v. City of Philadelphia, 105 Pa. St. 25 [1884]; Gault's Appeal, 33 Pa. St. (9 Casey), 94 [1859]; Olyphant Borough to use, v. Egreski, 29 Pa. Super. Ct. 116 [1905]; McMasters v. Commonwealth 3 Watts 292 [1834]; Cleveland v. Tripp, 13 R. I. 50 [1880]; Reelfoot Lake Levee District v. Dawson, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041 [1896]; Taylor, McBean & Co. v. Chandler, 9 Heisk. (56 Tenn.) 349 [1872]; *sub nomine* McBean v. Chandler, 24 Am. Rep. 308 [1872]; Allen v. Drew, 44 Vt. 174 [1872]; City of Norfolk v. Young, 97 Va. 728, 47 L. R. A. 574, 34 S. E. 886 [1900]; Blount v. City of Janesville, 31 Wis. 648 [1872]; Weeks v. City of Milwaukee, 10 Wis. 242 [1860]; Soens v. City of Racine, 10 Wis. 271 [1860].

² See § 780 *et seq.*

³ Bacas v. Adler, 112 La. 806, 36 So. 739 [1904].

§ 90. Assessment referred to legislative power.

In one jurisdiction it was once held that the power of taxation was too narrow and restricted to include the power of local assessment, and accordingly the suggestion was made that the exercise of the power of special assessment was to be referred to the legislative power, a power broader than that of taxation and including the latter within it.¹ However, this suggestion was made in part in order to enable the court to explain, in a manner satisfactory to itself, the reason for holding that the provision of the constitution,² which provides that private property shall be inviolate though subservient to the public welfare, and that if taken for public use compensation shall be made in money, which compensation shall be assessed by a jury without deduction for benefits to any property of the owner, was not a restriction on the power of levying assessments. From this theory of assessment was deduced the principle that if land was appropriated by eminent domain, as for opening a street, the cost of such appropriation might be assessed upon the property benefited thereby,³ even if such property is the residuum out of which a part has been thus appropriated.⁴ With reference to this reason for referring the power of special assessment to the legislative rather than to the taxing power two suggestions may be made. First, as pointed out by this court⁵ and as held by the great weight of authority,⁶ these constitutional provisions regulate the right of eminent domain and have nothing to do with taxation, properly speaking. The true objection to assessing where no benefits exist is that it is taking property without due process of law.⁷ To assign as the reason for this objection that it is taking private property without compensation is to confound eminent domain with taxation. Second, this court has overruled these earlier cases and now holds that this section

¹ Sessions v. Crunkilton, 20 O. S. 349 [1870]; Reeves v. Treasurer of Wood County, 8 O. S. 333 [1858]; Hill v. Higdon, 5 O. S. 243, 67 Am. Dec. 289 [1855].

² Art I § 19 Constitution of Ohio 1851.

³ Henkel v. City of Cincinnati, 58 O. S. 726 [1898]; (No opinion.) Cincinnati v. Batsche, 52 O. S. 324, 27 L. R. A. 536, 40 N. E. 21 [1895];

Caldwell v. Village of Carthage, 49 O. S. 334, 31 N. E. 602 [1892]; Krumberg v. City of Cincinnati, 29 O. S. 69 [1875].

⁴ City of Cleveland v. Wick, 18 O. S. 303 [1868].

⁵ Hill v. Higdon, 5 O. S. 243, 245, 246, 67 Am. Dec. 289 [1855].

⁶ See §§ 110, 118.

⁷ See §§ 110, 118.

of the constitution⁸ restricts the power of levying assessments;⁹ and that as a corollary assessments cannot be levied to pay for the expense of appropriating land by eminent domain whether such assessment is levied upon the residuum of the realty left after appropriating a part thereof¹⁰ or upon other realty.¹¹ The remaining reason for attributing the power of assessment to the legislative power rather than to the narrower power of taxation was that it also enabled the court to explain in a manner satisfactory to itself, the reason for holding that the provision requiring real and personal property to be taxed according to its true value in money¹² did not apply to special assessments.¹³ But the same result is reached in states which hold that the power of assessment is to be referred to the taxing power, by holding that an assessment, though a tax in its essential nature, is not a tax within the meaning of such constitutional provisions.¹⁴ It follows that of the reasons for holding assessment to be a branch of the taxing power, one has since been discarded in the jurisdiction in which that doctrine was suggested, while the other is very generally assumed to be insufficient. The act of a city council in establishing a sewer district and determining its boundaries has been said in another jurisdiction to be the exercise of a legislative power having its origin in the taxing power.¹⁵

§ 91. Assessment referred to judicial power.

Occasionally we find that the assessment involving, as it often does, the determination of questions of fact as to the existence and amount of special benefits is referred to the judicial power. The act of a city in ordering an original improvement in the exercise of a legislative power having its origin in the taxing therefor, has been said to be a judicial act.¹ This view wa

⁸ Art. I § 19.

⁹ *City of Dayton v. Bauman*, 66 O. S. 379, 64 N. E. 433 [1902]; *Cincinnati, Lebanon & Northern Ry. Co. v. City of Cincinnati*, 62 O. S. 465, 49 L. R. A. 566, 57 N. E. 229 [1900];

¹⁰ *Cincinnati, Lebanon & Northern Ry. Co. v. City of Cincinnati*, 62 O. S. 465, 49 L. R. A. 566, 57 N. E. 229 [1900].

¹¹ *City of Dayton v. Bauman*, 66 O. S. 379, 64 N. E. 433 [1902].

Art. XII § 2 Constitution of Ohio 1851.

¹² *Hill v. Higdon*, 5 O. S. 243, 67 Am. Dec. 289 [1855].

¹³ See § 147 *et seq.*

¹⁴ *Wolff v. City of Denver*, 20 Colo. App. 135, 77 Pac. 364 [1904].

¹ *Treasurer of the City of Camden v. Mulford*, 26 N. J. L. (2 Dutch.) 49 [1856].

taken in this case, however, in order to justify the review of assessment proceedings by the writ of certiorari, a remedy which is given in many jurisdictions,² even though assessments are regarded as an exercise of the legislative power rather than of the judicial power.

§ 92. Assessments based on benefits not referable to police power.

The courts have often been urged to regard special assessments as based upon, and as a special form of exercise of, the police power. This suggestion is generally made where assessments are involved which exceed the amount of benefit conferred upon the realty upon which the assessments are levied or where the apportionment of the assessment is such as to ignore the question of special benefits. In order to determine whether assessments may properly be referred to the police power it is necessary to consider, first the nature of the police power itself, and second the nature of the improvement for which the specific assessment in question in each case is levied. The police power is that indefinite and possibly indeterminate power which the state exercises in securing the protection of property and the protection of life, limb, body, comfort and well-being of persons.¹ "The police power is incapable of exact definition and of a precise limitation. It seems to be a power to which are referred all governmental acts which are incapable of arrangement under any other distinct head, and which are at the same time justifiable, as internal regulations having in view facility of intercourse between citizen and citizen, the preservation of good order, good manners and morals, and the health of the public. When a duty is imposed, under this power, on a property-holder, no attention is paid to the fact that its performance will confer any exceptive benefit on his property, as in cases of local assessments. On the contrary, this power justifies the exaction from him of that which will lessen the value of his estate by depriving him of what would, under other circumstances, be a lawful use and enjoyment of his property: as where it prevents his carrying on a lawful business in his house, situated in a crowded district

² See § 1393 *et seq.*

¹ *Stone v. Mississippi*, 101 U. S. 814, 25 L. 1079 [1879]; *Ingram v. Colgan*, 106 Cal. 113, 46 Am. St. Rep. 221, 28 L. R. A. 187, 38 Pac. 315, 39

Pac. 437 [1895]; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451 [1879]; *City of Helena v. Kent*, 32 Mont. 279, 80 Pac. 258 [1905].

because such business is, under the peculiar circumstances, a nuisance; and also where it prevents the erection on his property of a house of wood or other inflammable material, as a precaution against fire. Under this power is imposed on the owner of urban property the duty of keeping his grounds and vaults clean, and the removal of all causes for the generation or spread of disease. This power, as to active duties required under it, has usually been confined to acts to be performed on property in the use and occupancy of the party upon whom they are imposed, and such imposition has been on account of the relation which the person from whom the requisition is made bears to the property, with reference to which the duty is to be performed."² It is a power of which it is said that "it is known when and where it begins, but not when and where it terminates."³ Further, as has already been stated,⁴ special assessments are for some purposes at least to be divided into three broad classes. Considering now the first class of assessments, that is, those which are levied upon property especially benefited by a local improvement of a public character, upon the basis of the benefits conferred by such improvements, it is to be noted that by the great weight of authority the courts have held that such assessments cannot be referred to the police power.⁵

§ 93. Assessments for legal duty referred to police power.

On the other hand the attempt is made occasionally to construe improvements for the benefit of the public at large, to assess the

² *Town of Macon v. Patty*, 57 Miss. 378, 407, 34 Am. Rep. 451, 473, 474 [1879].

³ *Champer v. City of Greencastle*, 138 Ind. 339, 351, 46 Am. St. Rep. 390, 24 L. R. A. 768, 35 N. E. 14 [1894].

⁴ See § 4 *et seq.*

⁵ *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889]; (Not affected on this point by *City of Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041 [1892] which overrules the greater part of the doctrine of *Wilson v. Chilcott*.) *City of Ottawa v. Spencer*, 40 Ill. 211 [1866]; *White v. Gove*, 183 Mass. 333, 67 N.

E. 359 [1903]; *Motz v. City of Detroit*, 18 Mich. 494 [1869]; *State, Kirkpatrick, Pros. v. Commissioners of Streets and Sewers in the City of New Brunswick*, 42 N. J. L. (13 Vr.) 510 [1880]; following *State, Agens, Pros. v. Mayor and Common Council of Newark*, 37 N. J. L. (8 Vr.) 415 [1874]; *Lathrop v. City of Racine*, 119 Wis. 461, 97 N. W. 192 [1903]; The power of assessment for sewers is said to be a legislative power exercised for police purposes and having its origin in the taxing power in *Wolff v. City of Denver*, 20 Colo. App. 135, 77 Pac. 364 [1904].

cost of such improvements upon adjoining property without regard to the question of special local benefits, and then, since such an assessment cannot be upheld as a tax, to justify it under the theory of the police power. Whether such attempt is successful or not depends upon the question whether it is the duty of the adjoining land-owners to construct such improvement in order to keep their property in such condition as will not endanger the public welfare. Assessments of the second class; that is, charges levied upon property to reimburse the public for the cost of doing certain things with reference to such property which it is the legal duty of the owner to do, but which he has omitted or refused to do, are on the other hand, according to many authorities, to be referred to the police power.¹

¹ *Northern Pacific Ry. v. Duluth*, 208 U. S. 583 [1908]; (*Affirming State ex rel. City of Duluth v. Northern Pacific Ry. Co.*, 98 Minn. 429, 108 N. W. 269); *James v. Pine Bluff*, 49 Ark. 199, 4 S. W. 760 [1887]; *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825 [1887]; *Chicago, Indianapolis & Louisville Railway Company v. City of Crawfordsville*, 164 Ind. 70, 72 N. E. 1025 [1904]; *Mayor and Board of Trustees of the Town of New Iberia v. Fontelieu*, 108 La. 460, 32 So. 369 [1901]; *Nugent v. City of Jackson*, 72 Miss. 1040, 18 So. 493 [1895]; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451 [1879]; *Harbach v. City of Omaha*, 54 Neb. 83, 74 N. W. 434 [1898]; *Van Wagoner, Pros. v. Mayor and Aldermen of the City of Paterson*, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902]; *State, Brittin, Pros. v. Blake*, 36 N. J. L. (7 Vr.) 442 [1872]; *Taylor v. Crawford*, 72 O. S. 560, 69 L. R. A. 805, 74 N. E. 1065 [1905]; (*reversing Crawford v. Taylor*, 27 Ohio C. C. 245 [1905]); *Wilmington v. Yopp*, 71 N. C. 76; *Village of St. Marys v. Lake Erie and Western Railroad Company*, 60 O. S. 136, 53 N. E. 795 [1899]; *Cincinnati, Hamilton & Dayton R. R. Co. v. Village of Bowling Green, Ohio*, 57

O. S. 336, 41 L. R. A. 422, 49 N. E. 121 [1897]; *Cincinnati, Hamilton & Dayton Railroad Company v. Sullivan*, 32 O. S. 152 [1877]; *Sessions v. Crunkilton*, 20 O. S. 349 [1870]; *Bliss v. Kraus*, 16 O. S. 54 [1864]; *Meanor v. Goldsmith*, 216 Pa. 489, 10 L. R. A. (N. S.) 342, 65 Atl. 1084 [1907]; *Philadelphia v. Pennsylvania Hospital*, 143 Pa. St. 367, 22 Atl. 744 [1891]; *Wilkinsburg Bor. v. Home for Aged Women*, 131 Pa. St. 109, 6 L. R. A. 531, 18 Atl. 937 [1890]; *Charleston v. Werner*, 38 S. C. 488, 37 Am. St. Rep. 776, 17 S. E. 33 [1892]; *Mayor and Aldermen vs. Maberry*, 25 Tenn. (6 Hump.) 368, 44 Am. Dec. 315 [1845]; *Whyte v. Mayor and Aldermen of Nashville*, 2 Swan (32 Tenn.) 364 [1852]; *Washington v. Mayor and Aldermen of Nashville*, 1 Swan (31 Tenn.) 177 [1851]; *Lentz v. City of Dallas*, 96 Tex. 258, 72 S. W. 59 [1903]; *Adams v. Fisher*, 63 Tex. 651 [1885]; *Lisbon Avenue Land Co. v. Town of Lake*. — Wis. —, 113 N. W. 1099 [1907]; *Town of Muskego v. Drainage Commissioners*, 78 Wis. 40, 47 N. W. 11 [1890]; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947 [1889]; *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545 [1887].

The result of so referring the power of levying these assessments to the police power is to free the legislature in levying them from many of the constitutional restrictions as to the nature and purpose of the improvement, the apportionment of the assessment and the like.² If a legal duty rests upon the owner, such a charge is not a violation of the clause which forbids the taking of property without due process of law, nor is it the impairment of the obligation of a contract.³

§ 94. Classification of specific types of improvement.

The practical difficulty in determining what assessments are to be referred to the police power and what are to be referred to the taxing power, still remains. The same type of improvement may be placed by the courts of one jurisdiction under the police power and by the courts of another jurisdiction under the taxing power. Indeed in the same jurisdictions an improvement of a given type may be placed under the police power at one time and under the taxing power at another.¹ Accordingly it is necessary to consider some of the different types of improvement in detail.

§ 95. Streets.

According to the weight of authority assessments for street improvements¹ including the construction of gutters,² cannot

² "We must not, therefore, confound an exercise of the police power with the nice distinctions which belong to the doctrine of taxation for local improvements." *Charleston v. Werner*, 38 S. C. 488, 493, 37 Am. St. Rep. 776, 17 S. E. 33 [1892].

³ *Northern Pacific Ry. v. Duluth*, 208 U. S. 583 [1908]; (Affirming *State ex rel. City of Duluth v. Northern Pacific Ry. Co.*, 98 Minn. 429, 108 N. W. 269.)

¹ Thus compare the different Colorado cases upon the subject of sidewalks, and the different South Carolina cases. See §§ 44, 93, 95, 96, 323.

² *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889]; *Motz v. City of Detroit*, 18 Mich. 494 [1869]; *Nugent v. City of Jackson*, 72 Miss. 1040, 18

So. 493 [1895]; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451 [1879]; *State, Kirkpatrick, Pros. v. Commissioners of Streets and Sewers in the City of New Brunswick*, 42 N. J. L. (13 Vr.) 510 [1880].

² *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889]; *State, Kirkpatrick, Pros. v. Commissioners of Streets and Sewers in the City of New Brunswick*, 42 N. J. L. (13 Vr.) 510 [1880]. Whether curb-stones are considered as part of the street and therefore not referable to the police power, as in *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889], or as part of the sidewalk and therefore referable to the police power if the construction of the sidewalk is so referable as in *State, Kirkpatrick, Pros. v. Commissioners of Streets and*

be referred to the police power; and therefore they cannot be sustained at all unless as under the taxing power. In some of these cases the distinction is made between assessments for street improvements proper which are said not to be referable to the police power, and those for the construction of sidewalks which are said to be referable to the police power.³ On the other hand there is some authority, in obiter at least, for saying that the same police power which would authorize a local assessment for a sidewalk, would also authorize one for a street.⁴ So it seems to have been held that an assessment for the repair of roads is based upon the police power.⁵ The right to charge a street railway company for the expense of paving between the rails is said to rest upon the taxing power,⁶ though it has been observed that the same result would be reached in these cases if such right were referred to the police power.⁷

§ 96. Sidewalks.

As has already been intimated, assessments for the construction of sidewalks are very generally referred to the 'police power.'¹

Sewers in the City of New Brunswick, 42 N. J. L. (13 Vr.) 510 [1880], is a question upon which the authorities are in conflict.

³ *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889]; *Nugent v. City of Jackson*, 72 Miss. 1040, 18 So. 493 [1895]; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451 [1879]; *State, Kirkpatrick, Pros. v. Commissioners of Streets and Sewers in the City of New Brunswick*, 42 N. J. L. (13 Vr.) 510 [1880]; *State, Agens, Pros. v. Mayor and Common Council of Newark*, 37 N. J. L. (8 Vr.) 415, 18 Am. Rep. 729 [1874]; *State, Sigler, Pros. v. Fuller*, 34 N. J. L. (5 Vr.) 227 [1870]; *Mauldin v. City Council of Greenville*, 42 S. C. 293, 46 Am. St. Rep. 723, 27 L. R. A. 284, 20 S. E. 842 [1893].

⁴ *Adams v. Fisher*, 63 Tex. 651 [1885].

⁵ *Barrow v. Hepler*, 34 La. Ann 362 [1882].

⁶ *City of Worcester v. Worcester Consolidated Street Railway Com-*

pany, 196 U. S. 539 [1904]; *Sioux City Street Railway Company v. Sioux City*, 138 U. S. 98, 34 L. 898 [1891]; *City of Rochester v. Rochester Railway Company*, 182 N. Y. 99, 70 L. R. A. 773, 74 N. E. 953 [1905].

⁷ *City of Rochester v. Rochester Railway Company*, 182 N. Y. 99, 70 L. R. A. 773, 74 N. E. 953 [1905].

¹ *James v. Pine Bluff*, 49 Ark. 199, 4 S. W. 760 [1887]; *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889]; *Speer v. Mayor and Council of Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890]; *Mayor and Board of Trustees of the Town of New Iberia v. Fontelieu*, 108 La. 460, 32 So. 364 [1901]; *Nugent v. City of Jackson*, 72 Miss. 1040, 18 So. 493 [1895]; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451 [1879]; *City of Lincoln v. Janesch*, 63 Neb. 707, 93 Am. St. Rep. 478, 56 L. R. A. 762, 89 N. W. 280 [1902]; *State, Kirkpatrick, Pros. v. Commissioners of Streets and Sewers in the*

A charter provision authorizing a town to require the owner of land to construct a sidewalk in front of his house, and if he should fail to do so on demand, to construct the same and charge him with the expense thereof is said to be a "mere police regulation,"² even in jurisdictions where assessments for street improvements other than the sidewalks cannot be so referred.³ There is, on the other hand, some authority for holding that assessments for the construction of sidewalks are not referable to the police power.⁴ Without determining whether assessments for the construction of sidewalks might not be referred to the police power, it has been held that assessments for such purposes, if based on the theory of benefits, may be referred to the power of taxation.⁵ In West Virginia it has been said to be immaterial whether the power of the state in relation to sidewalks should be classified as an exercise of the police power or of the taxing power, but the court said that it was inclined to treat it as an exercise of the police power and hold that it

City of New Brunswick, 42 N. J. L. (13 Vr.) 510 [1880]; State, Sigler. Pros. v. Fuller, 34 N. J. L. (5 Vr.) 227 [1870]; Wilmington v. Yopp, 71 N. C. 76; Meador v. Goldsmith, 216 Pa. St. 489, 10 L. R. A. (N. S.) 342, 65 Atl. 1084 [1907]; Philadelphia v. Pennsylvania Hospital, 143 Pa. St. 367, 22 Atl. 744 [1891]; Wilkinsburg Bor. Home for Aged Women, 131 Pa. St. 109, 18 Atl. 937 [1890]; *sub nomine* Home for Aged Protestant Women vs. Borough of Wilkinsburg, 6 L. R. A. 531; Mauldin v. City Council of Greenville, 42 S. C. 293, 46 Am. St. Rep. 723, 27 L. R. A. 284, 20 S. E. 842 [1893]; Taylor, McBean & Co. v. Chandler, 9 Heisk. (56 Tenn.) 349 [1872]; *sub nomine* McBean vs. Chandler, 24 Am. Rep. 308; Mayor and Aldermen v. Maberry, 6 Hump. (25 Tenn.) 368, 44 Am. Dec. 315 [1845]; Washington v. Mayor and Aldermen of Nashville, 1 Swan (31 Tenn.) 177 [1851]; Whyte v. Mayor and Aldermen of Nashville, 32 Tenn. (2 Swan.) 364 [1852]; Mayor and City Council of Nashville v. Berry, 2 Shannon's Tenn. Cases 561 [1877]; Lentz v. City of

Dallas, 96 Tex. 258, 72 S. W. 59 [1903]; Lisbon Avenue Land Co. v. Town of Lake, — Wis. —, 113 N. W. 1099 [1907].

² *Inhabitants of Palmyra v. Morton*, 25 Mo. 593 [1857].

³ See § 95.

⁴ *Tripp v. City of Yankton*, 10 S. D. 516, 74 N. W. 447 [1898]; "A sidewalk is a portion of a public highway, appropriated it is true to pedestrians alone, but still open and free to all persons desiring to use and enjoy it as a public highway. It is as much a public highway in the mode of its use as the street itself. The difference in the manner of their use does not render one more public than the other. They are both free to be properly used and enjoyed by the entire public and are constructed alike for their use." *City of Ottawa v. Spencer*, 40 Ill. 211, 217 [1866].

⁵ *City of Keokuk v. Independent District of Keokuk*, 53 Ia. 352, 36 Am. Rep. 226, 5 N. W. 503 [1880]; *Wilhelm v. City of Defiance*, 58 O. S. 56, 65 Am. St. Rep. 745, 40 L. R. A. 294, 50 N. E. 18 [1898].

"cannot properly be reckoned as a taxing power."⁶ The power of assessing for sidewalks has been referred to the power of taxation even where an apportionment not in proportion to benefits was upheld and the apportionment would have been held to be improper in a regular assessment for benefits.⁷ Such a view is illogical. If such a charge can be imposed without an apportionment on the basis of benefits it cannot be an exercise of the taxing power,⁸ and it can be upheld, if at all, only under the police power.

§ 97. Sewers and drainage.

Assessments for the construction of sewers have been held to be referable to the police power, and accordingly have been upheld under circumstances which an assessment based upon benefits could not be sustained.¹ In other jurisdictions it has been held that assessments for sewers are referable to the power of taxation and not to the police power.² Assessments for the drainage of large tracts of realty have also been referred to the police power,³ as well as assessments for widening, deepening

⁶ *Douglass v. Town of Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548 [1876]; (Citing *Goddard*, Petitioner, 16 Pick. (Mass.) 594 [1835]; *Norfolk City v. Ellis*, 26 Gratt. (67 Va.) 224 [1875].

⁷ *State, Sigler, Pros. v. Fuller*, 34 N. J. L. (5 Vr.) 227 [1870].

⁸ See § 118, Chapter XIII.

¹ *Paulsen v. Portland*, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893], (affirming *Paulson v. City of Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]); *Keece v. City of Denver*, 10 Colo. 112, 15 Pac. 825 [1887]; *Van Wagoner, Pros. v. Mayor and Aldermen of City of Paterson*, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902].

"A sewer is constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will." *Paulsen v. Portland*, 149 U. S. 30, 40, 37 L. 637, 13 S. 750 [1893], (affirming *Paulson v. City of Portland*, 16 Or.

450, 1 L. R. A. 673, 19 Pac. 450 [1888]).

² *In re 127th Street*, 56 How. (N. Y.) 60. Being an exercise of the power of taxation such assessments are subject to the constitutional requirement that they must be "proportional and reasonable." *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903].

³ *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894]; *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222 [1874]; *O'Reilly v. Kankakee Valley Draining Company*, 32 Ind. 169 [1869]; *Lien v. Board of County Commissioners of Norman County*, 89 Minn. 58, 82 N. W. 1094 [1900]; *Horbach v. City of Omaha*, 54 Neb. 83, 74 N. W. 434 [1898]; *State, Brittin, Pros. v. Blake*, 36 N. J. L. (7 Vr.) 442 [1872]; *Taylor v. Crawford*, 72 O. S. 560, 69 L. R. A. 805, 74 N. E. 1065 [1905]; *Sessions v. Crumkilton*, 20 O. S. 349 [1870]; *Bliss v. Krauss*, 16 O. S. 54 [1864].

and straightening the channel of a river as incident to drainage,⁴ and assessments for filling up low ground so as to prevent the accumulation of stagnant water.⁵ The view that drainage assessments are to be referred to the police power has been subject to some criticism, nowever, even from courts which once have expressed the same view. In Wisconsin it has been said drainage assessments were referable to the police power,⁶ and indeed that such assessments could be justified only on the theory of the police power.⁷ A part, at least, of the reasoning of these cases has recently been condemned,⁸ though without necessarily affecting the doctrine of the police power. If the assessment for drainage is not in violation of any constitutional provision it is comparatively immaterial whether it is referred to the taxing power, the power of eminent domain, or the police power.⁹ In some jurisdictions assessments for the construction of levees have been held to be referable to the police power.¹⁰ On the other hand assessments for the construction of levees have in other jurisdictions been held to be referable to the taxing power, and incapable of justification as an exercise of the police power.¹¹

§ 98. Other types of improvement.

Assessments against railway companies for the expense of lighting grade crossing are referable to the police power¹ and have been held to be valid charges upon that theory.² Under this

⁴ *State v. Blake*, 36 N. J. L. (7 Vr.) 442 [1872].

⁵ *Charleston v. Werner*, 38 S. C. 488, 37 Am. St. Rep. 776, 17 S. E. 33 [1892].

⁶ *Town of Muskegon v. Drainage Commissioners*, 78 Wis. 40, 47 N. W. 11 [1890]; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947 [1889]; *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545 [1887].

⁷ *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389 [1883].

⁸ *Rude v. Town of St. Marie*, 121 Wis. 634, 99 N. W. 460 [1904].

⁹ *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707 [1897]; *Carson v. St. Francis Levee District*, 59 Ark. 513,

27 S. W. 590 [1894]; *Lien v. Board of County Commissioners of Norman County*, 80 Minn. 58, 82 N. W. 1094 [1900].

¹⁰ In speaking of a law authorizing an assessment for the construction of a levee, the court said: "the police power of the state is broad enough to authorize the law in question." *Morrison v. Morey*, 146 Mo. 543, 562, 48 S. W. 629 [1898].

¹¹ *Reelfoot Lake Levee District v. Dawson*, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041 [1896].

¹ *Cincinnati, Hamilton & Dayton Railroad Company v. Sullivan*, 32 O. S. 152 [1877]. See § 59.

² *Chicago, Indianapolis & Louisville Railway Company v. City of Crawfordsville*, 164 Ind. 70, 72 N. E. 1025

theory the cost of constructing a viaduct may be imposed upon a railway company.³ The expense of cleaning and sprinkling streets⁴ and of removing ice and snow from sidewalks⁵ is to be charged upon the owner of the abutting property upon the theory of the police power in jurisdictions where such charges can be imposed upon the owners of abutting property at all. In some jurisdictions it is held that such assessments cannot be upheld upon any theory.⁶ The construction of public docks at the expense of the owner of abutting property cannot be upheld as justified by the police power. An assessment was made for building a public dock upon the land of a private owner, who had refused to build such dock when ordered. The city then built such dock and levied an assessment upon such land-owner for the cost thereof. It was held that such assessment could not be justified as an exercise of the police power.⁷ A charge for laying waterpipes so that land can receive water thereby, cannot be upheld under the police power. So a tax was levied upon each lot or parcel of ground having a building upon it, which abutted on any street through which water supply pipes were laid and which could be conveniently supplied with water therefrom. The tax, amounting to two dollars and fifty cents per annum, and the cost of the water actually consumed upon said premises was made a personal liability of the owner of such premises. It was conceded by the village that such charge was not a local assessment, based upon benefits, but it was sought to justify it under the police power. The Supreme Court of Illinois held that such a charge could not be justified under the theory of the police power and hence that such charge was invalid.⁸

§ 99. Attempt to base assessments on power of eminent domain.

Occasionally courts have been urged to place the power of assessment upon the basis of eminent domain rather than of taxa-

[1904]; *Village of St. Marys v. Lake Erie & Western Railroad Company*, 60 O. S. 136, 53 N. E. 795 [1899]; *Cincinnati, Hamilton & Dayton R. R. Co. v. Village of Bowling Green, Ohio*, 57 O. S. 336, 41 L. R. A. 422, 49 N. E. 121 [1897].

³ *Northern Pacific Ry. v. Duluth*, 208 U. S. 583 [1908]. (affirming *State ex rel. City of Duluth v. North-*

ern Pacific Ry. Co., 98 Minn. 429, 108 N. W. 269). See § 359.

⁴ See § 370.

⁵ See §§ 58, 371.

⁶ See §§ 370, 371.

⁷ *Lathrop v. City of Racine*, 119 Wis. 461, 97 N. W. 192 [1903].

⁸ *Village of Lemont v. Jenks*, 197 Ill. 363, 90 Am. St. Rep. 172, 64 N. E. 362 [1902].

tion. Such attempt is usually made, it may be added, not in order to find a ground for justifying assessment, but rather in order to restrict the exercise of the power by applying the constitutional provision that property cannot be taken for public use without making compensation. This power undoubtedly limits eminent domain and by the great weight of authority has no application to taxation; and accordingly unless assessment is a branch of eminent domain it is not restricted by such provision.¹ Special assessment, as based on benefits, is essentially an exaction from an individual or a charge upon property, upon the theory that it is, under the circumstances of the case, a fair contribution to the expense of a public improvement in return for the peculiar benefits received therefrom. Payment of such assessment does not leave the public indebted to the property owner for the amount thereof. The sole duty it owes by reason of such assessment is to make proper application of the fund thus created. Under eminent domain, on the other hand, property is taken, not as the fair proportion of public burdens due from the owner, but as something in addition to and beyond his share. What is taken from him is measured not by fair proportion, but by the needs of the public. The taking leaves the public indebted to the owner unless compensation is made in advance.² Another purpose in the attempt to base the right of

¹ For discussion of this specific question see §§ 109-113.

² One of the leading cases which holds that assessment is not a branch of the power of eminent domain is *People ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266 [1851], overruling *People ex rel. Post v. Mayor, etc., of Brooklyn*, 6 Barb. (N. Y.) 209 [1849]. In this case the essential distinction between the power of special assessment as based on benefits and the power of eminent domain is stated in language often quoted in subsequent decisions.

"Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for any public use, by right of eminent domain, is taken, not as

the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community, and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals. *People ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 424, 55 Am. Dec. 266 [1851].

special assessment upon the power of eminent domain is to insist upon having the question of the amount of benefits and the apportionment thereof passed upon by a jury. In most jurisdictions there is a constitutional provision securing the right to a jury in determining compensation in eminent domain. Under the taxing power on the other hand there is ordinarily no constitutional right to have the amount or the apportionment of the tax passed upon by a jury.

§ 100. Assessment not based on power of eminent domain.

In determining this question, in whatever way it has arisen, the courts have held that the power of special assessment, as far at least as it is based on the theory of special benefits, is not a branch of the power of eminent domain nor is it to be referred thereto.¹

¹ *Hornung v. McCarthy*, 126 Cal. 17, 58 Pac. 303 [1899]; *Chambers v. Satterlee*, 40 Cal. 497 [1871]; *Emery v. San Francisco Gas Company*, 28 Cal. 346 [1865]; *Nichols v. City of Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636 [1854]; *Speer v. Mayor and Council of Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890]; *Hayden v. City of Atlanta*, 70 Ga. 817 [1883]; *Chicago & Northwestern Railway Company v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437 [1897]; *Chicago & Alton Railroad Company v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077 [1894]; *White v. People ex rel. City of Bloomington*, 94 Ill. 604 [1880]; *New York C. & St. Louis Ry. Co. v. City of Hammond*, — Ind. —, 83 N. E. 244 [1908]; *Chicago, Rock Island & Pacific Railway Company v. City of Ottumwa*, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900]; *Hackworth v. City of Ottumwa*, 114 Ia. 467, 87 N. W. 424 [1901]; *Howell v. Bristol*, 71 Ky. (8 Bush.) 493 [1871]; *Bradley v. McAtee*, 70 Ky. (7 Bush.) 667 [1870]; *City of Lexington v. McQuillan's Heirs*, 39 Ky. (9 Dana) 513, 35 Am. Dec. 159 [1839]; *Sutton's Heirs v. City of Louisville*, 5 Dana (35 Ky.) 28

[1837]; *Barber Asphalt Paving Company v. Gogreve*, 41 La. Ann. 251, 5 So. 848 [1889]; *Excelsior Planting & Manufacturing Co. v. Green*, 39 La. Ann. 455, 1 So. 873 [1887]; *Mayor and City Council of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1 [1880]; *Brooks v. Mayor and City Council of Baltimore*, 48 Md. 265 [1877]; *Groff v. Mayor, Aldermen and Common Council of Frederick City*, 44 Md. 67 [1875]; *Moale v. Mayor and City Council of Baltimore*, 5 Md. 314, 61 Am. Dec. 276 [1854]; *Jones v. Board of Aldermen of City of Boston*, 104 Mass. 461 [1870]; *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091 [1897]; *Woodbridge v. City of Detroit*, 8 Mich. 274 [1860]; *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853]; *Stinson v. Smith*, 8 Minn. 366, 8 Gil. 326 [1863]; *McComb v. Bell*, 2 Minn. 295, 2 Gil. 256 [1858]; *Heiman v. Schulte*, 166 Mo. 409, 66 S. W. 163 [1902]; *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600 [1896]; *Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683 [1889]; *Inhabitants of Palmyra v. Morton*, 25 Mo. 593 [1857]; *City of Springfield to use of Tuttle v. Baker*, 56 Mo. App. 637 [1894]; *J. & A. McKechnie Brewing Company v.*

§ 101. Theory that assessment is referable to power of eminent domain.

The proposition that the power of special assessment is not referable to the power of eminent domain has not, however, been free from question. Cases are not wanting in which, in obiter at least, it is suggested that this power is, or may be, referable to the power of eminent domain. In California it has been suggested that it may be referable to the power of eminent domain,¹ but this suggestion is made solely for the purpose of showing that even if special assessment is a branch of eminent domain, the assessment cannot be a personal liability, but must be restricted to a lien upon the property against which it is assessed.² In Illinois the Supreme Court in its earlier decisions seemed to hold that the power of local assessment might possibly be referred to the right of eminent domain.³ In these cases, however, the actual holding was not necessarily based upon this proposition. The real point in question was the validity of special assessments upon the basis of frontage; and the actual holding was that under the Constitution of 1848 such assessments were invalid, since if referable to the taxing power they lacked the uniformity required by the constitution and if referable to the power of eminent domain, no provision for adequate compensation was made.⁴ In New Jersey it was once suggested that

Trustees of Village of Canandaigua, 162 N. Y. 631, 57 N. E. 1113 [1900], (affirming *J. & A. McKechnie Brewing Company v. Trustees of the Village of Canandaigua*, 15 App. Div. 139, 44 N. Y. Supp. 317 [1897]); *People ex rel. Crowell v. Lawrence*, 41 N. Y. 137 [1869]; *Litchfield v. Vernon*, 41 N. Y. 123 [1869]; *Howell v. City of Buffalo*, 37 N. Y. 267 [1867]; *Brewster v. City of Syracuse*, 19 N. Y. 116 [1859]; *Striker v. Kelly*, 7 Hill (N. Y.) 9 [1844]; *Hilliard v. City of Asheville*, 118 N. C. 845, 24 S. E. 738 [1896]; *City of Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; *Maloy v. City of Marietta*, 11 O. S. 636 [1860]; *Seavill v. City of Cleveland*, 1 O. S. 126 [1853]; *Kine v. City of Portland*, 2 Or. 146 [1865]; *In re Vacation of Center Street*, 115 Pa. St. 247, 8 Atl. 56 [1886]; Wash-

ington Avenue, 69 Pa. St. (19 P. F. Smith) 352, 8 Am. Rep. 255 [1871]; *Stroud v. City of Philadelphia*, 61 Pa. St. 255 [1869]; In the matter of *Dorrance Street*, 4 R. I. 230 [1856]; *Roundtree v. City of Galveston*, 42 Tex. 612 [1875]; *Allen v. Drew*, 44 Vt. 174 [1872]; *Rude v. Town of St. Marie*, 121 Wis. 634, 99 N. W. 460 [1904].

¹ *Creighton v. Manson*, 27 Cal. 614 [1865].

² See Chapter XX.

³ *Wright v. City of Chicago*, 46 Ill. 44 [1867]; *Bedard v. Hall*, 44 Ill. 91, 92 Am. Dec. 196 [1867]; *City of Chicago v. Baer*, 41 Ill. 306 [1866]; *City of Ottawa v. Spencer*, 40 Ill. 211 [1866]; *City of Chicago v. Larned*, 34 Ill. 203 [1864]; *City of Peoria v. Kidder*, 26 Ill. 351 [1861].

⁴ *City of Chicago v. Larned*, 34 Ill. 203 [1864]. For the effect of the

assessments for drainage might be justified under the theory of eminent domain.⁵ This suggestion was made to justify the theory that such assessments would not necessarily be limited to the amount of the benefits conferred upon the property by reason of the improvement for which the assessment was levied. In an earlier case it had been said that assessments for purposes of drainage were not to be explained as resting either on the power of taxation or on that of eminent domain, but as a "part of the local common law."⁶ In other jurisdictions, also, it has been suggested that the right to levy local assessments for the purpose of drainage is to be referred to the power of eminent domain.⁷ An assessment levied without notice to the property owners affected thereby has been held to be invalid as a taking of private property for public use.⁸ Assessments without notice are usually regarded as unconstitutional because lacking in due process of law.⁹ In a case involving an assessment upon certain towns for contributions for maintaining highways and bridges not within the limits of such towns, it has been said that the power of assessment rested on the power of eminent domain.¹⁰ An assessment for a purpose not public in its char-

special constitutional provision of the constitution of 1870 upon such assessment, see §§ 51, 104.

⁵ In matter of drainage of the Great Meadows on Pequest River, 42 N. J. L. (13 Vr.) 553 [1880], (affirmed without opinion as Hoagland v. State, Simonton, Pros., 43 N. J. L. (14 Vr.) 456 [1881], and affirmed by the Supreme Court of the United States as Wurts v. Hoagland, 111 U. S. 606, 29 L. 229, 5 S. 1086 [1885]).

⁶ Hoagland v. Wurts, 41 N. J. L. (12 Vr.) 175 [1879], (affirming In matter of Commissioners to drain Great Meadows on Pequest River, 39 N. J. L. (10 Vr.) 433 [1877]. It was said to be "quite too late to revert to first principles in order to overthrow a system of procedure which is possessed of such antiquity and has to its credit so many recognitions." Hoagland v. Wurts, 41 N. J. L. [12 Vr.] 175, 180 [1879].

⁷ Cribbs v. Benedict, 64 Ark. 555, 44 S. W. 707 [1897]; Hagar v. Supervisors of Yolo County, 47 Cal. 233; Duke v. O'Bryan, 100 Ky. 710, 39 S. W. 444, 824 [1897]; In matter of Commissioners to drain the Great Meadows on Pequest River, 39 N. J. L. (10 Vr.) 433 [1877]; In the matter of the Application for Drainage of Lands between Lower Chatham and Little Falls, in the Counties of Passaic, Essex and Morris, 35 N. J. L. (6 Vr.) 497 [1872]; In the matter of the Application of Ryers for Audit of Accounts, 72 N. Y. 1, 28 Am. Rep. 88 [1878]; Hartwell v. Armstrong, 19 Barb. (N. Y.) 166 [1854]; Burk v. Ayers, 19 Hun. (N. Y.) 17 [1879].

⁸ City of Logansport v. Shirk, 129 Ind. 352, 28 N. E. 538 [1891].

⁹ See § 119 *et seq.*

¹⁰ Town of Underhill v. Town of Essex, 64 Vt. 28, 23 Atl. 617 [1891].

acter has been said to be a taking of private property for a private use.¹¹ Assessments in excess of benefits have been said to be invalid as being an exercise of the power of eminent domain without making due compensation for the property taken.¹²

§ 102. Confusion of assessment with power of eminent domain.

One excuse for confusing special assessment with eminent domain is to be found in the fact that often the actual taking of property by eminent domain for a public improvement is combined with the exercise of the power of special assessment to pay for such improvement;¹ and accordingly a discussion of the two together is necessarily made. Furthermore, in some cases the validity of the special assessment depends upon the validity of the proceedings in eminent domain.² Furthermore, in many cases the power of special assessment is discussed on the assumption, rather than on the specific holding, that it is a branch of eminent domain. These cases involve the question of the right to levy special assessments in disregard of the question of benefits accruing to the realty assessed by reason of the public improvement to pay for which the assessment is levied. If no benefits exist or if the assessment levied is in excess of the benefits conferred the assessment is according to many authorities not a valid tax. Such taking of property is then objectionable as a taking without due process of law.³ Unfortunately on the assumption that special assessment is a branch of eminent domain, the invalidity of such assessments is placed, in the

¹¹ *Chicago & Erie Railroad Co. v. Feith*, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902].

¹² "There is a line at which the right of taxation, which subjects the individual to his share of the public burdens ceases, and the right of eminent domain which subjects him to more than his share, begins to operate. It is not requisite now to attempt to define that line, or to anticipate cases in which the question will have to be met and settled whether officers of municipal corporations, under legislative authority,

may so exercise the taxing power of the Commonwealth as to work the financial ruin of the owners of lands within their boundaries." *In re Opening of Park Avenue*, 83 Pa. St. (2 Morris) 167, 173 [1876].

¹ *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894]; *Gas Light & Coke Company v. City of New Albany*, 158 Ind. 268, 63 N. E. 458 [1901]. See § 63 *et seq.*

² See § 390 *et seq.*

³ See § 118.

line of cases referred to, upon the ground that it is a taking of private property without compensation.⁴

§ 103. Specific grant of power of assessment.

In most of the state constitutions no specific grant is made to the legislature of power to levy special assessments, since it is embraced in the general grant of legislative power, which in turn includes the power of taxation. Special constitutional provisions are, however, occasionally to be found which specifically authorize assessments. Full effect is of course given to these provisions in all cases coming within the scope thereof.¹ The constitution of Arkansas provides, "Nothing in this constitution shall be so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvement;

⁴ For the further discussion of this particular topic see Chapter XIII.

¹ *Ahern v. Board of Improvement District No. 3 of Texarkana*, 69 Ark. 68, 61 S. W. 575 [1901]; *Crane v. Siloam Springs*, 67 Ark. 30, 55 S. W. 955 [1899]; *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894]; *Little Rock v. Katzenstein*, 52 Ark. 107, 12 S. W. 198 [1889]; *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184 [1886]; *City of Little Rock v. Board of Improvements, etc.*, 42 Ark. 152 [1883]; *Givins v. City of Chicago*, 188 Ill. 348, 58 N. E. 912 [1900]; *Chicago & Northwestern Railway Company v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437 [1897]; *Chicago & Alton Railroad Company v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077 [1894]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894]; *McChesney v. Village of Hyde Park*, 151 Ill. 634, 37 N. E. 858 [1894]; *Kuehner v. City of Freeport*, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372 [1893]; *Smith v. People ex rel. Detrick*, 140 Ill. 355, 29 N. E. 676 [1893]; *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761 [1893]; *Wilson v. Board of Trustees of the Sanitary District of Chicago*, 133 Ill. 443, 27 N. E. 203 [1891]; *Wilbur v. City of Spring-*

field, 123 Ill. 395, 14 N. E. 871 [1889]; *Blake v. People for use of Caldwell*, 109 Ill. 504 [1884]; *Dunham v. People ex rel. McCrea*, 96 Ill. 331 [1880]; *White v. People ex rel. City of Bloomington*, 94 Ill. 604 [1880]; *Lake v. City of Decatur*, 91 Ill. 596 [1879]; *Ricketts v. Village of Hyde Park*, 85 Ill. 110 [1877]; *People ex rel. Miller v. Sherman*, 83 Ill. 165 [1876]; *People ex rel. Miller v. Brislin*, 80 Ill. 423 [1875]; *Hines v. City of Leavenworth*, 3 Kan. 180 [1865]; *Excelsior Planting & Manufacturing Company v. Green*, 39 La. Ann. 455, 1 So. 873 [1887]; *McGee v. Board of County Commissioners of Hennepin County*, 84 Minn. 472, 88 N. W. 6 [1901]; *Scott County v. Hinds*, 50 Minn. 204, 52 N. W. 523 [1892]; *State of Minnesota ex rel. Stateler v. Reis*, 38 Minn. 371, 38 N. W. 97 [1888]; *Dowlan v. County of Sibley*, 36 Minn. 430, 31 N. W. 517 [1887]; *City of St. Paul v. Mullen*, 27 Minn. 78, 6 N. W. 424 [1880]; *Rogers v. City of St. Paul*, 22 Minn. 494 [1876]; *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819 [1891]; *State of Nebraska ex rel. Abbott v. Board of County Commissioners of Dodge County*, 8 Neb. 124, 30 Am. Rep. 819 [1879]; *Unford v. City of Omaha*, 4 Neb. 336 [1876]; *Hansen*

in towns and cities, under such regulations as may be prescribed by law to be based upon the consent of a majority in value of the property adjoining the locality to be affected, but such assessments shall be ad valorem and uniform. . . .² Whatever questions may be raised under such a provision there can be no doubt as to the possibility of providing for assessments, within the limits of such constitutional provision which shall be free from constitutional objections.³ A statute which provides for an assessment but does not provide for securing the assent of the property owners is, under such a provision, unconstitutional.⁴ The constitution of Massachusetts provides that the legislature shall have power "to impose and levy proportional and reasonable assessments, rates and taxes."⁵ This provision is regarded as a restriction as well as a grant of power, and under it a statute which authorizes an assessment without a corresponding equivalent in benefits is unconstitutional.⁶ It is this provision which controls in case of such assessments and not the provision,⁷ which forbids taking private property, except by consent of the owner thereof, unless reasonable compensation is made.⁸ On the other hand an assessment which is in proportion

v. Hammer, 15 Wash. 315, 46 Pac. 332 [1896]. And see upon this question Milwaukee Electric Railway & Light Company v. City of Milwaukee, 95 Wis. 42, 69 N. W. 796 [1897]; Dean v. Borchsenius, 30 Wis. 236 [1872].

² Article XIX., § 27, Constitution of Arkansas.

³ Crane v. Siloam Springs, 67 Ark. 30, 55 S. W. 955 [1899]; Little Rock v. Katzenstein, 52 Ark. 107, 12 S. W. 198 [1889].

⁴ Craig v. Board of Improvements of Russellville Water Works Improvement District, 84 Ark. 390, 105 S. W. 867 [1907].

⁵ Part. II., Chap. I, § 1, Art. IV., Constitution of Massachusetts.

⁶ Harwood v. Donovan, 188 Mass. 487, 74 N. E. 914 [1905], (a case in which the plaintiff was not, however, allowed to take advantage of the unconstitutionality of the statute). Edwards v. Brnorton, 184

Mass. 529, 69 N. E. 328 [1904]; Harwood v. Street Commissioners of the City of Boston, 183 Mass. 348, 67 N. E. 362 [1903]; White v. Gove, 183 Mass. 333, 67 N. E. 359 [1903]; Sears v. Street Commissioners of the City of Boston, 180 Mass. 274, 62 N. E. 397 [1902]; Lorden v. Coffey, 178 Mass. 489, 60 N. E. 124 [1901]; Dexter v. City of Boston, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379 [1900]; Lincoln v. Board of Street Commissioners of the City of Boston, 176 Mass. 210, 57 N. E. 356 [1900]; Sears v. Street Commissioners of Boston, 173 Mass. 350, 53 N. E. 876 [1899]; Weed v. Mayor and Aldermen of Boston, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204 [1898].

⁷ Part I. (Bill of Rights), Art. X., Constitution of Massachusetts.

⁸ Weed v. Mayor and Aldermen of Boston, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204 [1898].

to the special benefits conferred and not in excess of the amount of such benefits is not invalidated by this clause of the constitution.⁹

§ 104. Grant held to imply restriction.

The difficult questions raised under such provisions are (1) what assessments are included within the scope of such provisions, and (2) whether such provisions impliedly forbid assessment other than those included in their provisions. The greater number of these specific constitutional provisions authorizing assessments have been adopted because of judicial decisions rendered prior to the adoption of such provisions which either entirely prevented or greatly restricted the power of levying local assessments. Such specific provisions, it may be added, are comparatively few in number because in most states the provisions ordinarily found in constitutions are so construed as to make it possible to levy and apportion assessments in a practicable manner,¹ and it is, as a rule, only in jurisdictions where the construction placed upon the ordinary constitutional provisions is contrary to the weight of authority that such special provisions have been found to be necessary. In Illinois the courts held originally that assessments must be apportioned solely according to benefits, and that apportionment by the front foot was necessarily unconstitutional.² The constitution which was adopted in 1870 contained the following provision: "The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property or otherwise. . . ."³ Under this provision, whatever questions have arisen, there has been no doubt of the validity of statutes, conferring upon the authorities of cities, towns or villages the power to levy

⁹ *Cheney v. City of Beverley*, 188 Mass. 81, 74 N. E. 306 [1905]; *Smith v. Mayor and Aldermen of Worcester*, 182 Mass. 222, 59 L. R. A. 728, 65 N. E. 49 [1902]; *Hall v. Street Commissioners of Boston*, 177 Mass. 434, 59 N. E. 68 [1901]; *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870]; *Dorgan v. City of Boston*, 12 All. (94 Mass.) 223 [1866].

¹ See § 86.

² *City of Chicago v. Baer*, 41 Ill. 306 [1865]; *City of Ottawa v. Spencer*, 40 Ill. 211 [1866]; *City of Chicago v. Larned*, 34 Ill. 203 [1864]. These decisions were rendered under the Constitution of 1848. See §§ 51, 101.

³ Art. IX., § 9, Constitution of Illinois, 1870.

special assessments.⁴ This provision of the constitution of Illinois of 1870 has been regarded not only as granting the power of special assessment as therein set forth, but also as prohibiting the legislature from conferring the power of special assessment in any way other than as therein set forth.⁵ Accordingly it was held that the power of special assessment could not be conferred upon any other corporation than a city, a town, or a village; that is, it could not be conferred upon a drainage district.⁶ To meet this difficulty an amendment was made to the constitution of 1870, which provided: "The general assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes across the lands of others; and provide for the organization of drainage districts and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state by special assessment upon the property benefited thereby." Under this provision the power of the legislature to create special drainage districts and to empower them to levy special assessments cannot be questioned;⁷ and it has been held that the legislature may, under this provision, confer power upon cities and villages to levy assessments

⁴ *City of Chicago v. Brede*, 218 Ill. 528, 75 N. E. 1044 [1905]; *Givins v. City of Chicago*, 188 Ill. 348, 58 N. E. 912 [1900]; *Chicago & Northwestern Railway Company v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437 [1897]; *Chicago & Alton Railway Company v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077 [1894]; *McChesney v. Village of Hyde Park*, 151 Ill. 634, 37 N. E. 858 [1894]; *Kuehner v. City of Freeport*, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372 [1893]; *Willbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889]; *Huston v. Clark*, 112 Ill. 314 [1885]; *Dunham v. People ex rel. McCrea*, 96 Ill. 331 [1880]; *White v. People ex rel. City of Bloomington*, 94 Ill. 604 [1880]; *Lake v. City of Decatur*, 91 Ill. 596 [1879]; *Fagan v. City of*

Chicago, 84 Ill. 227 [1876]; *People ex rel. Miller v. Sherman*, 83 Ill. 165 [1876]; *People ex rel. Miller v. Brislin*, 80 Ill. 423 [1875].

⁵ *Givins v. City of Chicago*, 188 Ill. 348, 58 N. E. 912 [1900].

⁶ *Udike v. Wright*, 81 Ill. 49 [1876].

⁷ *Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District*, 127 Ill. 581, 21 N. E. 206 [1890]; *Samuels v. Drainage Commissioners*, 125 Ill. 536, 17 N. E. 829 [1889]; *Kilgour v. Drainage Commissioners*, 111 Ill. 342 [1885]; *Blake v. People for use of Caldwell*, 109 Ill. 504 [1884]; *Moore v. People ex rel. Lewis*, 106 Ill. 376 [1883], decided under the amendment Article IV., § 31.

for the purpose of drainage.⁸ Under the constitution of Minnesota, which contained the provision, "All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the state,"⁹ it was held that such provision included local assessments under the term 'taxes,' and prevented the legislature from levying assessments on the theory of benefits or apportioning assessments according to the benefits accruing to the property assessed by reason of the improvement for which such assessment was levied, or apportioning the assessments on any basis, but that of a cash valuation.¹⁰ Following this decision the constitution of Minnesota was amended so as to include the further provision, "the legislature may by general law or special act authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements or upon the property to be benefited by such improvements without regard to a cash valuation and in such manner as the legislature may prescribe."¹¹ Under this amendment the power of the legislature to levy assessments for local improvements without reference to the cash valuation of the property upon which such assessment is levied is clearly established.¹² Subsequently some difficulty was experienced in levying assessments for waterpipes,¹³ and accordingly the constitution of Minnesota was further so amended as to include the provision, "And provided, further, that for the purpose of defraying the expenses of laying waterpipes and supplying any city or municipality with water, the legislature may by general or special law authorize any such city or municipality having a population of five thousand or more to levy an annual tax or assessment upon the lineal foot

⁸ *McChesney v. Village of Hyde Park*, 151 Ill. 634, 37 N. E. 858 [1894]; *Village of Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846 [1888].

⁹ Art. IX., § 1, Constitution of Minnesota [1857].

¹⁰ *Stinson v. Smith*, 8 Minn. 366, 8 Gil. 326 [1863].

¹¹ Art. IX., § 1, Constitution of Minnesota as amended in 1869; Laws 1869, Ch. 51.

¹² *McGee v. Board of County Commissioners of Hennepin County*, 84 Minn. 472, 88 N. W. 6 [1901]; *State of Minnesota ex rel. Stateler v. Reis*, 38 Minn. 371, 38 N. W. 97 [1888]; *City of St. Paul v. Mullen*, 27 Minn. 78, 6 N. W. 424 [1880]; *Rogers v. City of St. Paul*, 22 Minn. 494 [1876].

¹³ *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468, 20 Gil. 424 [1874].

of all lands fronting on any water main or water pipe laid by such city or municipality within corporate limits of said city for supplying water to the citizens thereof without regard to the cash value of such property; and to empower such city to collect any such tax assessments or fines or penalties for failure to pay the same or any fine or penalty for any violation of the rules of such city or municipality in regard to the use of water, or for any water rate due for the same. . . .”¹⁴ Under this provision the power of levying assessments for the purpose of constructing water pipes is thoroughly established as far as the state constitution is concerned,¹⁵ though with some doubt as to the validity of such apportionment under the constitution of the United States¹⁶ as construed at one time by the Supreme Court of the United States,¹⁷ a doubt which at one time led the Supreme Court of Minnesota to hold such assessments invalid,¹⁸ but which was subsequently resolved in favor of their validity.¹⁹ In Wisconsin it has been said that the power of assessment existed only by virtue of the express grant of the power of assessment, and could not be sustained under the general grant of the taxing power.²⁰

§ 105. Grant held not to imply restriction.

Where the other provisions of the constitution as construed by the court do not impose any serious restrictions upon local assessments, such provisions as those referred to in this section, are not usually regarded as the source of legislative power concerning assessments; nor are they regarded as restrictions upon legislative power. The constitution of Arkansas provides: “Nothing in this constitution shall be so construed as to prohibit the general assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations

¹⁴ Art. IX., § 1. Constitution of Minnesota, amended 1881.

¹⁵ *State of Minnesota v. Robert P. Lewis Company*, 72 Minn. 87; 75 N. W. 108 [1898]; *sub nomine* Ramsey County v. Robert P. Lewis Company, 42 L. R. A. 639.

¹⁶ Amendment XIV.

¹⁷ *Norwood v. Baker*, 172 U. S. 269. 43 L. 443, 19 S. 187 [1898].

¹⁸ *State v. Robert P. Lewis Com-*

pany, 82 Minn. 390, 85 N. W. 207 [1901]; *sub nomine* Ramsey County v. Robert P. Lewis Company, 53 L. R. A. 421 [1898].

¹⁹ *State v. Robert P. Lewis Company*, 82 Minn. 402, 86 N. W. 611 [1901]; *sub nomine* Ramsey County v. Robert P. Lewis Company, 53 L. R. A. 427.

²⁰ *Weeks v. City of Milwaukee*, 10 Wis. 242 [1860].

as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected; but such assessments shall be *ad valorem* and uniform.”¹ Under this provision it has been held that the legislature may confer the power of local assessment upon some public corporation or quasi corporation other than a city or a town, such as a levee district.² The legislature may, also, under this provision, create an improvement district³ which may embrace the entire area of a city or town.⁴ The constitution of Nebraska contains the provision: “The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of the property benefited.”⁵ There have not been, under the construction placed upon the general provisions of the Nebraska constitution by the courts of that state, any especial restrictions upon the power of levying special assessments. The foregoing provision is not, therefore, regarded in that state as the sole source of the power to levy local assessments, nor is it regarded as preventing the legislature from conferring upon other municipal corporations or public quasi corporations the power of levying special assessments; but on the contrary, such power is held to be embraced in the power of taxation, included in the grant of legislative power, and is not to be restricted by this specific provision.⁶ Accordingly such power may be conferred upon counties.⁷ In this respect

¹ Art. XIX., § 27, Constitution of Arkansas [1874].

² Ritter v. Drainage District No. 1, Poinsett County, 78 Ark. 580, 94 S. W. 711 [1906]; Carson v. St. Francis Levee District, 59 Ark. 513, 27 S. W. 590 [1894]; Davis v. Gaines, 48 Ark. 370, 3 S. W. 184 [1886].

³ City of Little Rock v. Board of Improvements, etc., 42 Ark. 152 [1883].

⁴ Crane v. Siloam Springs, 67 Ark. 30, 55 S. W. 955 [1899].

⁵ Art. IX., § 6, Constitution of Nebraska.

⁶ Darst v. Griffin, 31 Neb. 668, 48 N. W. 819 [1891]; State of Nebraska ex rel. Abbott v. Board of County Commissioners of Dodge County, 8

Neb. 124, 30 Am. Rep. 819 [1879]. As originally expressed the view of the court was that the right of local assessment rested on this clause exclusively. Hurford v. City of Omaha, 4 Neb. 336 [1876].

⁷ Darst v. Griffin, 31 Neb. 668, 48 N. W. 819 [1891]; State of Nebraska ex rel. Abbott v. Board of County Commissioners of Dodge County, 8 Neb. 124, 30 Am. Rep. 819 [1879].

⁸ Updike v. Wright, 81 Ill. 49 [1876]; Board of Directors for Leveeing Wabash River v. Houston, 71 Ill. 318 [1874]; Gage v. Graham, 57 Ill. 144 [1870]; Hesler v. Drainage Commissioners, 53 Ill. 105 [1870]; Harward v. St. Clair & Monroe Levee Drainage Company, 51 Ill. 130 [1869].

the courts of Nebraska differ from those of Illinois.⁸ Under the provision in the constitution of California, the legislature is not limited to the creation of cities and towns as the sole public corporations upon which the power of levying local assessments may be conferred but may create other public corporations, such as irrigation districts,⁹ and confer upon such district the power of special assessment. The constitution of Ohio provides: "The general assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit so as to prevent the abuse of such power."¹⁰ Under this provision local assessments are held to be valid.¹¹ This provision is held on the one hand to show conclusively that local assessment is distinct from the power of general taxation; and on the other hand it is held not to limit the power of the legislature or to restrict its action in conferring the power of special assessment to "cities and incorporated villages."¹² Accordingly, the power of local assessment may be conferred upon township trustees.¹³ The constitution of South Dakota contains the provision, "The legislature may vest the corporate authority of cities, towns and villages with power to make local improvements by special taxation of contiguous property or otherwise."¹⁴ The constitution of Washington provides: "The legislature may vest the corporate authorities of cities, towns and villages with the power to make local improvements by special assessment or by special taxation of property benefited. For all corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."¹⁵ Without any discussion of the question it was at first assumed that under this provision the legislature had power to create

⁸ In the matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675 [1891].

¹⁰ Article XIII., § 6, Constitution of Ohio [1851].

¹¹ Hill v. Hiedon, 5 O. S. 243, 67 Am. Dec. 289 [1855].

¹² Reeves v. Treasurer of Wood County, 8 O. S. 333 [1858].

¹³ Reeves v. Treasurer of Wood County, 8 O. S. 333 [1858].

¹⁴ Art. XI., § 10, Constitution of South Dakota.

¹⁵ Art. VII., § 9, Constitution of Washington.

special taxing districts,¹⁶ such as an irrigation district,¹⁷ a road district,¹⁸ or a district for constructing dikes,¹⁹ and to confer upon such district the power of levying local assessments to pay for such improvements. When the power of the legislature to confer such power upon taxing districts was attacked specifically, it was held that the legislature possessed such power.²⁰ Under this provision it has been held that a drainage statute requiring the commissioners to submit the scheme of drainage to the court, in order that the court may determine whether such scheme is practical, conducive to public welfare and beneficial to the land to be drained; and further requiring damages and benefits to be estimated by a jury, and transcript of such proceedings to be certified to the county auditor who then proceeds to make such assessment, is valid, as it does not confer upon either the court or the jury the power of making such assessments.²¹ So a statute on the subject of assessments for street improvements which allows the city to take the initiative in the question of levying assessments, but provides that the court shall appoint commissioners to make apportionment of such assessment, and that the court shall on objection review such assessment, and shall correct inequalities therein, is held to be valid, as conferring the power to make the assessment upon the city and not upon the court.²²

¹⁶ *Cass v. Dicks*, 14 Wash. 75, 53 Am. St. Rep. 859, 44 Pac. 113 [1896]; *Seanor v. Board of County Commissioners*, 13 Wash. 48, 42 Pac. 552 [1895]; *Board of Directors of Middle Kittitas Irrigation District v. Peterson*, 4 Wash. 147, 29 Pac. 995 [1892].

¹⁷ *Board of Directors of Middle Kittitas Irrigation District v. Peterson*, 4 Wash. 147, 29 Pac. 995 [1892].

¹⁸ *Seanor v. Board of County Commissioners*, 13 Wash. 48, 42 Pac. 552 [1895].

¹⁹ *Cass v. Dicks*, 14 Wash. 75, 53 Am. St. Rep. 859, 44 Pac. 113 [1896].

²⁰ *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332 [1896]. The court follows the holding in Nebraska: *State of Nebraska ex rel. Abbott v. Board of County Commissioners of Dodge County*, 8 Neb. 124, 30 Am. Rep. 819 [1879]. See *ante*, this

section, notes 6, 7 and 8, and declined to follow the holding in Illinois: *Udike v. Wright*, 81 Ill. 49 [1876]. See § 104, pointing out, however, a slight difference in phraseology between the Constitution of Washington on the one hand, and the Constitutions of Illinois and Nebraska on the other: the former providing "For all corporate purposes municipal corporations may be vested with the taxing power;" while the two latter provide in such connection, "For all other corporate purposes."

²¹ *State of Washington on the relation of Matson v. Superior Court for Skagit County*, 42 Wash. 491, 85 Pac. 264 [1906].

²² *In the matter of Westlake Avenue, Seattle*, 40 Wash. 144, 82 Pac. 279 [1905].

§ 106. Provisions requiring legislature to restrict power of assessment.

In many of the state constitutions are to be found provisions, variously worded, to the general effect that it is the duty of the legislature to restrict the power of assessment as conferred upon public corporations so as to prevent the abuse thereof. These provisions are as follows: "The General Assembly shall provide . . . for the organization of cities . . . and incorporated towns, and restrict their power of taxation, assessment, borrowing money and contracting debts so as to prevent the abuse of such power."¹ Such a provision evidently pre-supposes the existence of the power of local assessment.² Whether such provisions impose any effective restraint upon the exercise of the power of local assessment is a more difficult question. Where the effect of such provisions upon the power of the legislature has been considered, it has been held that such provisions are addressed to the conscience of the legislature, that by the oath of office of the members of the legislature they are bound to respect and enforce such provisions, and that they should not pass any law in violation thereof; but that the courts cannot enforce so general and so indefinite a rule and cannot declare a statute to be unconstitutional because in the judgment of the court it does not restrict the power of public corporations sufficiently.³ The question, it may be added is the same as the one

¹ Article XII., § 3, Constitution of Arkansas. Similar provisions are found in Article XII., § 5, Constitution of Kansas; Article XIV., § 13, Constitution of Michigan; Article XI., § 5, Constitution of Mississippi; Article VIII., § 8, Constitution of Nevada; Article XII., § 1, Constitution of New York; Article VI., § 130, Constitution of North Dakota; Article VIII., § 4, Constitution of North Carolina; Article XIII., § 6, Constitution of Ohio; Article XI., § 5, Constitution of Oregon; Article VIII., § 3, Constitution of South Carolina; Article X., § 1, Constitution of South Dakota; Article XIII., § 3, Constitution of Wyoming.

² *Ridenour v. Saffin*, 1 Handy (Ohio) 464 [1855].

³ *City of Emporia v. Norton*, 13 Kan. 569 [1874]; (on rehearing, 16 Kan. 236 [1876]); *Hines v. City of Leavenworth*, 3 Kan. 186 (original edition), 180 (second edition), [1865]; *Hurford v. City of Omaha*, 4 Neb. 336; *Tift v. City of Buffalo*, 82 N. Y. 204 [1880]; In the matter of the Petition of Meade to Reduce an Assessment, 74 N. Y. 216 [1878]; *City of Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; *Parsons v. City of Columbus*, 50 O. S. 460, 34 N. E. 677 [1893]; *Raymond v. Cleveland*, 42 O. S. 522 [1885]; *Malloy v. City of Marietta*, 11 O. S. 636 [1860]; *Hill v. Higdon*, 5 O. S. 243, 67 Am. Dec. 289 [1855]; *Faddenly v. Portland*, 44 Ore. 118, 74 Pac.

presented in cases involving general taxation, since the constitutional provisions already quoted apply to taxation as well as to special assessment. The conclusion reached in cases of special assessment is the same as that reached in cases of general taxation. Indeed it has been held that these provisions apply to general taxation alone and not to special assessments.⁴ However, in all these cases the statute which authorized the assessment contained some restrictions, showing that the legislature had made some attempt, though possibly an inadequate one, to comply with the constitutional mandate. It may fairly be looked upon as still an open question, whether a statute which imposed no restriction of any sort could be held to be unconstitutional as being in violation of these provisions. Such a question, however, is not likely to arise for two reasons: First, because no legislature is at all likely to pass such a statute; and second, because if it did, such statute would in all probability be in violation of other specific and more definite constitutional provisions. A statute providing for the levy of local assessments must, therefore, be construed as restricting the power of the public corporation to which is given authority to levy such assessment.⁵

§ 107. Provisions forbidding assessment.

The constitution of Virginia, which went into effect June 10, 1902, contains a provision, "No city or town shall impose any tax or assessment on abutting land-owners or other public local improvements, except for making and improving the walkways upon existing streets and improving and paving the existing alleys and for their construction or for the rise of sewers."¹ The same constitution contained a provision that every city having a municipal charter at the time of the adoption of the constitution might retain the same, except so far as it might be repealed or amended by the general assembly, but "that every such charter is hereby amended so as to conform to all the provisions, restrictions, limitations and powers set forth in this ar-

710, 75 Pac. 222 [1903]; *Milwaukee Electric Railway & Light Company v. City of Milwaukee*, 95 Wis. 42, 69 N. W. 796 [1897]; *Dean v. Borchsenius*, 30 Wis. 236 [1872].

⁴ *City of Raleigh v. Peace*, 110 N.

C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892].

⁵ *Bailey v. City of Zanesville*, 20 Ohio C. C. 236 [1900].

¹ Art. VIII., § 170, Constitution of Virginia [1902].

title or otherwise provided in the constitution."² The schedule of the constitution contained a provision, "Except as modified by this constitution, all suits, actions and causes of action, prosecutions, rights of individuals, of bodies corporate and politic, and of the state shall continue;"³ and also a provision, "All taxes accrued or accruing to the commonwealth or to any political subdivision thereof under laws now in force shall, under this constitution, enure to the use of the commonwealth or of such subdivision thereof."⁴ Under these provisions it was held that an assessment for paving a street authorized by the charter prior to the taking effect of the new constitution, but not actually made until after such constitution took effect, was even if a "tax," still not one "accrued or accruing;" and hence that such assessment was prohibited by the constitution.⁵ If some assessments were perfected and some not perfected when this constitutional provision took effect, it has been held that the assessments not perfected then could not be perfected thereafter, and that on account of the constitutional requirement of uniformity⁶ the assessments already perfected could not be enforced since it was impossible to enforce the other assessments for the same improvement.⁷

§ 108. Equal protection of law.

The Constitution of the United States and those of many of the states contain provisions securing the equal protection of the laws to persons affected thereby. These provisions, requiring equal protection of the laws, are often found in constitutions united so closely with the provisions forbidding the taking of property without due process of law that the two classes of provisions are often discussed together.¹ The clause of the Constitution of the United States which contains this provision is as fol-

² Art. XIII., § 117, Constitution of Virginia [1902].

³ Sec. 3, Schedule of Constitution of Virginia [1902].

⁴ Sec. 4, Schedule of Constitution of Virginia [1902].

⁵ Hicks v. City of Bristol, 102 Va. 861, 47 S. E. 1001 [1904].

⁶ See § 161.

⁷ Fulkerson v. City of Bristol, 105 Va. 555, 54 S. E. 468 [1906].

¹ Field v. Barber Asphalt Paving Company, 194 U. S. 618, 48 L. 1142, 24 S. 784 [1904], (modifying Field v. Barber Asphalt Paving Company, 117 Fed. 925 [1902]); Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Taber, 168 Ind. 419, 77 N. E. 741 [1906].

lows: " . . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."² Many of the state constitutions contain in varying phraseology and with some repetition the statement of the equality of men before the law. Under these provisions an assessment levied upon due notice and fairly apportioned according to benefits is not necessarily unconstitutional.³ Under these provisions an assessment apportioned according to frontage as a fair method of estimating benefits and not according to frontage *co nomine* is not a violation of the requirement of equal protection of the law.⁴ A statute giving to resident property owners the right to stop an improvement by filing a protest against it, thereby preventing both the improvement and the levying of an assessment therefor, but giving no such right to non-resident property owners does not violate

² Article XIV., § 1. Amendments to the Constitution of the United States.

³ *Field v. Barber Asphalt Paving Company*, 194 U. S. 618, 48 L. 1142, 24 S. 784 [1904]. (modifying *Field v. Barber Asphalt Paving Company*, 117 Fed. 925 [1902]); *Walston v. Nevin*, 128 U. S. 578, 9 S. Ct. 192, 32 L. 544 [1888]. (affirming *Watson v. Nevin*, 86 Ky. 492, 9 Ky. Law Rep. 819, 5 S. W. 546 [1887]); *Wurts v. Hoagland*, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]. (affirming *In the matter of Drainage of the Great Meadows on Pequest River*, 42 N. J. L. (13 Vr.) 553 [1880], which had been affirmed without opinion as *Hoagland v. State, Simonton. Pros.*, 43 N. J. L. (14 Vr.) 456 [1881]); *Hagar v. Reclamation District, No. 10*, 111 U. S. 711, 28 L. 569 [1884]; *Duclon v. New Orleans*, 96 U. S. 97, 4 L. 616 [1877]; *State ex rel. Johnson*, 105 Ind. 463, 5 N. E. 553 [1885]; *Sisson v. Board of Supervisors of Buena Vista County*, 128 Ia. 442, 70 L. R. A. 440, 104 N. W. 454 [1905]; *Owen v. City of Sioux City*, 91 Ia. 190, 59 N. W. 3 [1894]; *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107 [1904]; *Lovenberg v. City of Galveston*, 17 Tex. Civ. App. 162, 42 S. W. 1024 [1897];

"As the statute (providing for drainage at the expense of the owners of property benefited) is applicable to all lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the plaintiffs in error have neither been denied the equal protection of the laws, nor been deprived of their property without due process of law, within the meaning of the Fourteenth Amendment of the United States." *Wurts v. Hoagland*, 114 U. S. 606, 615, 29 L. 229, 5 S. 1086 [1888]. (affirming *Matter of Drainage of Great Meadows on Pequest River*, 42 N. J. L. (13 Vr.) 553 [1880], which had been affirmed without opinion as *Hoagland v. State, Simonton. Pros.*, 43 N. J. L. (14 Vr.) 456 [1881]).

"Whenever the law operates alike on all persons and property similarly situated, equal protection cannot be said to be denied." *Walston v. Nevin*, 128 U. S. 578, 582, 9 S. 192, 32 L. 544 [1888]. affirming *Watson v. Nevin*, 86 Ky. 492, 9 Ky. Law Rep. 819, 5 S. W. 546 [1887].

⁴ *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107 [1904].

this provision of the Constitution of the United States.⁵ A statute which provides that assessments are to be enforced against residents by a suit in the circuit court, but against non-residents as other taxes does not deny the equal protection of the laws to non-residents.⁶ A statute which authorizes the county surveyor to keep in repair the ditches constructed under the drainage laws of the state, and to certify the cost of such repair, including his own per diem to the county auditor, who is required to draw his warrant in favor of the holders of such certificates upon the county treasurer, payment to be made out of the county treasury, which is to be reimbursed thereafter by assessment levied against the owners of property benefited by such repair, does not violate the provision insuring equal protection of law, an opportunity being given for appeal which gives the property owner his day in court and a full hearing.⁷ A statute which requires the entire amount of the assessment to be paid at once, but which provides that those property owners who waive all objections to the legality of the proceedings shall have the privilege of paying the assessment in installments does not violate this constitutional provision,⁸ or the corresponding provision of the Constitution of the United States. A similar statute was

⁵ "It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the States from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. (Citing *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. 414, 6 S. 57 [1885]; *Hayes v. Missouri*, 120 U. S. 68, 30 L. 578 [1877]; *Magoon v. Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. 1037 [1898]; *Gulf, Colorado & Santa Fe Railway Company v. Ellis*, 165 U. S. 150, 41 L. 666 [1897].)

The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resident property owners, their interest

in the subject matter and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the non-residents whom it may be difficult to reach. Furthermore, there is no discrimination among the property owners in taxing for the improvement. When the assessment is made it operates on all alike." *Field v. Barber Asphalt Paving Company*, 194 U. S. 618, 621, 622, 48 L. 1142, 24 S. 784 [1904], (modifying *Field v. Barber Asphalt Paving Company*, 117 Fed. 925 [1902]).

⁶ *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707 [1897].

⁷ *State ex rel. French v. Johnson*, 105 Ind. 463, 5 N. E. 553 [1885].

⁸ *Sisson v. Board of Supervisors of Buena Vista County*, 128 Ia. 442, 70 L. R. A. 440, 104 N. W. 454 [1905].

attacked as unconstitutional on the ground that it violated the corresponding provision of the constitution of Indiana: "All courts shall be open, and every man for injury done to him, in his person, property or reputation, shall have remedy by due course of law. Justice shall be administered freely and without purchase; completely and without denial; speedily and without delay."⁹ The validity of such statute was upheld.¹⁰ Under the same constitutional provisions the validity of a statute imposing attorney's fees as part of the costs in a suit to collect a local assessment has been upheld.¹¹ The Indiana statute for assessments for street improvements¹² has been held to be a violation of this constitutional provision, on the ground that the assessment was not limited to special benefits and that no notice and hearing was given except to revise and correct the report and estimate of the engineer and make it conform to the prescribed basis of assessment.¹³ This case cannot be regarded as an authority, for the Supreme Court of Indiana has construed the statute as limiting the assessment to the amount of the special benefits, and has held that at the hearing given, the assessments are to be revised to limit them to the special benefits.¹⁴ With this construction, this statute has been held by the Supreme Court of the United States to be constitutional.¹⁵ The constitution of Colorado provides: "That courts of justice shall be open to every person and a speedy remedy afforded for every injury to person, property or character; and that right and justice should be administered without sale, denial or delay."¹⁶

⁹ Art. I., § 12, Constitution of Indiana.

¹⁰ *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Taber*, 168 Ind. 419, 77 N. E. 741 [1906].

¹¹ *Shirk v. Hupp*, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490 [1906]; *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741 [1906]; *Brown v. Central Bermudez Company*, 162 Ind. 452, 69 N. E. 150 [1903]; *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Fish*, 158 Ind. 525, 63 N. E. 154 [1901].

¹² 2 Burns' Revised Statutes of Indiana, §§ 4288-4298 [1894], commonly known as the Barrett law.

¹³ *Charles v. City of Marion*, 100 Fed. 538 [1900].

¹⁴ *Schaefer v. Werling*, 156 Ind. 704, 60 N. E. 194 [1901]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899].

¹⁵ *Hibben v. Smith*, 191 U. S. 310, 24 S. 88, 48 L. 195 [1903], (affirming *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1901]); *Schaefer v. Werling*, 108 U. S. 516, 23 S. 449, 47 L. 570 [1903], (affirming *Schaefer v. Werling*, 156 Ind. 704, 60 N. E. 149 [1901]).

¹⁶ Art. II., § 6, Constitution of Colorado [1876].

Under this provision a statute providing that a failure to pay an assessment within thirty days from the publication of the assessing ordinance shall be considered conclusively as an election to pay in installments, and that persons electing to pay in installments shall be precluded from questioning the power of the city to construct the improvement, the regularity or sufficiency of the proceedings, or the validity or correctness of the assessment, has been held to be constitutional.¹⁷

§ 109. Provisions forbidding the taking of property without just compensation—Specific provisions.

In many constitutions provisions are found which forbid the taking of private property for public use without just compensation. Some of these provisions, which have been considered by the courts as affecting the validity of assessments, are as follows: "Private property shall not be taken or applied for public use unless just compensation be first made therefor; nor shall private property be taken for private use or the use of corporations other than municipal without the consent of the owner."¹ "Private property shall not be taken, appropriated or damaged for private use, without just compensation therefor."² "The property of no person shall be taken for public use without just compensation therefor."³ "Private property shall not be taken or damaged for public or private use without just compensation."⁴ "No private property or right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner or first secured to him by deposit of money. . . ."⁵ "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."⁶ "Private property may be taken for public use, but not until a just compensation to be ascertained in a manner prescribed by law

¹⁷ *City of Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142 [1905].

¹ Article I., § 24, Constitution of Alabama.

² Article I., § 22, Constitution of Arkansas.

³ Article I., § 13, Constitution of California, Article I., § 11, Constitution of Connecticut; Article

XVIII., § 14, Constitution of Michigan.

⁴ Article II., § 14, Constitution of Colorado; Article I., § 33, Constitution of Wyoming.

⁵ Article XVI., § 29, Constitution of Florida.

⁶ Article I., § 3, Constitution of Georgia.

shall be paid therefor.”⁷ “Private property shall not be taken or damaged for public use without just compensation.”⁸ “No man’s property shall be taken by law without just compensation.”⁹ “Private property shall not be taken for public use without just compensation being made or secured to be made to the owner thereof. . . .”¹⁰ “Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by them.”¹¹ “Private property shall not be taken or damaged for public use without just and adequate compensation being first paid.”¹² “Private property shall not be taken for public uses without just compensation. . . .”¹³ “Private property shall not be taken for public use without just compensation therefor first paid or secured.”¹⁴ “Private property shall not be taken or damaged for public use except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law.”¹⁵ “The property of no person shall be taken or damaged for public uses without just compensation therefor.”¹⁶ “Private property shall not be taken for public use without just compensation. . . .”¹⁷ “. . . Nor shall private property be taken for public use without just compensation.”¹⁸ “Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency imperatively requiring its immediate seizure, or for the purpose of making or requiring roads which shall be open to the public

⁷ Article I., § 14, Constitution of Idaho.

⁸ Article II., § 13, Constitution of Illinois; Article II., § 21, Constitution of Missouri; Article III., § 14, Constitution of Montana; Article I., § 14, Constitution of North Dakota.

⁹ Article I., § 21, Constitution of Indiana.

¹⁰ Article I., § 18, Constitution of Iowa.

¹¹ § 242, Constitution of Kentucky. A substantially similar provision is found in Article XVII., § 18, Constitution of South Dakota.

¹² Article 156, Constitution of Louisiana [1879].

¹³ § 21, Constitution of Maine; Article I., § 16, Constitution of Rhode Island.

¹⁴ Article I., § 13, Constitution of Minnesota.

¹⁵ Article III., § 17, Constitution of Mississippi.

¹⁶ Article I., § 21, Constitution of Nebraska.

¹⁷ Article I., § 16, Constitution of New Jersey. Substantially the same provision is found in Article I., § 4, Constitution of Oregon.

¹⁸ Article I., § 6, Constitution of New York.

without charge, a compensation shall be made to the owner in money, and in all other cases where private property shall be taken for public use a compensation therefor shall first be made in money or first secured by a deposit of money. . . . ”¹⁹ “No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made unless by the consent of such person. . . . ”²⁰ “Private property shall not be taken or damaged for public use without just compensation.”²¹ “. . . Whenever any person’s property is taken for the use of the public the owner ought to receive an equivalent in money.”²² “The general assembly . . . shall not enact any law whereby private property shall be taken or damaged for public uses without just compensation.”²³ “No private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner.”²⁴

§ 110. Constitutional rule as to just compensation held not to apply to assessments.

Whether these provisions apply to local assessments or not is a question upon which there has been a diversity of judicial opinion, chiefly, however, in obiter dicta. By the great weight of authority and by the sounder and more logical view, these provisions are restrictions upon the power of eminent domain, and require compensation to be made for property taken in the exercise of that power; but they have nothing to do with the power of taxation, and therefore have no application to local assessments which are a branch of the taxing power.¹ The correctness of the rule that the provision forbidding the taking of private property for public use without compensation does not apply to local assessments is best seen when the constitu-

¹⁹ Article I., § 19, Constitution of Ohio.

²⁰ Article I., § 17, Constitution of Texas.

²¹ Article I., § 22, Constitution of Utah.

²² Article II., § 1, Constitution of Vermont.

²³ § 58, Constitution of Virginia.

²⁴ Article I., § 16, Constitution of Washington.

¹ *Chambers v. Satterlee*, 40 Cal. 497 [1871]; *Piper’s Appeal in the matter of Widening Kearney Street*, 32 Cal. 530 [1867]; *Emery v. San Francisco Gas Company*, 28 Cal. 345 [1865]; *Burnett v. Mayor and Common Council of the City of Sacramento*, 12 Cal. 76, 73 Am. Dec. 518 [1859]; *Nichols v. City of Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636 [1854]; *Speer v. Mayor and Coun-*

tional provision in question is one which specifically requires compensation to be made in money. In such cases it has been pointed out that the provision cannot apply to local assessments,² and from a negative standpoint it may be said that it has never been held or even seriously contended that such a provision applies to local assessments so as to require the public to pay back to the property owner the money which it has exacted from him as an assessment, except the earlier cases since overruled, which made use of this principle to demonstrate that assessments according to benefits were necessarily invalid.³ Ac-

cil of Athens, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890]; *Hayden v. City of Atlanta*, 70 Ga. 817 [1883]; *Chicago & Northwestern Railway Co. v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437 [1897]; *White v. People ex rel. City of Bloomington*, 94 Ill. 604 [1880]; *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021 [1901]; *Warren v. Henly*, 31 Ia. 31 [1870]; *City of Covington v. Worthington*, 88 Ky. 206, 10 S. W. 790, 11 S. W. 1038 [1889]; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 251, 5 So. 848 [1889]; *Excelsior Planting & Manufacturing Company v. Green*, 39 La. Ann. 455, 1 So. 873 [1887]; *Brooks v. Mayor and City Council of Baltimore*, 48 Md. 265 [1877]; *Groff v. Mayor, Aldermen and Common Council of Frederick City*, 44 Md. 67 [1875]; *Mayor and City Council of Baltimore v. Proprietors Green Mount Cemetery*, 7 Md. 517 [1855]; *Meale v. Mayor and City Council of Baltimore*, 5 Md. 314, 61 Am. Dec. 276 [1854]; *Weed v. Mayor and Aldermen of Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204 [1898]; *Grand Rapids School Furniture Co. v. City of Grand Rapids*, 92 Mich. 504, 52 N. W. 1028 [1892]; *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853]; *Griffin v. Dogan*, 48 Miss. 11 [1873]; *Heman v. Schulte*, 166 Mo. 409, 65 S. W. 163 [1902]; *Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683 [1889]; *City of St. Joseph v. O'Donoghue*, 31

Mo. 345 [1861]; *Inhabitants of Palmyra v. Morton*, 25 Mo. 593 [1857]; *Garrett v. City of St. Louis*, 25 Mo. 505, 69 Am. Dec. 475 [1857]; *City of Springfield to the use of Tuttle v. Baker*, 56 Mo. App. 637 [1894]; *State, Graham, Pros. v. Mayor, etc., of Paterson*, 37 N. J. L. (8 Vr.) 380 [1875]; *State, Brittin, Pros. v. Blake*, 36 N. J. L. (7 Vr.) 442 [1872]; *Litchfield v. Vernon*, 41 N. Y. 123 [1869]; *People ex rel. Crowell v. Lawrence*, 41 N. Y. 137 [1869]; *People ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; *Livingston v. Mayor, etc., of New York*, 8 Wend. 85, 22 Am. Dec. 622 [1831]; *Moran v. City of Troy*, 9 Hun. (N. Y.) 540 [1877]; *Hill v. Higdon*, 5 O. S. 243, 67 Am. Dec. 289 [1855]; *Seoville v. City of Cleveland*, 1 O. S. 126 [1853]; *Bonsall v. Mayor, Recorder and Trustees of Town of Lebanon*, 19 Ohio 418 [1850]; *Washington Avenue*, 69 Pa. St. (19 P. F. Smith) 352, 8 Am. Rep. 255 [1871]; *Roundtree v. City of Galveston*, 42 Tex. 612 [1875]; *Allen v. Drew*, 44 Vt. 174 [1872]; *Haubner v. City of Milwaukee*, 124 Wis. 153, 101 N. W. 930 [1905], (rehearing denied, 102 N. W. 578 [1905]).

² *Emery v. San Francisco Gas Co.*, 28 Cal. 345 [1865]; *Ridenour v. Saffin*, 1 Handy (Ohio) 464 [1855].

³ *People ex rel. Post v. Mayor, etc., of Brooklyn*, 6 Barb. (N. Y.) 209 [1849].

cordingly such provision does not invalidate a re-assessment made where the original assessment was for some reason invalid.⁴

§ 111. Constitutional rule as to just compensation held to apply to assessments.

It must be admitted, however, that there are many cases in which it is said or assumed that the constitutional provision which forbids the taking of private property for public use without compensation is applicable to local assessments. The most common class of these cases is that in which it is claimed that the assessment as levied is in excess of or not in proportion to the benefits conferred by the improvement for which the assessment is levied. In many of these cases the courts have discussed the question on the theory that such constitutional provision was applicable. If it is shown that the assessment does not exceed the benefits substantially and that it is fairly apportioned according to benefits, it is said that such constitutional provision is not violated, and that just compensation is made for the assessment exacted.¹ If the assessment exceeds the benefits in a substantial manner, or is not fairly apportioned according to the benefits, it is said on the other hand that the

⁴ *Haubner v. City of Milwaukee*, 124 Wis. 123, 101 N. W. 930 [1905], (rehearing denied, 102 N. W. 578 [1905]).

¹ *Charles v. City of Marion*, 100 Fed. 538; *City Council of Montgomery v. Birdsong*, 126 Ala. 632, 28 So. 522 [1899]; *Mayor, Aldermen, etc., of Mobile v. Royal Street Railroad Co.*, 45 Ala. 322 [1871]; (overruled in *Mayor and Aldermen of Birmingham v. Klein*, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386); *Ritter v. Drainage District No. 1, Poinsett County*, 78 Ark. 580, 94 S. W. 711 [1906]; *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707 [1897]; *Tomlinson v. Bainaka*, 163 Ind. 112, 70 N. E. 155 [1904]; *Roundenbush v. Mitchell*, 154 Ind. 616, 57 N. E. 510 [1900]; *Reinken v. Fuehring*, 130 Ind. 382, 30 Am. St. Rep. 247, 15 L. R. A. 624, 37 Am. & Eng. Corp. Cas. 354, 30 N. E. 414 [1891]; *Ray v. City of Jef-*

ersonville, 90 Ind. 567 [1883]; *Palmer v. Stumph*, 29 Ind. 329 [1868]; *Cypress Pond Draining Company v. Hooper*, 59 Ky. (2 Met.) 350 [1859]; *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475 [1894]; *Wilzinski v. City of Greenville*, 85 Miss. 393, 37 So. 807 [1905]; *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629 [1898]; *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600 [1896]; *State, Sigler, Pros. v. Fuller*, 34 N. J. L. (5 Vr.) 227 [1870]; *Genet v. City of Brooklyn*, 99 N. Y. 296, 1 N. E. 777 [1885]; *People ex rel. Crowell v. Lawrence*, 36 Barb. (N. Y.) 178 [1862]; *King v. Portland*, 38 Ore. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]; *Vacation of Howard Street, Philadelphia*, 142 Pa. St. 601, 21 Atl. 974 [1891]; *McMasters v. Commonwealth*, 3 Watts (Pa.) 292 [1834]; *In the Matter of Dorrance Street*, 4 R. I. 230 [1856].

assessment is unconstitutional as amounting to a taking of private property for public use without compensation.² Where an assessment was held to be valid as not in excess of the benefits, since there was no case where the property assessed "has not been so far benefited by the work done as to be increased in value more than the cost of the work assessed," it was added, "were this not the case the property of each proprietor to the extent of the difference between the increased value and the cost of the work assessed to him would be taken for a purpose of public utility without adequate compensation previously made; and consequently there would be a violation of the provisions of Article 105 of the Constitution."³ So the Supreme Court of Kentucky said in speaking of an assessment not apportioned according to benefits and not limited to the amount thereof: "Such an exaction by whatever the legislature might choose to call it, would not be a tax, but would be undoubtedly the taking of private property for public use and which could not be done constitutionally without the consent of the owner or owners or without retribution of the value in money."⁴

²*Norwood v. Baker*, 172 U. S. 269, 19 S. Ct. 187, 43 L. 443 [1898]; *White v. City of Tacoma*, 109 Fed. 32 [1901]; *Cowley v. City of Spokane*, 99 Fed. 840 [1900]; *Allman v. District of Columbia*, 3 App. D. C. 8 [1894]; *City of Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1893]. (A case of special taxation, and as such distinguished in *Waggeman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895], which is a case of special assessment). *Graham v. Conger*, 85 Ky. 582, 4 S. W. 327 [1887]; *City of Louisville v. Louisville Rolling Mill Company*, 3 Bush. (66 Ky.) 416, 96 Am. Dec. 243 [1867]; *Cypress Pond Draining Company v. Hooper*, 59 Ky. (2 Met.) 350 [1859]; *City of Lexington v. McQuillan's Heirs*, 39 Ky. (9 Dana) 513, 35 Am. Dec. 159 [1840]; *State v. Pillsbury*, 82 Minn. 559, 85 N. W. 175 [1901]; *Zoeller v. Felloe*, 4 Mo. App. 163

[1877]; *Walsh v. Barron*, 61 O. S. 15, 76 Am. St. Rep. 354, 55 N. E. 164 [1899]; *Schroder v. Overman*, 61 O. S. 1, 47 L. R. A. 156, 55 N. E. 158, 42 W. L. B. 270 [1899], (affirming *Schroeder v. Overman*, 18 Ohio C. C. 385 [1899]); *Wewell v. City of Cincinnati*, 45 O. S. 407, 424, 15 N. E. 196 [1887]; *Chamberlain v. City of Cleveland*, 34 O. S. 551 [1878]; *Weston v. Commissioners of Hamilton County*, 6 Ohio C. C. 641 [1892]; *Rhoades v. City of Toledo*, 6 Ohio C. C. 9 [1890]; *McNamee v. City of Tacoma*, 24 Wash. 591, 64 Pac. 791 [1901].

³*New Orleans Drainage Company Praying for the Confirmation of a Tableau*, 11 La. Ann. 338 [1856]; (setting aside on rehearing the opinion first rendered).

⁴*City of Lexington v. McQuillan's Heirs*, 39 Ky. (9 Dana) 513, 517, 35 Am. Dec. 159 [1840].

§ 112. Confusion as to true constitutional principle involved.

The confusion between provisions forbidding the taking of private property for public use without compensation and the provisions forbidding the taking of property without due process of law, into which the courts have fallen, may be well illustrated by a case in which the confusion can be traced.¹ In the lower court the assessment was held to be invalid as being a taking of property without due process of law.² In the first part of the opinion of the Supreme Court of the United States, affirming the opinion of the circuit court, the objection to the assessment is stated as a taking without due process of law;³ but very soon the objection is stated as "a taking, under guise of taxation, of private property for public use without compensation,"⁴ and it is this proposition which is discussed in the remainder of the opinion. This was done in spite of the fact that the Supreme Court of the United States had pointed out, in an earlier assessment case, that the United States Constitution contained no prohibition against a state's taking private property for public use without due compensation.⁵ The same confusion is found in other Federal cases, the court holding that an assessment not levied in proportion to benefits was in violation of that clause in the Federal Constitution which forbids a state to take private property for public use without due compensation.⁶

§ 113. Special grounds for confusion.

In some of the cases involving the validity of assessments the effect of the provision against taking private property for public use without compensation and the effect of the provision against taking property without due process of law are discussed together, no attempt being made to distinguish the effect of the

¹ *Norwood v. Baker*, 172 U. S. 269; 19 S. Ct. 187, 43 L. 443 [1898].

² *Baker v. Village of Norwood*, 74 Fed. 997 [1896].

³ *Norwood v. Baker*, 172 U. S. 269, 277, 19 S. Ct. 187, 43 L. 443 [1898].

⁴ *Norwood v. Baker*, 172 U. S. 269, 279, 43 L. 443, 19 S. 187 [1898].

⁵ "If private property be taken for public uses without just compensation, it must be remembered that,

when the fourteenth amendment is adopted, the provision on that subject in immediate juxtaposition in the fifth amendment with the one we are construing, was left out and this one was taken." *Davidson v. New Orleans*, 96 U. S. 97, 105, 24 L. 616 [1877].

⁶ *Cowley v. City of Spokane*, 99 Fed. 840 [1900].

one from the effect of the other.¹ Some of the cases go no farther than to hold that if special assessments are to be justified upon the theory of eminent domain, they are then within the restrictive provision against taking private property for public use without compensation, and that they are therefore invalid unless compensation is made in the form of benefits.² These are cases in which the assessments were held not to be sustained upon the basis of the power of taxation and it was then sought to justify them on the theory of eminent domain. On the other hand if the assessment does not exceed the benefits it is held that there is no taking without just compensation.³ Some of the cases holding that the provision of the constitution which forbids taking private property for public use without due compensation applies to local assessments, are cases involving improvements which are referred by some courts to the power of eminent domain⁴ or to the police power,⁵ such as assessments for the purpose of drainage.⁶ In some of the cases eminent domain and assessment are combined in one proceeding, and accordingly we find that the provision forbidding the taking of private property without compensation is quoted properly enough, although it is sometimes extended in its application beyond the taking of property for the purpose of the improvement to the assessment levied to pay the cost of such improvement.⁷ The ques-

¹ *Roundenbush v. Mitchell*, 154 Ind. 616, 57 N. E. 510 [1900]; *Reinken v. Fuehring*, 130 Ind. 382, 30 Am. St. Rep. 247, 15 L. R. A. 624, 37 Am. & Eng. Corp. Cas. 354, 30 N. E. 414 [1891]; *Hutcheson v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 848 [1899]; (overruling *Adams v. Fisher*, 75 Tex. 657, 6 S. W. 772 [1890]).

² *Creighton v. Manson*, 27 Cal. 614 [1865]; *Wright v. City of Chicago*, 46 Ill. 44 [1867]; *Bedard v. Hall*, 44 Ill. 91 [1867]; *City of Ottawa v. Spencer*, 40 Ill. 211 [1866]; *City of Chicago v. Larned*, 34 Ill. 203 [1864]; *Taylor, McBean & Co. v. Chandler*, 9 Heisk. (56 Tenn.) 349, 24 Am. Rep. 308 [1872].

³ *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 45 L. R. A. 797, 57 N. E. 114 [1899]; *Excelsior Planting & Manufacturing*

Company v. Green, 39 La. Ann. 455, 1 So. 873 [1887]; *Vacation of Howard Street*, Philadelphia, 142 Pa. St. 601, 21 Atl. 974 [1891].

⁴ See § 99 et seq.

⁵ See § 93.

⁶ *State, Kean, Pros. v. Driggs Drainage Company*, 45 N. J. L. (16 Vr.) 91 [1883]; *State, New Jersey Railroad & Transportation Company, Pros. v. Mayor and Common Council of the City of Newark*, 27 N. J. L. (3 Dutch.) 185 [1858]; *Tide Water Co. v. Cester*, 18 N. J. Eq. (3 C. E. Gr.) 518, 90 Am. Dec. 634 [1866]; (affirming *Coster v. Tidewater Company*, 18 N. J. Eq. (3 C. E. Green) 54 [1866]); *Hartwell v. Armstrong*, 19 Barb. (N. Y.) 166 [1854].

⁷ *Holmes v. Village of Hyde Park*, 121 Ill. 128, 13 N. E. 540 [1889]; *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. L. R. 128, 63 S. W. 964 [1901];

tion whether benefits may be set off against damages caused by the improvement is in one sense a branch of the law of assessments,⁸ and as it is also a branch of eminent domain it properly involves the question whether such setting off of benefits against damages is not a taking of private property without just compensation. Where such right of set-off is upheld, it is upon the theory that benefits constitute just compensation within the meaning of this constitutional provision.⁹ In some of the cases which hold that the constitutional provision forbidding the taking of private property for public use applies to local assessments, we find that this provision was invoked as a ground for declaring to be invalid, assessments of types which in those same jurisdictions have subsequently been held to be valid. Thus such provision was regarded as applicable in Alabama,¹⁰ where assessments were not levied in proportion to the value of the property assessed. Subsequently it has been held in Alabama that assessments may be levied in proportion to benefits and that they need not be levied in proportion to the value of the property assessed.¹¹ So in Louisiana this provision was regarded as applying to assessments which were regarded as invalid because apportioned according to benefits and not according to the valuation of the property.¹² Assessments so apportioned have subsequently been held in Louisiana to be perfectly valid and unobjectionable.¹³ Under this provision it is held that an assessment fairly apportioned to special benefits and not in excess of them is valid:

Municipality No. Two, for Opening Euphrosine Street, 7 La. Ann. 72 [1852]; *Dorgan v. City of Boston*, 12 All. (Mass.) 223 [1866]; *MeKusick v. City of Stillwater*, 44 Minn. 372, 46 N. W. 709 [1890]; *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107 [1904]; *State ex rel. Chicago, Burlington & Quincy Railroad Company v. City of Kansas*, 89 Mo. 34, 14 S. W. 515 [1886]; *Loweree v. City of Newark*, 38 N. J. L. (9 Vr.) 151 [1875]; *In the matter of One Hundred and Twenty-seventh Street*, 56 How. (N. Y.) 60 [1878]; *Betts v. City of Williamsburg*, 15 Barb. (N. Y.) 255 [1853]; *Sessions v. Crumkilton*, 20 O. S. 349 [1870]; *Forbes Street*, 70 Pa. St. (20 P. F. Smith)

125 [1871]; *Fenelon's Petition*, 7 Pa. St. (7 Barr.) 173 [1847].

⁸ See § 62 *et seq.*

⁹ *Forsyth v. Wilcox*, 143 Ind. 144, 41 N. E. 371 [1895]; *McIntire v. State*, 5 Blackf. (Ind.) 384 [1840].

¹⁰ *Mayor, Aldermen, etc., of Mobile v. Royal Street Railroad Company*, 45 Ala. 322 [1871]; *Mayor, Aldermen, etc., of Mobile v. Dargan*, 45 Ala. 310 [1871].

¹¹ *Mayor and Aldermen of Birmingham v. Uleia*, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386 [1889].

¹² *Municipality Number Two, Praying for the Opening of Benton Street v. White*, 9 La. Ann. 446 [1854].

¹³ See Chapter XIII., and also § 46.

out that an assessment in excess of such benefits is invalid.¹⁴ The constitution of Ohio further provides: "The general assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit so as to prevent the abuse of such power."¹⁵ The view originally taken by the Supreme Court of Ohio was that these two sections were independent of each other and that article one, section nineteen, was not a limitation upon the power of assessment.¹⁶ The practical working out of this view to its extreme limit was the holding that where part of a tract was taken by eminent domain for a local improvement, the owner must be compensated in full for such part taken, without deduction for benefits; but that the residue of such tract might then be assessed, up to the amount of benefits conferred, at least, for the cost of such improvement, including the amount paid for the land thus taken.¹⁷ The correctness of this view was assumed in subsequent cases.¹⁸ In this series of cases is found one, however, in which the opposite view is taken, it being held that article one, section nineteen, limits and restricts the power referred to in section six, article thirteen.¹⁹ This view was subsequently adopted in a case in which the earlier cases were overruled and the earlier principle held to be unsound;²⁰ and the later view thus expressed has subsequently been reiterated.²¹ The practical working out of this view is the holding that an assessment cannot be levied, even for the amount of benefits conferred, to pay for the cost of taking land by emi-

¹⁴ *Walsh v. Barron*, 61 O. S. 15, 76 Am. St. Rep. 354, 55 N. E. 164 [1899].

¹⁵ Article XIII., § 6, Constitution of Ohio [1851].

¹⁶ *City of Cleveland v. Wick*, 18 O. S. 303 [1868]; *Hill v. Haddon*, 5 O. S. 243, 67 Am. Dec. 289 [1855].

¹⁷ *City of Cleveland v. Wick*, 18 O. S. 303 [1868].

¹⁸ *Schroder v. Overman*, 61 O. S. 1, 47 L. R. A. 156, 55 N. E. 158 [1899]; *Cincinnati v. Batsche*, 52 O. S. 324, 27 L. R. A. 536, 40 N. E. 21 [1895];

Caldwell v. Village of Carthage, 49 O. S. 334, 31 N. E. 602 [1892]; *Krumberg v. City of Cincinnati*, 29 O. S. 69 [1875].

¹⁹ *Chamberlain v. City of Cleveland*, 34 O. S. 551 [1878].

²⁰ *Cincinnati, Lebanon & Northern Ry. Co. v. City of Cincinnati*, 62 O. S. 465, 49 L. R. A. 566, 57 N. E. 229 [1900]; (overruling *City of Cleveland v. Wick*, 18 O. S. 303 [1868]).

²¹ *City of Dayton v. Bauman*, 66 O. S. 379, 64 N. E. 433 [1902].

ment domain,²² whether upon the residue of the original tract,²³ or upon other realty,²⁴ a result which is clearly contrary to the weight of authority.²⁵ Underlying the entire discussion is the assumption that section six, article thirteen, confers the power of local assessment; whereas, as is held by the great weight of authority, provisions of this sort do not confer the power of assessment, but either merely recognize its existence or else restrict it.²⁶ It is only in jurisdictions in which the remaining constitutional provisions prevent the levy of local assessments that provisions like this are held to confer the power.²⁷ Even in Ohio it is held that the legislature can confer the power of local assessment upon corporations other than those named in this clause, a result which could not be reached if this clause were the source of the power. Furthermore, the view now held in Ohio assumes that the provision which concerns the taking of private property for public use applies to assessment and taxation, whereas by the weight of authority, such provision applies solely to eminent domain.²⁸ The first sentence of article one, section nineteen, has been held to forbid the taking of private property for private use, and this in turn has been held to invalidate assessments for purposes which are not public in their nature.²⁹ Such assessments are undoubtedly invalid. It is contrary to the very nature of taxation, of which assessment is a branch, that public exactions should be made except for public purposes.³⁰ To assume that this section applies, however, it must first be determined that the exaction in question is not a tax or a local assessment, but confiscation, masquerading in the guise of taxation.³¹ Under such provision a statute providing for an assessment,³² as well as for appropriation of realty,³³ for the construction of a levee for the private benefit of certain land-

²² *City of Dayton v. Bauman*, 66 O. S. 379, 64 N. E. 433 [1902]; *Cincinnati, Lebanon & Northern Ry. Co. v. City of Cincinnati*, 62 O. S. 465, 49 L. R. A. 566, 57 N. E. 229 [1900].

²³ *Cincinnati, Lebanon & Northern Ry. Co. v. City of Cincinnati*, 62 O. S. 465, 49 L. R. A. 566, 57 N. E. 229 [1900].

²⁴ *City of Dayton v. Bauman*, 66 O. S. 379, 64 N. E. 433 [1902].

²⁵ See § 308 et seq.

²⁶ See § 103; § 105.

²⁷ See § 104.

²⁸ See § 110.

²⁹ *Chicago & Erie Railroad Company v. Keith*, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902].

³⁰ See § 283.

³¹ See § 118; Chapter XIII.

³² *Wright v. Thomas*, 26 O. S. 346 [1875].

³³ *Smith v. Atlantic & Great Western Railroad Company*, 25 O. S. 91 [1874].

owners, the public interest not being involved, is unconstitutional. A statute which limits the property owner to a circumscribed and in many cases impracticable method of attack on a local assessment has been spoken of as an attempt to divest him of his property without his consent.³⁴

§ 114. Due process of law—Specific provisions.

In many constitutions are found provisions forbidding the taking of property except by due course of law, the law of the land or some expression of similar import. While substantially similar in legal effect¹ these provisions may be grouped into several classes according to their phraseology. This provision of Magna Charta is incorporated into several of the state constitutions in the language of its original form. “. . . Nor can he be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land; . . .”² “He shall not . . . be deprived of his life, liberty, property or privileges, but by the judgment of his peers or by the law of the land.”³ “. . . No man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled or, in any manner, destroyed or deprived of his life, liberty or property, but by the judgment of his peers or by the law of the land.”⁴ “. . . No subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land.”⁵ “No person ought to be taken, imprisoned or disseized of his freehold, liberties or privileges or outlawed or exiled, or in any manner deprived of his life, liberty or property but by the law of the land.”⁶ “. . . Nor can he be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land.”⁷ “No person

³⁴ Union Building Association v. City of Chicago, 61 Ill. 439 [1871].

¹ See § 115.

² § 11, Constitution of Kentucky.

³ Article I., § 6, Constitution of Maine.

⁴ § 23, Constitution of Maryland.

⁵ § 12, Constitution of Massachusetts, § 13 of the Constitution of New Hampshire is the same as § 12

of the Constitution of Massachusetts.

⁶ Article I., § 17, Constitution of North Carolina.

⁷ Article I., § 9, Constitution of Pennsylvania. Article I., § 10, of the Constitution of Rhode Island is substantially the same as Article I., § 9 of the Constitution of Pennsylvania.

shall be arrested, imprisoned, despoiled or dispossessed of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate but by the judgment of his peers or the law of the land. . . .”⁸ “ . . . No man shall be taken or imprisoned or disseized of his freehold, liberties or privileges or outlawed or exiled or in any manner destroyed or deprived of his life, liberty and property but by the judgment of his peers or the law of the land.”⁹ The phrase more commonly used is “due process of law.” “No person shall . . . be deprived of life, liberty or property without due process of law; . . .”¹⁰ “ . . . nor shall any state deprive any person of life, liberty or property without due process of law. . . .”¹¹ Provisions substantially similar to the language used in the fifth amendment to the Constitution of the United States are found in many of the state constitutions.¹² The constitution of Virginia separates property from life and liberty in the corresponding provision in its constitution. “ . . . No person shall be deprived of his property without due process of law. . . .”¹³ Some of the provisions found are of composite type, suggesting both the clause from Magna Charta and the more familiar requirement of due process of law. “No citizen of this state shall be deprived of life, liberty, property, privileges or immunities or in any manner

⁸ Article I., § 14, Constitution of South Carolina.

⁹ Article I., § 8, Constitution of Tennessee.

¹⁰ Article V., Amendments to the Constitution of the United States. [Adopted 1791].

¹¹ Article XIV., Amendments to the Constitution of the United States. [Adopted 1868].

¹² Article I., § 8, Constitution of Alabama; Article II., § 8, Constitution of Arkansas; Article I., § 13, Constitution of California; Article II., § 25, Constitution of Colorado; Article I., § 9, Constitution of Connecticut; Article I., § 7, Constitution of Delaware; Article XII., Constitution of Florida; Article I., § 1, Paragraph III., Constitution of Georgia; Article

I., § 13, Constitution of Idaho; Article I., § 2, Constitution of Illinois; Article I., § 9, Constitution of Iowa [1857]; § 6, Constitution of Louisiana; Article VII., § 32, Constitution of Michigan; Article I., § 7, Constitution of Minnesota; Article III., § 14, Constitution of Mississippi; Article II., § 30, Constitution of Missouri; Article III., § 37, Constitution of Montana; Article I., § 3, Constitution of Nebraska; Article I., § 8, Constitution of Nevada; Article I., § 13, Constitution of North Dakota; Article VI., § 2, Constitution of South Dakota; Article I., § 3, Constitution of Washington; Article I., § 10, Constitution of Wyoming.

¹³ Article I., § 11, Constitution of Virginia [1902].

disfranchised except by the due course of the law of the land.”¹⁴
 “No person shall be deprived of life, liberty or property without due process of law and the judgment of his peers.”¹⁵

§ 115. Scope and meaning of “due process of law.”

The scope and meaning of the phrase “due process of law” is a question which has received some attention from the courts. It is looked upon as the equivalent of the phrase “the law of the land,” found in the various charters in England, guaranteeing the personal rights of the English, of which the most celebrated is Magna Charta.¹ This provision was inserted in the Constitution of the United States in one of the earlier amendments thereto,² as a limitation upon the power of the Federal government. It has been incorporated in the constitutions of many of the states of the Union as a limitation upon the exercise of power by the officers of the governments of such states respectively.³ By a more recent amendment to the Constitution of the United States,⁴ it has become a limitation imposed by the Federal Constitution upon the powers of the states. The fourteenth amendment resulted in a prompt and marked increase in the number of cases brought before the Supreme Court of the United States to obtain a construction of this clause and a determination of its force and effect.⁵ The Supreme Court

¹⁴ Article I., § 19. Constitution of Texas [1876].

¹⁵ Article II., § 10, Constitution of West Virginia. Though differing in form this provision of the Constitution of West Virginia has the same meaning as the other constitutional provisions “or” here meaning “and.” *Jelly v. Dils*, 27 W. Va. 267 [1885]; (See discussion on page 275).

¹ The equivalent of the phrase “due process of law” according to Lord Coke is found in the words ‘law of the land’ in the Great Charter in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown.” *Davidson v. New Orleans*, 96 U. S. 97, 101, 24 L. 616 [1877].

² Amendment V., Constitution of the United States.

³ See § 114.

⁴ Amendment XIV., Constitution of United States.

⁵ “It is not a little remarkable that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal Government for nearly a century, and while during all that time the manner in which the powers of that government have been exercised has been watched with jealousy and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution as a restraint upon the power of the States only a very few years, the docket of this court is already crowded with

of the United States at first declined to attempt to define "due process of law" within the meaning of the fourteenth amendment, as impracticable, though highly useful.⁶ Subsequently an attempt was made to define or describe due process of law as follows: "It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights."⁷ Other attempts have been made to define "due process of law." "Due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this. In his argument in the Dartmouth College

cases in which we are asked to hold that State Courts and State Legislatures have deprived their own citizens of life, liberty or property without due process of law." *Davidson v. New Orleans*, 96 U. S. 97, 103, 104, 24 L. 616 [1877].

"If . . . it were possible to define what it is for a state to deprive a person of life, liberty or property without due process of law, in terms which would cover every exercise of power thus forbidden to the state, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law. But apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application

of such an important phrase, in the Federal Constitution by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require with the reasoning on which such decisions may be founded." *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. 616 [1877].

⁷*Illagar v. Reclamation District No. 108*, 111 U. S. 701, 708, 4 S. Ct. 663, 28 L. 569 [1884] quoted in *Turpin v. Lemon*, 187 U. S. 51, 58, 47 L. 70, 23 S. 20 [1902]; where it is said that "due process of law was well defined" in the definition quoted. The definition above quoted follows close upon the statement by the court that the definition is a difficult one, and its approval of the statement already quoted from *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. 616 [1877].

case, ⁴ *Wheat*. 519, Webster defines 'due process of law' as a proceeding 'which proceeds upon inquiry and renders judgment only after trial.'"⁸ "Due process of law is not violated and the equal protection of the laws is given when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the state, and where the party who may subsequently be charged in his property has had a hearing or the opportunity for one provided by the statute."⁹ "It is settled that if provision is made 'for notice to and hearing of each proprietor at some stage of the proceedings upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.'"¹⁰ Due process of law is said to consist in "an opportunity to appear and contest the legality, justice and correctness of a proposed assessment against (his) property, to defray any part of the expense of a local improvement, at some stage in the proceedings before the assessment becomes final, which was declared by this court to be his constitutional right."¹¹ At the same time the difficulty of defining due process of law with perfect accuracy is still frequently noted.¹² Furthermore, while there can be no doubt that such constitutional provisions being written law can override provisions of the common law inconsistent therewith,¹³

⁸ *Stuart v. Palmer*, 74 N. Y. 183, 191, 30 Am. Rep. 289 [1878]; quoted in *Campbell v. Dwiggin*s, 83 Ind. 473, 482 [1882].

⁹ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 168, 41 L. 369, 17 S. 56 [1896]; quoted in *Hibben v. Smith*, 191 U. S. 310, 322, 48 L. 195, 24 S. 88 [1903]; (affirming *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1902]).

¹⁰ *Paulsen v. Portland*, 149 U. S. 30, 41, 37 L. 637, 13 S. 750 [1893]; (Affirming *Paulson v. City of Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]); (Citing *McMillen v. Anderson*, 95 U. S. 37, 24 L. 335 [1877]); *Davidson v. New Orleans*, 96 U. S. 97, 24 L. 616 [1877]; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 4 S. 663, 28 L. 569 [1884]; *Sprenger v. Merchant*, 125 U. S. 345, 8 S. 921, 31 L. 763 [1888].

¹¹ *Adams v. City of Roanoke*, 102 Va. 53, 45 S. E. 881 [1903]; (Citing *City of Norfolk v. Young*, 97 Va. 728, 47 L. R. A. 574, 34 S. E. 886 [1900]; *Heth v. City of Radford*, 96 Va. 272, 31 S. E. 8 [1898]; *Violett v. City Council of Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896]).

¹² "It would not be a simple matter to state in a succinct proposition any rule as to when a notice of assessment is and when it is not due process of law." *Oliver v. Monona County*, 117 Ia. 43, 53, 90 N. W. 510 [1902].

¹³ "If at common law private property might be taken for private use, or taken or destroyed without due course of law, then our constitution has rendered inoperative the common

the condition of the law existing and well recognized when these provisions were adopted must be considered carefully, and is of great weight in aiding in the determination of what is due process of law. "It is important for this court to avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted and which it is safe to say that no one then supposed would be disturbed."¹⁴

§ 116. Sale of property as taking without due process.

The enforcement of a void assessment,¹ including assessments levied under unconstitutional statutes,² is spoken of as amounting to a taking without due process of law. This is not the ordinary meaning of due process of law, however. If due notice and hearing are given, the owner has a right to take advantage of the invalidity of the assessment and of the statute under which it is levied. If no notice or hearing is provided for, such omission constitutes the want of due process of law.

§ 117. Due process of law requires taking for public use.

It will be noted that the definitions of due process of law which have been given lay especial stress upon opportunity for a hearing. Constitutional provisions of this character may, however, affect the validity of assessments in several different ways. (1) Under such provisions, according to many authorities, the legislature is prohibited from levying an assessment for a purpose which is not essentially public in its character. The determination of the legislature that a given improvement is public in character is therefore not final and conclusive. It is, on the contrary, a matter for the court to pass upon in order to determine whether the purpose for which an assessment is levied can be

law in that regard. . . . The common law in so far as it conflicts with these provisions of the constitution is inoperative. There is nothing so sacred in the common law that it should override a constitution or a statute. Much of our constitution was adopted and many of our statutes enacted, to get rid of the imperfections and injustice of the common law." *Chicago & Erie Railroad Co.*

v. Keith, 67 O. S. 279, 295, 60 L. R. A. 525, 65 N. E. 1020 [1902].

¹ *Louisville and Nashville Railroad Company v. Barber Asphalt Paving Company*, 197 U. S. 430, 434, 25 S. 466 [1905].

² *Brady v. King*, 53 Cal. 44 [1878].

Brady v. King, 53 Cal. 44 [1878]; *Anderson v. Hill*, 54 Mich. 477, 20 N. W. 549 [1884].

a purpose so public in its nature that an assessment can be levied therefor.¹ What these purposes are is a topic which, for the sake of convenience, is treated in greater detail elsewhere.² There is no serious conflict of authority upon the proposition that the purpose for which an assessment may be levied must be one which is public in its nature; though there is considerable conflict upon the question whether or not certain specific purposes are public.³ Upon the question of the specific constitutional provision which forbids an assessment for a private purpose, there is on the other hand, a conflict of judicial opinion. Thus it has been urged that such an assessment is unconstitutional,⁴ because in conflict with the provision, "Private property shall ever be held inviolate but subservient to the public welfare,"⁵ and hence a taking of private property for a private use without the consent of the owner thereof. It may be added, however, that it has been said that private property can not be taken for private use even without such constitutional provision.⁶ This clause does not prevent an assessment for work which was not authorized by the improvement ordinance, but which has been adopted and accepted by the municipality, the work being of a kind which the municipality might have ordered in the first instance and thus have levied an assessment therefor.⁷ A statute which provides that the city shall issue bonds to pay

¹ Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; Consolidated Channel Company v. Central Pacific Railroad Company, 51 Cal. 269 [1876]; Parham v. Justices of the Inferior Court of Decatur County, 9 Ga. 341 [1851]; Coster v. Tide Water Company, 18 N. J. Eq. (3 C. E. Greene) 54 [1866]; In the Matter of the Petition of Tuthill for the Appointment of Commissioners to Drain Certain Wet and Low Lands in the Towns of Chester and Blooming Grove in Orange County, 163 N. Y. 133, 79 Am. St. Rep. 574, 49 L. R. A. 781, 57 N. E. 303 [1900]; Chicago & Erie Railroad Co. v. Keith, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902]; McQuillen v. Hatton, 42 O. S. 202 [1884]; Anderson v. Turbeville, 6 Cold. (46 Tenn.) 150 [1868];

Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398 [1871].

² See Chapter VIII.

³ See Chapter VIII.

⁴ Chicago & Erie Railroad Co. v. Keith, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902]; Reeves v. Treasurer of Wood County, 8 O. S. 333 [1858]; As expressing the same opinion see McQuillen v. Hatton, 42 O. S. 202 [1884].

⁵ Art. I, § 19, Constitution of Ohio [1851].

⁶ Shaver v. Starrett, 4 O. S. 494 [1855].

⁷ City of Seattle v. Kelleher, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904]; Hall v. Street Commissioners of Boston, 177 Mass. 434, 59 N. E. 68 [1901]; Bellows v. Weeks, 41 Vt. 590 [1868]; Mills v. Charleton, 29 Wis. 400, 9 Am. Rep. 578 [1872].

the expense of the improvement which is to be made thereafter, and that the city is to reimburse itself by levying an assessment upon the property benefited by such improvement is not invalid as in violation of the clause forbidding the taking of property without due process of law.⁸ It seems not to prevent the legislature from fixing the rate of interest to be paid on deferred installments of assessments.⁹ "Taking without due process of law" is usually regarded as meaning a taking by the public for its own use as well as a taking for the advantage of a private person, a taking under the guise of assessment or other form of taxation as well as undisguised confiscation. This provision has been said, however, to have no application to the taking of private property for public use, but to refer solely to the transfer of property from one person to another without the consent of the former.¹⁰ The constitutional provision forbidding the taking of property without due process of law has been said to be restricted to eminent domain, and to have no application to local assessments.¹¹ This observation was, however, an obiter, since the proceeding contained the elements usually recognized as due process of law.

§ 118. Due process of law requires apportionment according to benefits.

(2) These constitutional provisions forbidding the taking of property without due process of law, also affect the method of apportioning the assessment with reference to the property upon which it is levied. In theory, at least, it is held in the great majority of jurisdictions that an assessment must be apportioned according to the benefits conferred by the improvement for which such assessment is levied, and must not in any case be in substantial excess of such benefits.¹ As has already been said,² the courts are not in harmony as to the constitutional principle which

⁸ *State ex rel. Minnesota Loan & Trust Company v. Ames*, 87 Minn. 23, 91 N. W. 18 [1902].

⁹ *Hulbert v. City of Chicago*, 202 U. S. 275 [1906]; This question was not brought to the attention of either the trial court or the State Supreme Court and accordingly was not passed upon by the Supreme Court of the United States.

¹⁰ *Jordan v. Hyatt*, 3 Barb. (N. Y.) 275 [1848].

¹¹ *Excelsior Planting and Manufacturing Company v. Green*, 39 La. Ann. 455, 1 So. 873 [1887].

¹ See § 11.

² See § 111 *et seq.*

is applicable in limiting assessments to benefits conferred. The great weight of authority, however, is that the constitutional provision applicable is that which forbids taking of property without due process of law. If the assessment does not exceed the amount of the benefits conferred by the improvement for which such assessment is levied, and is apportioned according to such benefits, it is not objectionable as a violation of the constitutional provisions here under discussion.³ If the assess-

³ Louisville and Nashville Railroad Company v. Barber Asphalt Paving Co., 197 U. S. 430, 25 S. 466 [1905]; (affirming Louisville and Nashville R. R. Co. v. Barber Asphalt Paving Co., 116 Ky. 856; 76 S. W. 1097, 25 Ky. L. R. 1024 [1903]); Shepard v. Barron, 194 U. S. 553, 24 S. 737, 48 L. 1115 [1904]; Schaefer v. Werling, 188 U. S. 516, 23 S. 449, 47 L. 570 [1903]; (affirming Schaefer v. Werling, 156 Ind. 704, 60 N. E. 149 [1901], which upheld the assessment without opinion on the authority of Adams v. City of Shelbyville, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1900]); Chadwick v. Kelley, 187 U. S. 540, 47 L. 293, 23 S. 175 [1903]; (affirming Kelly v. Chadwick, 104 La. 719, 29 So. 295 [1901]); Goodrich v. Detroit, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902]; (affirming Goodrich v. City of Detroit, 123 Mich. 559, 82 N. W. 255 [1900]); Voigt v. Detroit City, 184 U. S. 115, 46 L. 459, 22 S. 337 [1902]; (affirming Voigt v. City of Detroit, 123 Mich. 547, 82 N. W. 253 [1900]); King v. Portland City, 184 U. S. 61, 46 L. 431, 22 S. 290 [1902]; (affirming King v. Portland, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]); Shumate v. Heman, 181 U. S. 402, 45 L. 922, 21 S. 645 [1901]; (affirming Heman v. Allen, 156 Mo. 534, 57 S. W. 559 [1900]); Wormley v. District of Columbia, 181 U. S. 402, 45 L. 921, 21 S. 609 [1901]; (*per curiam*, no opinion); Detroit v. Parker, 181 U. S. 399, 45 L. 917, 21 S. 624, 645

[1901]; (reversing Parker v. City of Detroit, 103 Fed. 357 [1900]); Cass Farm Company v. Detroit, 181 U. S. 396, 45 L. 914, 21 S. 644, 645 [1901]; (affirming Cass Farm Co. v. City of Detroit, 124 Mich. 433, 83 N. W. 108 [1900]); Tonawanda v. Lyon, 181 U. S. 389, 45 L. 908, 21 S. 609 [1901]; (reversing Lyon v. Town of Tonawanda, 98 Fed. 361 [1899]); French v. Barber Asphalt Paving Company, 181 U. S. 324, 21 S. 625, 45 L. 879 [1901]; (affirming Barber Asphalt Paving Company v. French, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]); Spencer v. Merchant, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682 [1885]); Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; (affirming Reclamation District No. 108 v. Hagar, 4 Fed. 366 [1880]); Brown v. Drain, 112 Fed. 582 [1901]; Burlington Sav. Bank v. City of Clinton, Iowa, 106 Fed. 269 [1901]; Harton v. Town of Avondale, 147 Ala. 458, 41 So. 934 [1906]; City Council of Montgomery v. Moore, 140 Ala. 638, 37 So. 291 [1903]; Inge v. Board of Public Works of Mobile, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678 [1902]; City Council of Montgomery v. Birdsong, 126 Ala. 632, 28 So. 522 [1899]; Chapman v. Ames, 135 Cal. 246, 67 Pac. 1125 [1901]; San Francisco Paving Company v. Bates, 134 Cal. 39, 66 Pac. 2 [1901]; Hadley v. Dague, 130 Cal. 207, 62 Pac. 500 [1900]; Cohen v. City of Alameda, 124 Cal. 504, 57 Pac. 377

ment is not apportioned in substantially the same ratio as the benefits or if it is substantially in excess thereof, such assessment

[1899]; *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057 [1896]; *Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771 [1890]; *Appeal of North Beach and Mission Railroad Company in the Matter of Widening Kearney Street*, 32 Cal. 500 [1867]; *City of Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142 [1905]; *City of Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041 [1892]; *Ferguson v. Borough of Stamford*, 60 Conn. 432, 22 Atl. 782 [1891]; *English v. Mayor and Council of Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158 [1896]; *Edgerton v. Mayor and Aldermen of the Town of Green Cove Springs*, 19 Fla. 140 [1882]; *Bacon v. Mayor and Aldermen of Savannah*, 86 Ga. 301, 12 S. E. 580 [1890]; *Speer v. Mayor and Council of Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890]; *Pioneer Irrigation District v. Bradley*, 8 Ida. 310, 101 Am. St. Rep. 201, 67 Pac. 295 [1902]; *Job v. City of Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901]; *Chicago and Northwestern Railway Company v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437 [1897]; *Chicago and Alton Railroad Company v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077 [1894]; *Wright v. City of Chicago*, 46 Ill. 44 [1867]; *Deane v. Indiana Macadam & Construction Company*, 161 Ind. 371, 68 N. E. 686 [1903]; *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021 [1901]; *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004 [1901]; *Roundenbush v. Mitchell*, 154 Ind. 616, 57 N. E. 510 [1900]; *Adams v. City of Shelbyville*, 151 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1900]; *Reinken v. Fuehring*, 130 Ind. 382, 30 Am. St. Rep. 247, 15 L. R. A. 624, 30 N. E. 414, 37 Am. and Eng. Corp. Cases. 354 [1891]; *Minneapolis & St. Louis R. R. Co. v. Lindquist*, 119 Ia. 144, 93 N. W. 103

[1903]; *Ft. Dodge Electric Light & Power Company v. City of Ft. Dodge*, 115 Ia. 568, 89 N. W. 7 [1902]; *Hackworth v. City of Ottumwa*, 114 Ia. 467, 87 N. W. 424 [1901]; *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898]; *City of Kansas City v. Gibson*, 66 Kan. 501, 72 Pac. 222 [1903]; *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. Law Rep. 128, 63 S. W. 964 [1901]; *Broadway Baptist Church v. McAtee*, 8 Bush. (71 Ky.) 508, 8 Am. Rep. 480 [1871]; *Burguières v. Sanders*, 111 La. 109, 35 So. 478 [1903]; *Bruning v. Chadwick*, 109 La. 1067, 34 So. 90 [1903]; *Mayor and City Council of Baltimore v. Ulman*, 79 Md. 469, 30 Atl. 43 [1894]; *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903]; *Lincoln v. Board of Street Commissioners of the City of Boston*, 176 Mass. 210, 57 N. E. 356 [1900]; *Howe v. City of Cambridge*, 114 Mass. 388 [1874]; *Cass Farm Co. v. City of Detroit*, 124 Mich. 433, 83 N. W. 108 [1900]; (affirmed *Cass Farm Company v. Detroit*, 181 U. S. 396, 45 L. 914, 21 S. 644, 645 [1901]); *Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]; (affirmed *Voigt v. Detroit City*, 184 U. S. 115, 46 L. 459, 22 S. 337 [1902]); *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]; *City of Kalamazoo v. Francoise*, 115 Mich. 554, 73 N. W. 801 [1898]; *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091 [1897]; *Sheley v. City of Detroit*, 45 Mich. 431, 8 N. W. 52 [1881]; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535 [1876]; *Motz v. City of Detroit*, 18 Mich. 494 [1869]; *McMillan v. Board of County Commissioners of Freeborn County*, 93 Minn. 16, 100 N. W. 384 [1904]; *State v. Trustees of Macalester College*, 87 Minn. 165, 91 N. W. 484 [1902]; *State v. Robert P. Lewis Company*, 82 Minn. 402, 86 N. W. 611 [1901]; *sub nomine Ramsey*

is invalid as amounting to a taking without due process of law.⁴ It may be observed that in many of the cases there was a failure

County v. Robert P. Lewis Co., 53 L. R. A. 421 [1901]; (reversing on rehearing State v. Robert P. Lewis Company, 82 Minn. 390, 85 N. W. 207 [1901]; *sub nomine* Ramsey County v. Robert P. Lewis Co., 53 L. R. A. 421); State of Minnesota v. Robert P. Lewis Company, 72 Minn. 87, 75 N. W. 108 [1898]; *sub nomine* Ramsey County v. Robert P. Lewis Co., 42 L. R. A. 639; Barber Asphalt Paving Co. v. Munn, 185 Mo. 552, 83 S. W. 1062 [1904]; Ross v. Gates, 183 Mo. 338, 81 S. W. 1107 [1904]; City of St. Charles ex rel. Budd v. Deemar, 174 Mo. 122, 73 S. W. 469 [1903]; Heman v. Gilliam, 171 Mo. 258, 71 S. W. 163 [1902]; Prior v. Buehler & Coney Construction Company, 170 Mo. 439, 71 S. W. 205 [1902]; Barber Asphalt Paving Company v. French, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]; Heman v. Allen, 156 Mo. 534, 57 S. W. 559 [1900]; City of Springfield to use of Central National Bank v. Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276 [1897]; Eyerman v. Blaksley, 78 Mo. 145 [1883]; Tyler v. City of St. Louis, 56 Mo. 60 [1874]; State of Missouri ex rel. Cavender v. City of St. Louis, 52 Mo. 574 [1873]; Uhrig v. City of St. Louis, 44 Mo. 458 [1869]; McMillan v. City of Butte, 30 Mont. 220, 76 Pac. 203 [1904]; State, Raymond, Pros. v. Mayor and Council of the Borough of Rutherford, 55 N. J. L. (26 Vr.) 441, 27 Atl. 172 [1893]; People ex rel. Scott v. Pitt, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662 [1902]; People ex rel. Griffin v. Mayor, etc., of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; People ex rel. Crowell v. Lawrence, 36 Barb. (N. Y.) 178 [1862]; Hilliard v. City of Asheville, 118 N. C. 845, 24 S. E. 738 [1896]; City of

Wilmington v. Yopp, 71 N. C. 76 [1874]; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841 [1902]; Webster v. City of Fargo, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]; (affirmed as Webster v. Fargo, 181 U. S. 394, 45 L. 912, 21 S. 623, 645 [1901]); Roberts v. First National Bank of Fargo, 8 N. D. 504, 79 N. W. 1049 [1899]; Rolph v. City of Fargo, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242 [1898]; Schroder v. Overman, 61 O. S. 1, 47 L. R. A. 156, 55 N. E. 158 [1899]; (affirming Schroeder v. Overman, 18 Ohio C. C. 385 [1899]); Village of Norwood v. Ogden, 15 Ohio C. C. 539, 8 Ohio C. D. 383 [1898]; Harrisburg v. McPherran, 200 Pa. St. 343, 49 Atl. 988 [1901]; Scranton v. Koehler, 200 Pa. St. 126, 49 Atl. 792 [1901]; Wray v. Mayor, etc., of Pittsburgh for use, etc., 46 Pa. St. (10 Wright) 365 [1863]; Cleveland v. Tripp, 13 R. I. 50 [1880]; Tripp v. City of Yankton, 10 S. D. 516, 74 N. W. 447 [1898]; Arnold v. Mayor and Aldermen of Knoxville, 115 Tenn. 195, 90 S. W. 469 [1905]; Lovenberg v. City of Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024 [1897]; Norfolk City v. Ellis, 26 Gratt. (67 Va.) 224 [1875]; Dancer v. Town of Mannington, 50 W. Va. 322, 40 S. E. 475 [1901]; City of Parkersburg v. Tavenner, 42 W. Va. 486, 26 S. E. 179; Meggett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566 [1892].
⁴ Norwood v. Baker, 172 U. S. 269, 43 L. 443, 19 S. 187 [1898]; (affirming Baker v. Village of Norwood, 74 Fed. 997 [1896]); White v. City of Tacoma, 109 Fed. 32 [1901]; Zehnder v. Barber Asphalt Paving Co., 108 Fed. 570 [1901]; Bidwell v. Huff, 103 Fed. 362 [1900]; Fay v. City of Springfield, 94 Fed. 409 [1899]; Loeb v. Trustees of Colum-

to give the property owner a proper notice and hearing as to the amount and apportionment of his assessment as well as an excess of the amount of the assessment over the amount of the special benefits,⁵ which constitutes an additional reason for holding that such assessment does not constitute due process of law.⁶ Questions of the details of a valid apportionment and a discussion of the specific classes of statutes upon the subject are considered subsequently.⁷ In some few cases the theory that an assessment must be apportioned according to benefits or must be limited to the amount thereof has been repudiated.⁸ The constitution of South Carolina provides: "No person shall be arrested, imprisoned, despoiled or dispossessed of his property, immunities or privileges, put out of the protection of the law, exiled or deprived

bia Tp., Hamilton County, Ohio, 91 Fed. 37 [1899]; *Scott v. City of Toledo*, 36 Fed. 385, 1 L. R. A. 688 [1888]; *Lower Kings River Reclamation District No. 531 v. Phillips*, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 [1895]; *City of Atlanta v. Hamlein*, 96 Ga. 381; 23 S. E. 408 [1895]; *Guckien v. Rothrock*, 137 Ind. 355, 37 N. E. 17 [1893]; *Klein v. Nugent Gravel Co.*, — Ind. App. —, 66 N. E. 486 [1903]; *City of Detroit v. Judge of Recorder's Court*, 112 Mich. 588, 71 N. W. 149 [1897]; *sub nomine City of Detroit v. Chapin*, 42 L. R. A. 628; *City of Detroit v. Daly*, 68 Mich. 503, 37 N. W. 11 [1888]; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451 [1879]; *City of St. Joseph v. Crowther*, 142 Mo. 155, 43 S. W. 786 [1897]; *State, Kirkpatrick, Pros. v. Commissioners of Streets and Sewers in the City of New Brunswick*, 42 N. J. L. (13 Vr.) 510 [1880]; *City of Dayton v. Bauman*, 66 O. S. 379, 64 N. E. 433 [1902]; *Cincinnati, Lebanon & Northern Ry. Co. v. City of Cincinnati*, 62 O. S. 465, 49 L. R. A. 566, 57 N. E. 229 [1900]; *Governing City of Cleveland v. Wick*, 18 O. S. 303 [1868], on the question whether such assessment (for paying the expense of taking land in eminent domain) can be levied on abut-

ting property. See §§ 113, 308); *Chamberlain v. Cleveland*, 34 O. S. 551; *Dodsworth v. City of Cincinnati*, 18 Ohio C. C. 288, 10 Ohio C. D. 177 [1899]; *Klein v. City of Cincinnati*, 7 Ohio C. C. 266 [1893]; *Rhoades v. City of Toledo*, 6 Ohio C. C. 9 [1890]; *Or. & Cal. R. R. Co. v. City of Portland*, 25 Or. 229, 22 L. R. A. 713, 35 Pac. 452 [1894]; *Craig v. City of Philadelphia*, 89 Pa. St. (8 Norris) 265 [1879]; *Kaiser v. Weise*, 85 Pa. St. (4 Norris) 366 [1877]; *Seely v. City of Pittsburgh*, 82 Pa. St. (1 Norris) 360, 22 Am. Rep. 760 [1876]; *Hutcheson v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 848 [1899]; *(overruling Adams v. Fisher)*, 75 Tex. 657, 6 S. W. 772 [1890]; *Ashberry v. Roanoke*, 91 Va. 562, 42 L. R. A. 636, 22 S. E. 360 [1895].

⁵ *Fay v. City of Springfield*, 94 Fed. 409; *Scott v. City of Toledo*, 36 Fed. 385, 1 L. R. A. 688; *Lower Kings River Reclamation District No. 531 v. Phillips*, 108 Cal. 305, 30 Pac. 630; *Guckien v. Rothrock*, 137 Ind. 355, 37 N. E. 17 [1893].

⁶ See § 119 *et seq.*

⁷ See Chapter XIII.

⁸ *Rolph v. City of Fargo*, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242 [1898]; *Taylor v. Boyd*, 63 Tex. 533.

of his life, liberty or estate but by the judgment of his peers or the law of the land . . . ”.⁹ The earlier decisions recognized the validity of assessments for sidewalks and drains under this clause of the constitution.¹⁰ In a later case, under the constitution of 1790, a case was presented in which land had been taken for widening a street, and the expense of such taking had in part been assessed upon the lot holders on the other side of the street, whose lands had not been taken. Such assessment was held to be a violation of this clause of the constitution.¹¹ In a subsequent case decided under the constitution of 1868, the question of the validity of assessments for street improvements was considered. The Supreme Court of South Carolina construed the phrase “the law of the land” as meaning “the common law and the statute law existing at the adoption of our constitution,” that is, in 1790.¹² There being no express authority found in the law of South Carolina as it stood in 1790 for assessments for street improvements, it was held that they were rendered invalid by this clause of the constitution.¹³ It was said, however, in an obiter in this case that by the decisions rendered prior to the present constitution, assessments for sidewalks, drains and sewers had been recognized as valid, and such assessments were therefore a part of the “law of the land” within the meaning of the present constitution. In subsequent cases, however, this earlier obiter is overruled and it is held that by virtue of the clause of the consti-

⁹ § 14. Constitution of South Carolina [1868]. A similar provision was found in Art. IX., § 2, Constitution of South Carolina [1790].

¹⁰ *Sidewalks and drains*.—Cruikshanks v. City Council, 1 McCord (S. C.) 360 [1821].

Drains.—Horiston v. City Council of Charleston, 1 McCord (S. C.) 345 [1821].

Shoolbred v. Corporation of the City of Charleston, 2 Bay (S. C.) 63 [1796], seems to be a case of assessment, but possibly of assessment preliminary to levying a general tax and not a special assessment.

¹¹ State ex rel. Horlbeck v. City Council of Charleston, 12 Rich. (S. C.) 702 [1860].

For the general view as to the

validity of assessments for taking land, see §§ 113, 308 *et seq.*

It will be noted that the result would be concurred in by some courts which would not agree with the reasoning whereby such result was reached.

¹² This construction is not in accordance with that generally given to this and to similar phrases. See § 115.

It would seem to have the effect of petrifying the law of South Carolina at 1790, making further extension impossible.

¹³ Mauldin v. City Council of Greenville, 42 S. C. 293, 46 Am. St. Rep. 723, 27 L. R. A. 284, 20 S. E. 842 [1893].

tution under discussion assessments even for sidewalks, drains and sewers are invalid.¹⁴ If these last decisions are adhered to and no constitutional amendment is made the law of local assessments in South Carolina is ended.

§ 119. Due process of law requires notice and hearing.

(3) The constitutional provisions which forbid the taking of property without due process of law find their most prominent sphere of influence as far as the law of local assessments is concerned, in the doctrine of the necessity of notice. That under these constitutional provisions the owner of the property assessed is entitled to some form of notice of the assessment at some stage of the proceedings is clear by the great weight of authority. At what stage of the proceedings such notice must be given and of what the property owner is entitled to notice, are questions upon which there is not so clear a consensus of opinion. The general rule is that at some time before the assessment becomes an absolute finality there must be a notice to the property owner and an opportunity for a hearing as to those questions of fact which concern the amount of the assessment to be imposed upon such property, except such as the legislative power has authority to determine without especial inquiry, and has in fact so determined. "Whenever the amount of tax to be exacted depends upon the exercise of the judgment and discretion of those fixing the value of the property or benefits by which such amount is to be measured, an opportunity for correction must be afforded."¹ Such notice and hearing must furthermore be given as a matter of right. "It is not enough that the owners chance to have notice or that they may as a matter of favor have a hearing. The law must require notice to them and give them the right to a hearing and the opportunity of being heard."² An assessment made upon notice which possesses these elements is not invalid upon the ground of want of notice, and as far as notice is concerned, is not a taking without due process

¹⁴ *Mauldin v. City Council of Greenville*, 53 S. C. 285, 69 Am. St. Rep. 855, 43 L. R. A. 101, 31 S. E. 252 [1898]; *Stehmeyer v. City Council of Charleston*, 53 S. C. 259, 31 S. E. 322 [1898].

¹ *Beebe v. Magoun*, 122 Ia. 94, 96,

101 Am. St. Rep. 259, 97 N. W. 986 [1904].

² *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289 [1878]; quoted in *Beebe v. Magoun*, 122 Ia. 94, 96, 97, 101 Am. St. Rep. 259, 97 N. W. 986 [1904].

of law.³ If, on the other hand, such notice is not given and under the law the assessment becomes a finality, subject to be enforced summarily, without giving any opportunity for a hear-

³ *Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. Porter*, 210 U. S. 177, 28 S. 647 [1908]; (*Affirming Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. Porter*, 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179); *Ballard v. Hunter*, 204 U. S. 241, 51 L. 461, 27 S. 261 [1907]; (*Affirming 74 Ark. 174, 85 S. W. 252* [1905]); *Turpin v. Lemon*, 187 U. S. 51, 47 L. 70, 23 S. 20 [1902]; *Bellingham Bay & British Columbia Railroad v. New Whatcom*, 172 U. S. 314, 43 L. 460, 19 S. 205 [1899]; (*Affirming City of New Whatcom v. Bellingham Bay Improvement Company*, 16 Wash. 131, 47 Pac. 236 [1896]); *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898]; (*Affirming Parsons v. District of Columbia*, 8 App. D. C. 391 [1896]); *Bauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; (*Reversing District of Columbia v. Armes*, 8 App. D. C. 393 [1896]; *Bauman v. Ross*, 9 App. D. C. 260 [1896]; *Abbott v. Ross*, 9 App. D. C. 289 [1896]); *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; (*Reversing Bradley v. Fallbrook Irrigation District*, 68 Fed. 948 [1895]; *Paulsen v. Portland*, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]; (*Affirming Paulson v. City of Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]); *Lent v. Tillson*, 140 U. S. 316, 35 L. 419, 11 S. 825 [1891]; *Palmer v. McMahon*, 133 U. S. 660, 33 L. 772, 10 S. 324; *Walston v. Nevin*, 128 U. S. 578, 32 L. 544, 9 S. 192 [1888]; (*Affirming Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887]); *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (*Affirming Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]); *Wurts v. Hoagland*, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885];

(*Affirming Matter of drainage of Great Meadows on Pequest River*, 42 N. J. L. (13 Vr.) 553 [1880] which was affirmed without opinion as *Hoagland v. State*, *Simonton, Pros.*, 43 N. J. L. (14 Vr.) 456 [1881]); *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. 616 [1877]; (*Affirming In the Matter of the Commissioners of the First Draining District*, praying for the Homologation of the Assessment Roll, 27 La. Ann. 20 [1875]); *McMillen v. Anderson*, 95 U. S. 37, 24 L. 335; *Brown v. Drain*, 112 Fed. 582 [1901]; *Minnesota & M. Land & Improvement Co. v. City of Billings*, 111 Fed. 972, 50 C. C. A. 70 [1901]; *Cohen v. City of Alameda*, 124 Cal. 504, 57 Pac. 377 [1899]; *In the matter of the Bonds of the Madera Irrigation District*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675 [1891]; *Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771 [1890]; *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]; *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904]; *Clapp v. City of Hartford*, 35 Conn. 66 [1868]; *Nichols v. City of Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636 [1854]; *District of Columbia v. Wormley*, 15 App. D. C. 58 [1899]; *District of Columbia v. Burgdorf*, 7 App. D. C. 405; *District of Columbia v. Burgdorf*, 6 App. D. C. 465 [1895]; *People ex rel. Hanberg v. Cohen*, 219 Ill. 200, 76 N. E. 388 [1906]; *Citizens' Savings Bank and Trust Company v. City of Chicago*, 215 Ill. 174, 74 N. E. 115 [1905]; *Owners of Land v. People ex rel. Stookey*, 113 Ill. 296 [1886]; *New York C. and St. Louis Ry. Co. v. City of Hammond*, — Ind. —, 83 N. E. 244 [1908]; *Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624 [1906]; *Voris v. Pitts-*

ing as to the questions of fact which concern the amount of the assessment other than those which the legislative power has authority to determine without especial inquiry, and which the legislative power has in fact so determined, such assessment then constitutes a taking without due process of law and is invalid as in violation of the constitutional provisions under consideration.⁴ The hearing for which provision is made must be one

burg Plate Glass Co., 163 Ind. 599, 70 N. E. 249 [1904]; Leeds v. De-frees, 157 Ind. 392, 61 N. E. 930 [1901]; Roundenbush v. Mitchell, 154 Ind. 616, 57 N. E. 510 [1900]; Kizer v. Town of Winchester, 141 Ind. 694, 40 N. E. 265 [1895]; Swain v. Fulmer, 135 Ind. 8, 34 N. E. 639 [1893]; Reinken v. Fuehring, 130 Ind. 382, 30 Am. St. Rep. 247, 37 A. & E. Corp. Cas. 354, 15 L. R. A. 624, 30 N. E. 414; Law v. Johnston, 118 Ind. 261, 20 N. E. 745 [1888]; Garvin v. Daussman, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826 [1887]; Ross v. Board of Supervisors of Wright County, 128 Ia. 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506 [1905]; Beebe v. Magoun, 122 Ia. 94, 101 Am. St. Rep. 259, 97 N. W. 986 [1904]; Yeomans v. Riddle, 84 Ia. 147, 50 N. W. 886 [1891]; Amery v. City of Keokuk, 72 Ia. 701, 30 N. W. 780 [1887]; Nevin v. Roach, 86 Ky. 492, 5 S. W. 546 [1887]; Mayor and City Council of Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43 [1894]; City of St. Paul v. Nickl, 42 Minn. 202, 44 N. W. 59 [1890]; City of St. Louis v. Ranken, 96 Mo. 497, 9 S. W. 910 [1888]; Hurford v. City of Omaha, 4 Neb. 336 [1876]; Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682 [1885]; In the matter of the Petition of Lowden to Vacate an Assessment, 89 N. Y. 548 [1882]; Matter of Ryers, 72 N. Y. 1, 28 Am. Rep. 88; Hilliard v. City of Asheville, 118 N. C. 845, 24 S. E. 738 [1896]; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841 [1902]; Taylor v. Crawford, 72 O. S. 560, 69 L. R. A. 805, 74 N. E.

1065 [1905]; (Reversing Crawford v. Taylor, 27 Ohio C. C. 245); Caldwell v. Village of Carthage, 49 O. S. 334, 31 N. E. 602 [1892]; King v. Portland, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]; Cleveland v. Tripp, 13 R. I. 50 [1880]; Kettle v. City of Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874 [1904]; Davis v. City of Lynchburg, 84 Va. 861, 6 S. E. 230 [1888]; Stone v. Little Yellow Drainage District, 118 Wis. 388, 95 N. W. 405 [1903]; Hennessey v. Douglas County, 99 Wis. 129, 74 N. W. 983 [1898]; Meggett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566 [1892]; See also as to sufficiency of notice in taxation Longyear v. Toolan, 209 U. S. 414, 28 S. 506 [1908]; (Affirming Toolan v. Longyear, 144 Mich. 55, 107 N. W. 699 [1906]).

⁴Norwood v. Baker, 172 U. S. 269, 43 L. 443, 19 S. 187 [1898]; (Affirming Baker v. Village of Norwood, 74 Fed. 997 [1896]); Anderson v. Messenger, 158 Fed. 250 [1907]; Fay v. City of Springfield, 94 Fed. 409 [1899]; Murdoek v. City of Cincinnati, 39 Fed. 891 [1889]; 44 Fed. 726 [1891]; Scott v. City of Toledo, 36 Fed. 385, 1 L. R. A. 688 [1888]; Lower Kings River Reclamation District, No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 [1895]; Hutson v. Woodbridge Protection District, No. 1, 79 Cal. 90, 16 Pac. 549, 21 Pac. 435 [1889]; Boorman v. City of Santa Barbara, 65 Cal. 313, 4 Pac. 31 [1884]; Brown v. City of Denver, 7 Colo. 305, 3 Pac. 455 [1884]; Allman v. District of Columbia, 3 App. D. C. 8 [1894]; Ben-

which gives to the property owner an opportunity for a fair and impartial determination as to the amount of his assessment.⁵ Hence a provision which permits an interested party to act as a commissioner in apportioning the assessment denies due process of law and is invalid.⁶ An opportunity to submit objections with-

singer v. District of Columbia, 6 Mack. (D. C.) 285 [1888]; Savannah F. and W. Ry. Co. v. City of Savannah, 96 Ga. 680, 23 S. E. 847; Clarke v. City of Chicago, 185 Ill. 354, 57 N. E. 15 [1900]; Guckien v. Rothrock, 137 Ind. 355, 37 N. E. 17 [1893]; Scudder v. Jones, 134 Ind. 547, 32 N. E. 221 [1893]; City of Logansport v. Shirk, 129 Ind. 352, 28 N. E. 538 [1891]; Hille v. Neale, 32 Ind. App. 341, 69 N. E. 713 [1904]; Beebe v. Magoun, 122 Ia. 94, 101 Am. St. Rep. 259, 97 N. W. 986 [1904]; Oliver v. Monona County, 117 Ia. 43, 90 N. W. 510 [1902]; Ford v. Town of North Des Moines, 80 Ia. 626, 45 N. W. 1031 [1890]; Lyman v. Plummer, 75 Ia. 353, 39 N. W. 527 [1888]; Gatch v. City of Des Moines, 63 Ia. 718, 18 N. W. 310; Gilmore v. Hentig, 33 Kan. 156, 5 Pac. 781 [1885]; Chesapeake and Ohio Railway Company v. Mullins, 94 Ky. 355, 22 S. W. 558 [1893]; Ulman v. Mayor and City Council of Baltimore, 72 Md. 587, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709, 32 Am. and Eng. Corp. Cas. 228 [1890]; Sears v. Street Commissioners of Boston, 173 Mass. 350, 53 N. E. 876 [1899]; Sligh v. City of Grand Rapids, 84 Mich. 497, 47 N. W. 1093; Thomas v. Gain, 35 Mich. 155, 24 Am. Rep. 535 [1876]; People on the Relation of Butler v. Supervisors of Saginaw County, 26 Mich. 22 [1872]; Overmann v. City of St. Paul, 39 Minn. 120, 39 N. W. 66 [1888]; City of St. Louis v. Ranken, 96 Mo. 497, 9 S. W. 910 [1888]; Poillon v. Mayor and Council of the Borough of Rutherford, 65 N. J. L. (36 Vr.) 538, 47 Atl. 439 [1900]; State, Watrous, Pros. v. City of Elizabeth, 40 N. J. L. (11 Vr.) 278 [1878]; State,

Mann Pros. v. Mayor and Common Council of Jersey City, 24 N. J. L. (4 Zab.) 662 [1855]; In the Matter of the Application of the Trustees of Union College for an Order directing the Treasurer of Long Island City to cancel certain water rates and rents, 129 N. Y. 308, 29 N. E. 460 [1891]; McLaughlin v. Miller, 124 N. Y. 510, 26 N. E. 1104 [1891]; Remsen v. Wheeler, 105 N. Y. 573, 12 N. E. 564 [1887]; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289 [1878]; Ireland v. City of Rochester, 51 Barb. (N. Y.) 414 [1868]; In the Matter of the Application of the Common Council of the City of Amsterdam to take lands for the extension of Grove and Jay Streets, 55 Hun. (N. Y.) 270, 8 N. Y. Supp. 234 [1889]; *In re* Mayor, etc., of New York, 89 N. Y. S. 6, 95 App. Div. 552 [1904]; Piekton v. City of Fargo, 10 N. D. 469, 88 N. W. 90 [1901]; Chicago & Erie Railroad Co. v. Keith, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902]; Hershberger v. City of Pittsburgh, 115 Pa. St. 78, 8 Atl. 381 [1886]; Hutcheson v. Storrie, 92 Tex. 685, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 848 [1899]; City of Galveston v. Heard, 54 Tex. 420 [1881]; City of Norfolk v. Young, 97 Va. 728, 47 L. R. A. 574, 34 S. E. 886 [1900]; Baltimore R. Co. v. Pittsburg R. Co., 17 W. Va. 835; Dietz v. City of Neenah, 91 Wis. 422, 64 N. W. 299, 65 N. W. 500 [1895].

⁵ Commissioners of Union Drainage District No. 1 v. Smith, 233 Ill. 417, 84 N. E. 376 [1908].

⁶ Commissioners of Union Drainage District No. 1 v. Smith, 233 Ill. 417, 84 N. E. 376 [1908].

out a provision for a hearing at which the objectors may offer evidence in support of their objections does not constitute due process of law.⁷

§ 120. Theory that notice is not a constitutional right.

In some cases language is used which seems to intimate that notice is not a constitutional right.¹ "Claims for paving and other municipal improvements are a species of taxation and the property owner has only such right of contest and defence as the legislature chooses to allow him."² These cases, however, are for the most part cases holding that notice of the intention of making the public improvement for which the assessment is to be levied is not necessary,³ or cases in which no notice was given in advance of a legislative determination of benefits,⁴ or cases in which some reasonable notice was in fact provided for by the legislature. In other cases it seems to be held that the mere performance of the work itself, under a law which provides for levying assessments therefor, is sufficient notice to the property holder.⁵

§ 121. Legislative discretion as to nature and kind of notice.

The legislature has a wide discretion in determining the nature and kind of notice to be given,¹ though it has no power to dis-

⁷ *Londoner v. City and County of Denver*, 210 U. S. 373, 28 S. 708 [1908]; (reversing *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117); *Heinz v. Buckham*, — Mich. —, 116 N. W. 736 [1908].

¹ *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559 [1900]; *Finnell v. Kates*, 19 O. S. 405 [1869]; *Seranton v. Jermyn*, 156 Pa. St. 107, 27 Atl. 66 [1893]; *Seranton v. Whyte*, 148 Pa. St. 419; *Adams v. Fisher*, 63 Tex. 651 [1885]; *City of Galveston v. Heard*, 54 Tex. 420 [1881].

² *Seranton v. Jermyn*, 156 Pa. St. 107, 27 Atl. 66 [1893].

³ See § 125, § 740.

⁴ *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559 [1900].

⁵ *Davis v. City of Lynchburg*, 84 Va. 861, 6 S. E. 230 [1888]; (It may be noted that the foregoing case

treats this question as no longer open, and cites upon the point *Norfolk City v. Ellis*, 67 Va. (26 Gratt.) 224 [1875] a case which does not seem to determine the question.) "All possible notice is given by the progress of the work itself, and under our system of laws every citizen is charged with notice of the public law." *Davis v. City of Lynchburg*, 84 Va. 861, 870, 6 S. E. 230 [1888].

¹ *Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. Porter*, 210 U. S. 177, 28 S. 647 [1908]; (Affirming *Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. Porter*, 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179); *Ballard v. Hunter*, 204 U. S. 241, 51 L. 461, 27 S. 261 [1907]; (Affirming 74 Ark. 174, 85 S. W. 252 [1905]); *Davidson v. New Orleans*, 96 U. S. 97, 24 L. 616

pense with all notice.² If such notice is given as will fairly and reasonably apprise the property owner of the pendency of the assessment proceedings so as to give him an opportunity for a hearing upon the merits he is not entitled as a matter of constitutional right to personal service. Notice by publication may therefore be provided for by the legislature without violating the constitutional provision forbidding the taking of property without due process of law.³ Notice by publication consisting

[1877]; In the Matter of the Petition of Lowden to Vacate an Assessment, 89 N. Y. 548 [1882]; Swain v. Fulmer, 135 Ind. 8, 34 N. E. 639 [1893].

²Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289 [1878].

³Ballard v. Hunter, 204 U. S. 241, 51 L. 461, 27 S. 261 [1907]; (Affirming Ballard v. Hunter, 74 Ark. 174, 85 S. W. 252 [1905]); Detroit v. Parker, 181 U. S. 399, 45 L. 917, 21 S. 624, 645 [1901]; (Reversing Parker v. City of Detroit, 103 Fed. 357 [1900]); Wight v. Davidson, 181 U. S. 371, 45 L. 900, 21 S. 616 [1901]; Bellingham Bay & British Columbia Railroad v. New Whatcom, 172 U. S. 314, 43 L. 460, 19 S. 205 [1899]; (Affirming City of New Whatcom v. Bellingham Bay Improvement Company, 16 Wash. 131, 47 Pac. 236 [1896]); Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; (Reversing Bradley v. Fallbrook Irrigation District, 68 Fed. 948 [1895]; Paulsen v. Portland, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]; (Affirming Paulson v. City of Portland, 16 Or. 450, 1 L. R. A. 673, 19 P. 450 [1888]); Lent v. Tillson, 140 U. S. 316, 35 L. 419, 11 S. 825 [1891]; Walston v. Nevin, 128 U. S. 578, 32 L. 544, 9 S. 192 [1888]; Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; Ritter v. Drainage District No. 1, Poinsett County, 78 Ark. 580, 94 S. W. 711 [1906]; Wulzen v. Board of Supervisors of the City and

County of San Francisco, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353 [1894]; Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771 [1890]; Gage v. City of Chicago, 225 Ill. 218, 80 N. E. 127 [1907]; Ricketts v. Village of Hyde Park, 85 Ill. 110 [1877]; Lyman v. Plummer, 75 Ia. 353, 39 N. W. 527 [1888]; Hoertz v. Jefferson Southern Pond Draining Company, 119 Ky. 824, 84 S. W. 1141, 27 Ky. L. R. 278 [1905]; Chesapeake and Ohio Railway Company v. Mullins, 94 Ky. 355, 22 S. W. 558 [1893]; State v. Pillsbury, 82 Minn. 359, 85 N. W. 175 [1901]; Hennepin County v. Bartleson, 37 Minn. 343, 34 N. W. 222; City of St. Joseph v. Truckenmiller, 183 Mo. 9, 81 S. W. 1116 [1904]; Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600 [1896]; In the Matter of the Application of the Common Council of the City of Amsterdam to take lands for the extension of Grove and Jay Streets, 126 N. Y. 158, 27 N. E. 272 [1891]; Remsen v. Wheeler, 105 N. Y. 573, 12 N. E. 564 [1887]; Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682 [1885]; (Affirmed Spencer v. Merchant, 125 U. S. 345, 31 L. 763, 8 S. Ct. 921 [1888]); In the matter of the Petition of De Peyster to Vacate an Assessment, 80 N. Y. 565 [1880]; King v. Portland, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2; Philadelphia v. Jenkins, 162 Pa. St. 451, 29 Atl. 794; Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332 [1896]; Fass v. Seehawer, 60 Wis. 525, 19 N. W. 533 [1884].

of one insertion in a paper of general circulation has been held sufficient as constituting due process of law.⁴ The option which is often given to property owners to construct the improvement themselves instead of requiring them to pay an assessment therefor⁵ is a mere favor extended by the legislature. They have no constitutional right thereto.⁶ Notice may therefore be given in such cases by publication.⁷ Notice may be given as well by the statute by which the assessment is authorized or by the ordinance by which the assessment is levied as by any other means. Accordingly if notice of the time and place of hearing is given in the ordinance by which the assessment is levied, such notice is sufficient.⁸ The hearing provided by the Indiana statute is sufficient even though by statute the property abutting on the improvement is liable in the first instance and the strip of back-lying property extending one hundred feet in depth from the fifty-foot strip is liable only if the assessment upon the fifty-foot strip proves insufficient.⁹

§ 122. Legislative discretion as to time of notice.

Similar considerations apply to the question of the time for which the notice is to be given. The legislature has a wide range of discretion and as long as the time is sufficient to give the property owner a fair opportunity to be heard, the length of time is within the discretion of the legislature.¹ A fair opportunity for a hearing is, however, a constitutional right of the

⁴ *Ritter v. Drainage District No. 1, Poinsett County*, 78 Ark. 580, 94 S. W. 711 [1906].

⁵ See § 52 et seq.

⁶ *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533 [1884].

⁷ *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533 [1884].

⁸ *Wulzen v. Board of Supervisors of the City and County of San Francisco*, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353 [1894]; *Arnold v. City of Fort Dodge, Iowa*, 111 Ia. 152, 82 N. W. 495 [1900]; *Broadway Baptist Church v. McAtee*, 8 Bush. (71 Ky.) 508, 8 Am. Rep. 480 [1871].

⁹ *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Porter*, 210

U. S. 177, 28 S. 647 [1908]; (Affirming *Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. Porter*, 38 Ind. App. 226; 74 N. E. 260, 76 N. E. 179); following *Voris v. Pittsburg Plate Glass Co.*, 163 Ind. 599, 70 N. E. 249.

¹ *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Porter*, 210 U. S. 177, 28 S. 647 [1908]; *Bellingham Bay & British Columbia Railroad v. New Whatcom*, 172 U. S. 314, 13 L. 460, 19 S. 205 [1899]; (affirming *City of New Whatcom v. Bellingham Bay Improvement Company*, 16 Wash. 131, 47 Pac. 236 [1896]); *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900].

property owner. A notice which is not given until the assessment has become a finality is given too late to satisfy the constitutional requirement of "due process of law."²

§ 123. Notice not necessary as to matters which legislature may determine.

If the legislature has power to levy the assessment itself and has in fact so levied it, notice thereof has been held to be unnecessary as to such matters as the legislature itself may pass upon.¹ Two reasons, not necessarily inconsistent with each other, have been suggested for this rule. One is that where the question is within the discretion of the legislature which may in such cases pass upon the facts and determine the question of benefits, notice is useless, and therefore unnecessary. The other is that where the legislature itself levies the assessment, the property owner has in fact notice and hearing, not in person, but through his representative in the legislature. In accordance with the foregoing principles notice need not be given of the determination of such questions, as the legislature may pass

² Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; Palmer v. McMahon, 133 U. S. 660, 33 L. 772, 10 S. 324 [1890]; Spencer v. Merchant, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (Affirming 100 N. Y. 585, 3 N. E. 682 [1885]); Davidson v. New Orleans, 96 U. S. 97, 24 L. 616 [1877]; Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; Scott v. City of Toledo, 36 Fed. 385, 1 L. R. A. 688 [1888]; Beebe v. Magoun, 122 Ia. 94, 101 Am. St. Rep. 259, 97 N. W. 986 [1904]; Ulman v. Mayor and City Council of Baltimore, 72 Md. 587, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709, 32 Am. and Eng. Corp. Cas. 228 [1890]; Sears v. Street Commissioners of Boston, 173 Mass. 350, 53 N. E. 876 [1899]; In the Matter of the Application of the Trustees of Union College for an order directing the Treasurer of Long Island City to cancel certain Water Rates and

Rents, 129 N. Y. 308, 29 N. E. 460 [1891]; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289 [1878]; Chicago & Erie Railroad Co. v. Keith, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902]; Hutcheson v. Storrie, 92 Tex. 685, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 848 [1899]; City of Norfolk v. Young, 97 Va. 728, 47 L. R. A. 574, 34 S. E. 886 [1900]; Violett v. City Council of Alexandria, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896]; Dietz v. City of Neenah, 91 Wis. 422, 64 N. W. 299, 65 N. W. 500 [1895].

¹ Williams, Treasurer, v. Eggleston, 170 U. S. 304, 42 L. 1047, 18 S. 617 [1898]; Parsons v. District of Columbia, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898]; Spencer v. Merchant, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (Affirming Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682 [1885]); Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682 [1885].

upon finally and as to which its determination is a finality.² Where the legislature has power to pass upon the question of benefits and determine what property is benefited and in what proportion,³ the property owners have no right to notice as a condition precedent to such determination.⁴ If the legislature in the exercise of its constitutional power has made such provision concerning the area and limits of the assessment district, the determination of the amount of the assessment and the apportionment thereof, that the ascertaining of the amount that each property owner is to pay is a matter of mere arithmetical calculation, notice of the time and place of making such calculation is said to be useless, in that it could not avail the property owner. Accordingly, it is held in some jurisdictions that if the proceedings up to this point are not objectionable as being a taking of property without due process of law, omission to require or to give notice is not in such cases a violation of such constitutional provisions.⁵ This principle is not, however, regarded in all jurisdictions as the correct one. Questions of various sorts, such as the extent of the land belonging to a given property owner as affecting the basis of arithmetical calculation, or special circumstances peculiar to the tract in question, and modifying the apportionment, may arise. An opportunity for hearing should be

² Williams, Treasurer, v. Eggleston.

170 U. S. 304, 42 L. 1047, 18 S. 617 [1898]; Spencer v. Merchant, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; Lower Kings River Reclamation District, No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 [1895]; Barfield v. Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. R. 128 [1901]; Meier v. City of St. Louis, 180 Mo. 391, 79 S. W. 955 [1903]; Barber Asphalt Paving Co. v. French, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]; (affirmed in French v. Barber Asphalt Paving Co., 181 U. S. 324, 45 L. 879, 21 S. 625 [1901]; Heman v. Allen, 156 Mo. 534, 57 S. W. 559 [1900]); City of St. Louis v. Ranken, 96 Mo. 497, 9 S. W. 910 [1888]; People of the State of New York ex rel. Scott v. Pitt, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662 [1902].

³ See § 553 et seq.

⁴ Barfield v. Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. R. 128 [1901].

⁵ Gillette v. Denver, 21 Fed 822; English v. Mayor and Council of Wilmington, 2 Marv. (Del.) 63, 37 Atl. 158 [1896]; People ex rel. Barber v. Chapman, 127 Ill. 387, 19 N. E. 872 [1890]; Amery v. City of Keokuk, 72 Ia. 701, 30 N. W. 780 [1887]; People of the State of New York ex rel. Scott v. Pitt, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662 [1902]; Cleveland v. Tripp, 13 R. I. 50 [1880]; City of Galveston v. Heard, 54 Tex. 420 [1881]; Adams v. City of Roanoke, 102 Va. 53, 45 S. E. 881 [1903]; Stone v. Little Yellow Drainage District, 118 Wis. 388, 95 N. W. 405 [1903]; Meggett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566 [1892].

given to permit the property owner to raise questions of this sort if he wishes, according to the view entertained in many jurisdictions, and therefore in such jurisdictions notice is held necessary.⁶

§ 124. Notice not necessary if liability optional with owner.

If the charge is for a purpose of which the property owner may avail himself or not, at his option, and the charge is one to which he is not liable if he does not see fit to avail himself of such privilege, notice is unnecessary, since no assessment is imposed for the improvement itself, but only for such use of the privilege.¹ Thus where an assessment was to be levied upon the property from which private sewers might be connected with a public sewer, it was held that notice was unnecessary.² So a statute providing that the state may make contracts for excavating a waterway and filling in tide lands, and then selling the lands to private owners subject to the lien of the cost of such improvement, is not unconstitutional as a taking of property without due process of law.³ So where the charge for water used upon the premises was based upon the amount so used, the owner being free to make use of the water or not, as he

⁶ *Ulman v. Mayor and City Council of Baltimore*, 72 Md. 587, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709, 32 Am. and Eng. Corp. Cas. 228 [1890]; *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104 [1891].

¹ *Seattle Dock Co. v. Seattle and Lake Washington Waterway Co.*, 195 U. S. 624, 49 L. 350, 25 S. 789 [1904]; (Affirming in a *per curiam* opinion without discussion *Seattle and Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845 [1904]); *Carson v. Brockton Sewerage Commission*, 182 U. S. 398, 45 L. 1151, 21 S. 860 [1901]; (Affirming *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]); *Provident Institution for Savings v. Mayor and Aldermen of Jersey City*, 113 U. S. 506, 28 L. 1102, 5 S. 612 [1884]; *Wagner v. City of Rock Island*, 146 Ill. 139, 21

L. R. A. 519, 34 N. E. 545; *Vreeland v. O'Neil*, 36 N. J. Eq. (9 Stew.) 399; (affirmed 37 N. J. Eq. (10 Stew.) 574); *Lrass v. Rathbone*, 153 N. Y. 435, 47 N. E. 905; *Silkman v. Board of Water Commissioners of City of Yonkers*, 152 N. Y. 327, 37 L. R. A. 827, 46 N. E. 612 [1897]; *Alter v. City of Cincinnati*, 56 O. S. 47, 35 L. R. A. 737, 46 N. E. 69 [1897].

² *Carson v. Brockton Sewerage Commission*, 182 U. S. 398, 45 L. 1151, 21 S. 860 [1901] (Affirming *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]).

³ *Seattle Dock Co. v. Seattle and Lake Washington Waterway Co.*, 195 U. S. 624, 25 S. 789 [1904]; (affirming in a *per curiam* report without discussion *Seattle and Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845 [1904]).

might choose, notice is not necessary.⁴ The essential fact which renders notice unnecessary in levying such assessments is that it is optional with the party charged with such liability to accept or reject the article offered at his pleasure. It is not the nature of the article furnished that dispenses with the necessity of notice. Accordingly, if the statute attempts to impose a liability upon land which fronts upon the water pipes for the laying of which the assessment is levied, irrespective of the use of water made upon such land, and irrespective of whether the owner voluntarily makes connection with such pipes, notice is necessary as in case of other assessments.⁵

§ 125. Notice of preliminary steps not necessary.

Notice of every step in assessment proceedings is by no means necessary.¹ On the one hand it is not necessary that notice be given of preliminary matters, which lead up to the determination of the amount for which each tract of property is to be assessed, but do not directly involve such determination.² "If the law provides for the required notice to the land-owner whose land

⁴ *Provident Institution for Savings v. Mayor and Aldermen of Jersey City*, 113 U. S. 506, 28 L. 1102, 5 S. 612 [1884]; *Wagner v. City of Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545; *Vreeland v. O'Neil*, 36 N. J. Eq. (9 Stew.) 399; (affirmed 37 N. J. Eq. (10 Stew.) 574); *Brass v. Rathbone*, 153 N. Y. 435, 47 N. E. 905; *Alter v. City of Cincinnati*, 56 O. S. 47, 35 L. R. A. 737, 46 N. E. 69 [1897]; *Silkman v. Board of Water Commissioners of City of Yonkers*, 152 N. Y. 327, 37 L. R. A. 827, 46 N. E. 612 [1897].

⁵ In the Matter of the Application of the Trustees of Union College for an order directing the Treasurer of Long Island to cancel certain Water Rates and Rents, 129 N. Y. 308, 29 N. E. 460 [1891].

¹ *Voigt v. Detroit City*, 184 U. S. 115, 46 L. 459, 22 S. 337 [1902]; (affirming *Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]); *King v. Portland City*, 184 U. S. 61, 46 L. 431, 22 S. 290 [1902]; (affirm-

ing *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]).

² *Goodrich v. Detroit*, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902]; (affirming *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]); *Voigt v. Detroit City*, 184 U. S. 115, 46 L. 459, 22 S. 337 [1902]; (affirming *Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]); *King v. Portland City*, 184 U. S. 61, 46 L. 431, 22 S. 290 [1902]; (affirming *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]); *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]; *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600 [1887]; *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. R. 128 [1901]; *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091 [1897]; *Kelley v. Minneapolis City*, 57 Minn. 294, 47 Am. St. Rep. 605, 26 L. R. A. 92, 59 N. W. 304 [1894]; *City of St. Paul v. Nickl*, 42 Minn. 262, 44 N. W. 59 [1890]; *Adams v. City of Roanoke*, 102 Va. 53, 45 S. E. 881 [1903].

it is proposed to charge with any part of the costs of the public improvement, an assessment against his property made under it will not be defeated if he has been given at some stage of the proceedings a fair opportunity to be heard to test the legality, justice and correctness of the assessment. It is only with the charge upon him that he is concerned, and of that alone he can complain. In the legality of that charge is necessarily involved all that precedes it, and of which it is the consequence. When the land-owner has been given a hearing at which he might insist that his property was not benefited to the amount assessed, or that it was not benefited at all, and thus obtains every advantage which he might obtain were he informed of every step in the proceedings there is no want of due process of law within the meaning of the Fourteenth Amendment; and where the ordinance or resolution of the council is that each lot in the district or section within which the improvement is made shall be assessed in accordance with or not in excess of the benefits derived from the improvement, the whole question of the amount of benefit derived from a particular parcel of real estate is opened up even to showing that no benefit whatever was occasioned by the improvement.”³ This is true especially where such preliminary steps are within the discretion of the legislative department.⁴ Thus, by the weight of authority no notice of the determination of making a public improvement need be given to those to be assessed therefor.⁵ In some cases, however, it seems

³ *Adams v. City of Roanoke*, 102 Va. 53, 63, 64, 45 S. E. 881 [1903]; (citing as under a similar statute *Voigt v. Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]; affirmed 184 U. S. 115, 46 L. 459, 22 S. 337 [1902]); and also *Goodrich v. Detroit*, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902].

⁴ *Williams, Treasurer v. Eggleston*, 170 U. S. 304, 42 L. 1047, 18 S. 617 [1898]; *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. R. 128 [1901]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *City of St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910 [1888].

⁵ *Goodrich v. Detroit*, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902]; (affirming *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]); *Voigt v. Detroit City*, 184 U. S. 115, 46 L. 627, 22 S. 397 [1902]; (affirming *Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]); *King v. Portland City*, 184 U. S. 61, 46 L. 431, 22 S. 290 [1902]; (Affirming *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]); *In the Matter of the Bonds of the Madera Irrigation District*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891]; *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]; *District of Columbia v. Burgdorf*, 6 App. D. C. 465 [1895];

to be assumed that such notice should be given.⁶ So notice need not be given of the condemnation of realty to those whose lands are not to be taken, but are to be assessed for the cost of the improvement.⁷ Where local authorities are given discretion to determine whether a given improvement should or should not be made the better view is that the persons whose property is to be assessed have no constitutional right to notice of the intention of such local authorities to make such improvement.⁸ If the council, the board of commissioners and the like are given power to fix the limits of the assessment district, they may do so without giving notice of such determination of the limits of such assessment district if not required by statute; and the omission of the statute to require such notice, and the omission of the council, the board of commissioners and the like to give such notice, does not violate the constitutional right of the owners of the land to be assessed, have to notice and hearing as long as an opportunity is given to them to file objections and to have a hearing upon the question of apportionment and of the amount of the assessment to be charged upon each tract of realty.⁹ Thus if the statute authorizes the commissioners to

Dyer v. Woods, 166 Ind. 44, 76 N. E. 624 [1906]; *Collins v. Holyoke*, 146 Mass 298, 15 N. E. 908; *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091 [1897]; *People of the State of New York ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662 [1902].

⁶*Scott v. City of Toledo*, 36 Fed. 385, 1 L. R. A. 688 [1888]; *Board of Commissioners of Wells County v. Fahlor*, 132 Ind. 426, 31 N. E. 1112; *Paul v. City of Detroit*, 32 Mich. 108 [1875]; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289 [1878]; *State v. Fond du Lac*, 42 Wis. 287.

⁷*Goodrich v. Detroit*, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902]; (*Affirming Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]); *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]; *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091 [1897].

⁸*Repair of Ditch*, *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 609 [1887]; *Construction of Drain*, *Rob-*

erts v. Smith, 115 Mich. 5, 72 N. W. 1091 [1897].

⁹*Voigt v. Detroit City*, 184 U. S. 115, 46 L. 459, 22 S. 337 [1902]; (*Affirming Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]); *King v. Portland City*, 184 U. S. 61, 46 L. 431, 22 S. 290 [1902]; (*Affirming King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]); *Paulson v. Portland*, 149 U. S. 30, 37 L. 637, 13 S. 759 [1893]; *Ross v. Board of Supervisors of Wright County, Iowa*, 128 Ia. 427, 1 L. R. A. [N. S.] 431, 104 N. W. 506 [1905]; *Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]; *Kelly v. Minneapolis City*, 57 Minn. 294, 47 Am. St. Rep. 605, 26 L. R. A. 92, 59 N. W. 304 [1894]; *Rogers v. City of St. Paul*, 22 Minn. 494 [1876]; *People of the State of New York ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662 [1902]; *People ex rel. Griffin v. Mayer*, etc., of Brooklyn, 4 N. Y. 419, 55 Am. Dec.

classify lands, with reference to a subsequent assessment thereon for drainage purposes as "low," "wet," "swamp" and "dry," such classification is in legal effect fixing the boundaries of the drainage district, and omission to give notice thereof does not amount to a want of due process of law.¹⁰ Owners of property to be assessed have no constitutional right to a hearing upon the question as to who shall be appointed assessors, nor any right to appeal therefrom, and accordingly a statute which does not provide for notice and hearing upon such question is not on that account unconstitutional.¹¹ If the legislature has power to levy the assessment itself, notice is unnecessary.¹² Notice is necessary and sufficient if the property owner is given an opportunity to be heard before the tribunal which is to ascertain the facts, and upon such facts is to apportion the street assessment.¹³

§ 126. Notice of preliminary steps not sufficient.

On the other hand notice of matters preliminary to the determination of the amount to be assessed against the land of each property owner is not sufficient if no notice is given of the determination of such amount, and the existence of such preliminary proceedings is not of itself sufficient to apprise the landowner that in the ordinary course of events an assessment will follow.¹ Thus if notice is given of a preliminary resolution which declares it necessary to open a street and to appropriate land therefor, but does not refer to the levy of an assessment to pay the cost thereof, such notice is not sufficient.² So if notice has been given and opportunity for hearing had, subsequent increase of the assessment without notice and hearing, not based upon

266 [1851]; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902]; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947 [1889].

¹⁰ *Ross v. Board of Supervisors of Wright County, Iowa*, 128 Ia. 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506 [1905].

¹¹ *Kelly v. Minneapolis City*, 57 Minn. 294, 47 Am. St. Rep. 605, 26 L. R. A. 92, 59 N. W. 304 [1894].

¹² *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888];

(affirming *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]).

¹³ *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903].

¹ *Scott v. City of Toledo*, 36 Fed. 385, 1 L. R. A. 688 [1888]; *Guckien v. Rothrock*, 137 Ind. 355, 37 N. E. 17 [1893]; *City of Logansport, v. Shirk*, 129 Ind. 352, 28 N. E. 538 [1891]; *City of Norfolk v. Young*, 97 Va. 728, 47 L. R. A. 574, 34 S. E. 886 [1900].

² *Scott v. City of Toledo*, 36 Fed. 385, 1 L. R. A. 688 [1888].

the former hearing is a taking of property without due process of law.³ Upon the last point, however, there is not complete accord among the authorities. Where the statute concerning the establishment of a drainage district provides that if, on making the first assessment, the commissioners report a sum too small to pay the entire cost of the work, the court may order a further assessment in proportion to the original assessment, it has been held that if notice of the original assessment is given, the property owner is apprised of the assessment proceedings and of the possibility of a supplemental assessment, so that no further notice of the supplemental assessment is necessary.⁴ If, however, the preliminary steps of which notice are given are such that in the ordinary course of events an assessment will follow, such preliminary notice is sufficient and further notice is unnecessary. Notice of the inclusion of the property in question in an assessment district has been held sufficient where under the law notice of such inclusion would be sufficient to apprise the property owner that an assessment would be levied upon the land so included for the purpose of paying for such improvement.⁵ “ . . . It seems to be well settled that a statute which provides for notice to the property owner at some stage of the proceedings before the assessment is made is not open to the constitutional objection simply because it does not provide for a new or additional notice of each successive step leading up to the assessment.”⁶

§ 127. Necessity of personal notice.

If the owner of the property assessed is a resident of the state in which the assessment is levied so that personal notice could be given to him within the state, the question whether the assessment is a personal liability of such owner or not, is not affected in any way by the clause which forbids taking property

³ Guckien v. Rothrock, 137 Ind. 355, 37 N. E. 17 [1893].

⁴ Stone v. Little Yellow Drainage District, 118 Wis. 388, 95 N. W. 405 [1903].

⁵ Oliver v. Monona County, 117 Ia. 43, 90 N. W. 510 [1902].

⁶ Ross v. Board of Supervisors of Wright County, Iowa, 128 Ia. 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506

[1905]; (Citing Voigt v. Detroit, 181 U. S. 115, 46 L. 459, 22 S. 337 [1902]; Weyerhaeuser v. State of Minnesota, 176 U. S. 550, 44 L. 583, 20 S. 485; Winona and St. Paul Land Co. v. Minnesota, 159 U. S. 526, 40 L. 247, 16 S. 83; Oliver v. Monona County, 117 Ia. 43, 90 N. W. 510 [1902]; Yeomans v. Riddle, 84 Ia. 147, 50 N. W. 886 [1891]).

without due process of law.¹ If, however, the owner of the property assessed is not a resident of the state in which the assessment is levied, and personal notice could not be given to him within the jurisdiction of the state, the clause of the Federal Constitution forbidding the taking of property without due process of law, applies to the question of personal liability and renders unconstitutional any statute which attempts to impose personal liability upon such non-resident.² Outside of the question of personal liability, personal notice is unnecessary and a reasonable notice given by publication is sufficient.³

§ 128. Notice after determination of amount, insufficient.

Furthermore a notice given after the determination of the apportionment of the assessment, and of the amount to be charged upon each tract of realty assessed is insufficient if the entire question of apportionment and amount of assessment is not opened up for a hearing as to those thus subsequently notified;¹ since the notice must be given in time to secure to the property owners a full and ample hearing on the merits.

§ 129. Notice of proceeding to determine validity of assessment.

A statute which provides for an action to be brought by a taxing district for determining the validity of the assessment in which notice and an opportunity for a full hearing on the merits is to be given to the property owner, the judgment rendered in which is to be conclusive between the parties thereto in any subsequent action upon the assessment, is not in violation of the constitutional provision forbidding the taking of property without due process of law.¹ A similar question under this statute was presented to the Supreme Court of the United States, and it was there held that such proceeding was merely one for the purpose of obtaining evidence, that it did not involve the taking

¹ Davidson v. New Orleans, 96 U. S. 97, 24 L. 616 [1877]; (affirming In the Matter of the Commissioners of the First Drainage District praying for the Homologation of the Assessment Roll, 27 La. Ann. 20 [1875]).

² Dewey v. Des Moines, 173 U. S. 193, 43 L. 665, 19 S. 379 [1899]; (reversing Dewey v. City of Des-

Moines, 101 Ia. 416, 70 N. W. 605 [1897]).

³ Wight v. Davidson, 181 U. S. 371, 45 L. 900, 21 S. 616 [1901]. See § 121.

¹ Hille v. Neale, 32 Ind. App. 341, 69 N. E. 713 [1904].

¹ Lower Kings River Reclamation District No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887 [1899].

of property, and that accordingly the question whether there was a taking without due process of law could not be considered.²

§ 130. Notice of confirmation.

Whether notice and an opportunity to be heard upon application to confirm the assessment is a compliance with the constitutional provision forbidding the taking of property without due process of law, or whether such notice is given at too late a stage of the proceedings, is a question which depends for its answer upon the nature of the proceedings at confirmation and the effect therein of the prior proceedings. If at confirmation the property owner is given a full opportunity to be heard upon the merits of the case, it is generally held that such notice and opportunity for hearing constitute due process of law,¹ whether such confirmation is upon hearing in court,² or upon hearing before the council or other similar taxing body.³ If, on the other hand, the confirmation is a mere review and no opportunity is given for a full and original hearing, notice of confirmation alone is not sufficient. Thus, where on confirmation the assessment is assumed to be valid if not shown affirmatively to be invalid and where possibly the only inquiry permitted was as to the correctness of the principle upon which the assessment was levied without any inquiry into the facts, it was held that notice of such confirmation was insufficient.⁴ A statute providing for the

² *Tregea v. Modesto Irrigation District*, 164 U. S. 179, 41 L. 395, 17 S. 52 [1896]; (dismissing error to *Modesto Irrigation District v. Tregea*, 88 Cal. 334, 26 Pac. 237).

¹ *Wight v. Davidson*, 181 U. S. 371, 45 L. 900, 21 S. 616 [1901]; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. 616 [1877]; *Cohen v. City of Alameda*, 124 Cal. 504, 57 Pac. 377 [1899]; *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904]; *People ex rel. Hanberg v. Cohen*, 219 Ill. 200, 76 N. E. 388 [1906]; *Job v. City of Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901]; *Auditor General v. Hoffman*, 132 Mich. 198,

93 N. W. 259 [1903]; *City of Duluth v. Dibblee*, 62 Minn. 18, 63 N. W. 1117 [1895].

² *People ex rel. Hanberg v. Cohen*, 219 Ill. 200, 76 N. E. 388 [1906]; *Job v. City of Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901]; *City of Duluth v. Dibblee*, 62 Minn. 18, 63 N. W. 1117 [1895].

³ *Cohen v. City of Alameda*, 124 Cal. 504, 57 Pac. 377 [1899]; *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904]; *Auditor General v. Hoffman*, 132 Mich. 198, 93 N. W. 259 [1903].

⁴ *State, The Board of Chosen Freeholders of the County of Hudson, Pros. v. Paterson Avenue and Secaucus Road Commissioners*, 41 N. J. L.

re-opening of a prior order of confirmation, and an inquiry into the valuation and apportionment in such proceeding does not amount to a taking without due process of law.⁵

§ 131. Notice for hearing objections.

Under some statutes provision is made for notice which gives to the owners of property assessed an opportunity to make objections to the assessment as actually made and to be heard before a board of commissioners, assessors, equalizers, and the like, before the assessment becomes a finality. Such a provision is held to give such notice and hearing as complies with the requirement for due process of law.¹ Like results have been reached where the statute provided for an opportunity to make objections to the assessment as actually made, and to have a hearing before an officer, as distinguished from a board, as long as such officer has authority to act upon such objections and readjust the assessments in conformity to the requirements of law.²

§ 132. Notice of proceedings to enforce assessment.

Whether a notice is necessary prior to proceedings to enforce the assessment in question is a matter which depends upon the nature of the proceeding by which such assessment is enforced. If the assessment is to be enforced summarily without notice or judicial proceedings, it is evident that no opportunity is there-

(12 Vr.) 83 [1879]; (Citing *State v. Wilkinson*, Pros. v. Inhabitants of the City of Trenton, 36 N. J. L. (7 Vr.) 499 [1873]; *Vantilburg v. Shann*, 24 N. J. L. (4 Zab.) 740; *State, Mann, Pros. v. Mayor and Common Council of Jersey City*, 24 N. J. L. (4 Zab.) 662 [1855]).

⁵ In the matter of widening Broadway in the City of New York, 61 Barb. (N. Y.) 583 [1872]; In the matter of widening Broadway in the City of New York, 42 How. (N. Y.) 220 [1872].

¹ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; *Paulson v. Portland*, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]; *Spencer v. Merchant*, 125 U.

S. 345, 31 L. 763, 8 S. 921 [1888]; (Affirming *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]); *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894]; *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81 [1905]; *City of Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 80 Pac. 467 [1905]; *New York, C. and St. L. Ry. Co. v. City of Hammond*. — Ind. —. 83 N. E. 244 [1908]; *City of Richmond v. Williams*, 102 Va. 733, 47 S. E. 844 [1904].

² *Walston v. Nevin*, 128 U. S. 578, 32 L. 544, 9 S. 192 [1888].

by given to the property owner to contest the assessment upon its merits. The assessment has, in such case, already become a finality. Accordingly, if notice has not been given at a prior stage of the proceedings so that the property owner has an opportunity to contest the assessment upon its merits, the proceeding is in violation of the constitutional provision which forbids the taking of property without due process of law.¹ On the other hand if the proceeding to enforce the assessment is in the nature of a judicial proceeding in which notice is given to the property owner and a full opportunity is given to him to be heard upon the merits, such proceeding constitutes due process of law and no prior notice seems to be necessary.² A statute which secures to the property owner the right to appeal to the city council to correct the assessment, and further provides that the assessment cannot be enforced until a court of equity shall have decreed its enforcement in a proceeding in which the property owner is given a full and ample opportunity to be heard upon the merits and to show cause why such decree should not be rendered is clearly a compliance with the constitutional provision forbidding the taking of property without due process of law.³ Under some statutes, the public corporation which seeks to enforce the assessment may elect between a judicial proceeding in which notice is given to the property owner, and a full opportunity is given to him to be heard upon the merits and a proceeding of a summary nature

¹ *Fay v. City of Springfield*, 94 Fed. 409 [1899]; *Scott v. City of Toledo*, 36 Fed. 385, 1 L. R. A. 688 [1888]; *Hutson v. Woodbridge Protection District No. 1*, 79 Cal. 90, 16 Pac. 549, 21 Pac. 435 [1889].

² *Hibben v. Smith*, 191 U. S. 310, 48 L. 195, 24 S. 88 [1903]; (affirming *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1901]); *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; (affirming *Reclamation District No. 108 v. Hagar*, 4 Fed. 366 [1880]); *Murdock v. City of Cincinnati*, 39 Fed. 891 [1889]; *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894]; *Reclamation District No. 108 v. Hagar*, 66 Cal. 54,

4 Pac. 945 [1884]; *Reclamation District No. 3 v. Goldman*, 65 Cal. 635,

4 Pac. 676 [1884]; *Reclamation District No. 108 v. Evans*, 61 Cal. 104 [1882]; *Rich v. City of Chicago*, 59 Ill. 286 [1871]; *City of Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 988, 1100 [1900]; *Garvin v. Dausseman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826 [1887]; *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887]; *City of Galveston v. Heard*, 54 Tex. 42 [1881]; *Meggett v. City of Eau Claire*, 81 Wis. 326, 51 N. W. 566 [1892].

³ *City Council of Montgomery v. Birdsong*, 126 Ala. 632, 28 So. 522 [1899].

in which neither notice nor hearing is necessary. Such an election does not of itself constitute due process of law, at least where the public corporation has not elected to resort to the judicial proceeding, since by a resort to the other method it may deprive the property owner of an opportunity to be heard; and, accordingly, such method of enforcing an assessment will not supply the want of due notice.⁴

§ 133. Right to court review.

Under some statutes the owner of the property assessed is given a full and ample opportunity to have the validity of the assessment and the justice of apportionment thereof reviewed by proceedings in court; and summary enforcement of the assessment is suspended until such review may be had. Such an opportunity for judicial hearing is held to constitute due process of law, even if sufficient notice of the fixing of the amount of the assessment was not provided for.¹ In some states the property owner may avail himself of the remedy of injunction to resist an invalid assessment or one in which the amount of the assessment exceeds the benefits conferred by the improvement. Where such procedure is recognized as proper, the question may then arise whether the opportunity to sue in equity for an injunction constitutes due process of law. If, in the suit in equity, the property owner is given a full and ample hearing upon the merits of the assessments and upon the question of benefits, the general rule is that such opportunity is due process of law.² This is the rule in general taxation,³ and no reason appears why the analogy should not extend to cases of local assessments, even though a right to a hearing may exist in the latter case but not in the former. It appears, however, to be assumed in some jurisdictions that the opportunity of suing for an injunction and having a full hearing in that suit does not constitute

⁴ *Scott v. City of Toledo*, 36 Fed. 385, 1 L. R. A. 688 [1888].

¹ *Security Trust and Safety Vault Co. v. City of Lexington*, 203 U. S. 323 [1906]; *Lent v. Tillson*, 140 U. S. 316, 35 L. 419, 11 S. 825 [1891].

² *Hibben v. Smith*, 191 U. S. 310, 48 L. 195, 24 S. 88 [1903]; (*Affirming Hibben v. Smith*, 158 Ind. 206,

62 N. E. 447 [1901]); *Caldwell v. Village of Carthage*, 49 O. S. 334, 31 N. E. 602 [1892]; *Tone v. Columbus*, 39 O. S. 281, 48 Am. Rep. 438 [1883]; *Stephan v. Daniels*, 27 O. S. 527 [1875]; *Steese v. Oviatt*, 24 O. S. 248 [1873].

³ *McMillen v. Anderson*, 95 U. S. 37, 24 L. 335 [1877].

due process of law.⁴ If reasonable notice is given of a hearing before the body which levies the assessment it is not necessary that an opportunity for a review by the courts be given to constitute due process of law. "The claim set up on the part of the lot owner that there can be no due process of law under which an assessment can be made which does not provide for a review of such assessment and a hearing by a court is not tenable. Assuming the necessity of a hearing before an assessment can be made conclusive the law may provide for that hearing by the body which levies the assessment, and after such hearing may make the decision of that body conclusive. Although in imposing such assessments the common council or board of trustees may be acting somewhat in a judicial character, yet the foundation of the right to assess exists in the taxing power and it is not necessary that in imposing an assessment there shall be a hearing before a court provided by the law in order to give validity to such assessment. Due process of law is afforded where there is an opportunity to be heard before the body which is to make the assessment and the legislature of a state may provide that such hearing shall be conclusive so far as the Federal Constitution is concerned."⁵

§ 134. Right of appeal as supplying want of notice.

Whether an opportunity for an appeal is a sufficient compliance with the constitutional requirement forbidding the taking of property without due process of law is a question depending upon the nature of the hearing allowed on appeal. If an opportunity is given on appeal for a full and complete hearing upon the merits, the rights of the property owner are protected and the proceeding constitutes due process of law.¹ Like

⁴ Chicago & Erie Railroad Co. v. Keith, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902].

⁵ Hibben v. Smith, 191 U. S. 310, 321, 322, 48 L. 195, 24 S. 88 [1903]; (Affirming Hibben v. Smith, 158 Ind. 206, 62 N. E. 447 [1901]).

¹ King v. Portland City, 184 U. S. 61, 46 L. 431, 22 S. 290 [1902]; (affirming King v. Portland, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]); Brown v. Drain, 112 Fed.

582 [1901]; In the Matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675 [1891]; Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771 [1890]; Roundenbush v. Mitchell, 154 Ind. 616, 57 N. E. 510 [1900]; State ex rel. French v. Johnson, 105 Ind. 463, 5 N. E. 553 [1885]; Flournoy v. City of Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468 [1861];

results have been reached where provision was made for a suit to correct the assessment.² So a statute providing that the "general council or courts in which suits may be pending shall make all corrections, rules and orders to do justice to all parties concerned" has been held to be sufficient to constitute due process of law.³ On the other hand the hearing on appeal may be so restricted as to preclude the property holder from obtaining a full and fair adjudication of his rights. Thus a statute granting an appeal and providing that if the appellant were successful his only relief should be that the difference between the amount originally assessed and the amount found on appeal to be the amount of benefits received by him should be paid by the city, leaving him to pay the amount so adjudged to be the amount of benefits, and providing that such appeal should be the only remedy for any grievance which he might have by reason of the making of such improvement was held to be unconstitutional, as a taking of property without due process of law.⁴ Other statutes intended to restrict the power to the property owner to seek relief from the courts have been held unconstitutional when by reason of such restrictions it is impracticable or unreasonably difficult for the property owner to avail himself of such relief.⁵

§ 135. Effect of notice in fact where none provided for.

If the statute providing for an assessment does not provide for notice specifically, but such notice is in fact given and a full and ample opportunity for a hearing is given, is such notice a

Gilmore v. Hentig, 33 Kan. 156, 5 Pac. 781 [1885]; *Mayor and City Council of Baltimore v. Ulman*, 79 Md. 469, 30 Atl. 43 [1894]; *Sears v. Street Commissioners of Boston*, 173 Mass. 350, 53 N. E. 876 [1899]; *Weed v. Mayor and Aldermen of Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204 [1898]; *Stone v. Little Yellow Drainage District*, 118 Wis. 388, 95 N. W. 405 [1903]; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947 [1889].

² *English v. Mayor and Council of Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158 [1896].

³ *Walston v. Nevin*, 128 U. S. 578, 32 L. 544, 9 S. 192 [1888]; (*Affirming Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887]).

⁴ *Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896].

⁵ "There was apparently a design on the part of the draughtsman of the section to place these original assessments beyond the reach of judicial power except when that power should be exercised in the circumscribed and in many cases impracticable manner specified." *Union Building Association v. City of Chicago*, 61 Ill. 439 [1871].

compliance with the constitutional provision forbidding a taking of property without due process of law? The position upon this question taken by many courts is that such power is necessarily subject to constitutional limitations, that it will not be assumed that the legislature intended to violate constitutional provisions,¹ and that accordingly in such cases the public corporation will be regarded as given a broad discretion with reference to the kind and character of notice which it gives, and that if such public corporation actually gives sufficient notice, the constitutional provision in question is not violated.² In other jurisdictions it seems to be held that notice must be provided for specifically by statute, as a right of the property owner, not as a favor to him.³ Under such view an assessment statute not making provision for notice would be held invalid even if notice were in fact given.⁴ If possible by fair construction, provision as to notice found in one statute will be regarded as adopted by another statute which does not provide for notice in express terms, so as to avoid the constitutional question.⁵ Thus a provision for a hearing to be given to the owners of the property

¹ See § 79.

² *Paulsen v. Portland*, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]; (affirming *Paulson v. City of Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]); *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 4 S. 663, 28 L. 569 [1884]; *City of Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114 [1904]; *Ford v. Town of Des Moines*, 80 Ia. 626, 45 N. W. 1031 [1890]; *Gatch v. City of Des Moines*, 63 Ia. 718, 18 N. W. 310; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1885]; *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853]; *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]; *Wilson v. City of Salem*, 24 Or. 504, 34 Pac. 9, 691 [1893]; *Strowbridge v. City of Portland*, 8 Or. 67 [1879]; (followed with regret in *Paulson v. City of Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]); *Cleveland v. Tripp*, 13 R. I. 50 [1880]; *Tripp v. City of Yankton*, 10 S. D. 516, 74

N. W. 447 [1898]; *Davis v. City of Lynchburg*, 84 Va. 861, 6 S. E. 230 [1888]; *Baltimore and Ohio Railroad v. Pittsburgh, Wheeling & Kentucky Railroad*, 17 W. Va. 812 [1881].

³ "It is not enough that the owners chance to have notice or that they may, as a matter of favor, have a hearing. The law must require notice to them and give them the right to a hearing and the opportunity of being heard." *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289 [1878]; (Quoted in *Beebe v. Magoun*, 122 Ia. 94, 96, 97, 101 Am. St. Rep. 259, 97 N. W. 986 [1904]).

⁴ *Violett v. City Council of Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896].

⁵ *Auditor General v. Hoffman*, 132 Mich. 198, 93 N. W. 259 [1903]; *Grand Rapids School Furniture Company v. City of Grand Rapids*, 92 Mich. 564, 52 N. W. 1028 [1892].

to be assessed implies a provision for a notice of such hearing.⁶ If the provision which requires notice and hearing is incomplete, as where the time and place of the hearing are not in fact given, an assessment is not invalid if a sufficient hearing is, in fact, given.⁷

§ 136. Right of each land-owner to notice.

The right to notice is a right which is possessed by each separate owner of property which it is sought to assess for the improvement in question. Accordingly notice to certain property owners less in number than all,¹ as to the owners of lands through or abutting on which the improvement is to be constructed, but not to the owners of other lands which are benefited and which it is proposed to assess,² violates the constitutional rights of those land-owners who are not notified and whose land it is sought to assess, and amounts to a taking of their property without due process of law.

§ 137. Effect of omission of notice.

If the constitutional requirement of notice sufficient to constitute due process of law has not been complied with, it is held that the entire assessment is void and not merely such part thereof as exceeds the benefits conferred by the improvement for which the assessment is levied.¹

⁶ Paulsen v. Portland, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]; (affirming Paulson v. City of Portland, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]); Auditor General v. Hoffman, 132 Mich. 198, 93 N. W. 259 [1903].

⁷ Hallett v. United States Security and Bond Co., — Colo. —, 90 Pac. 683 [1907].

¹ Langlois v. Cameron, 201 Ill. 301, 66 N. E. 332 [1903]; Beebe v. Magoun, 122 Ia. 94, 101 Am. St. Rep. 259, 97 N. W. 986 [1904]; In the Matter of the Application of the Common Council of the City of Amsterdam to take lands for the extension of Grove and Jay Streets, 55 Hun. (N. Y.) 270, 8 N. Y. Supp.

234 [1889]; Ireland v. City of Rochester, 51 Barb. (N. Y.) 414 [1868].

² Beebe v. Magoun, 122 Ia. 94, 101 Am. St. Rep. 259, 97 N. W. 986 [1904]; In the Matter of the Application of the Common Council of the City of Amsterdam to take lands for the extension of Grove and Jay Streets, 55 Hun. (N. Y.) 270, 8 N. Y. Supp. 234 [1889].

¹ Ufman v. Mayor and City Council of Baltimore, 72 Md. 587, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709, 32 Am. and Eng. Corp. Cases 228 [1890]; Hutchison v. Sterrie, 92 Tex. 685, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 848 [1899].

§ 138. Statute making certain steps *prima facie* evidence of validity.

Statutes not infrequently make certain steps *prima facie* evidence of the regularity and validity of the assessment proceedings. Under such statutes the property owner is given an opportunity to show any facts which may establish the invalidity of such assessment, and accordingly, although by force of the statute there is a presumption against him which he must overcome, it has generally been held that such statute does not violate the constitutional provision forbidding the taking of property without due process of law.¹ Thus, statutes which provide that the account of the cost of the work done, duly certified,² or tax bills issued for the cost of the work,³ or the report of the commissioners, assessing benefits and damages,⁴ or certified copies of the improvement ordinance, the contract for such improvement and the apportionment,⁵ shall respectively constitute *prima facie* evidence of the validity of the assessment, have been upheld.

§ 139. Statute making certain steps conclusive evidence of validity.

If the statute goes farther than making such steps *prima facie* evidence of the validity and regularity of the assessment and attempts to make them conclusive evidence thereof, it is generally held that such statute is valid as to all matters not jurisdictional in their character,¹ which the legislature might have dis-

¹ Chase v. Trout, 146 Cal. 350, 80 Pac. 81 [1905]; McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71 [1893]; Chicago Terminal Transfer Railroad Company v. City of Chicago, 217 Ill. 343, 75 N. E. 499 [1905]; McHenry v. Selva, 99 Ky. 232, 35 S. W. 645 [1896]; Zable v. Louisville Baptist Orphans' Home, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212 [1891]; St. Louis to use of Cornelli v. Armstrong, 38 Mo. 167 [1866]; St. Louis to use of Lakrum v. Coons, 37 Mo. 44 [1865]; City of Excelsior Springs to use of McCormick v. Mississippi Valley Trust Co., — Mo. App. —, 96 S. W. 707 [1906]; City of Excelsior Springs to use of McCormick v. Et-

tenson, 120 Mo. App. 215, 96 S. W. 701 [1906]; City of Schenectady v. Trustees of Union College 66 Hun. (N. Y.) 179, 21 N. Y. Supp. 147 [1892].

² City of Schenectady v. Trustees of Union College, 66 Hun. (N. Y.) 179, 21 N. Y. Supp. 147 [1892].

³ St. Louis to use of Cornelli v. Armstrong, 38 Mo. 167 [1866]; City of St. Louis to the use of Lakrum v. Coons, 37 Mo. 44 [1865].

⁴ Chicago Terminal Transfer Railroad Company v. City of Chicago 217 Ill. 343, 75 N. E. 499 [1905].

⁵ McHenry v. Selva, 99 Ky. 232, 35 S. W. 645 [1896].

¹ Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920 [1899].

pensed with in advance. As to matters, however, which are jurisdictional in their character,² and with which the legislature could not have dispensed in advance, a statute making such steps conclusive evidence of the validity of the assessment is unconstitutional if made obligatory upon the property owner.³ Thus if the assessment is to be enforced by a proceeding of a judicial character, but in such suit the action of the officials who have levied such assessment is to be final as to the apportionment of the assessment, such proceeding cannot supply the want of notice before the assessment became a finality.⁴ If the property owner is given the option of making certain steps conclusive as to the validity of the assessment, he cannot after taking advantage of such option complain that it amounts to a taking of property without due process of law. Statutes are occasionally found in which it is provided that the amount of the assessment shall be paid in full at once unless the property owner agrees to waive all irregularities or other defenses to the assessment, in which case he may exercise the option of paying the assessment in installments. Such statutes, it will be observed, merely give to the property owner the option between resisting the assessment at once, or waiving defenses and paying in installments; and accordingly such statutes are held not to violate the constitutional provision forbidding the taking of property without due process of law.⁵

§ 140. Issuance of bonds.

Statutes are frequently found which authorize the issuance of bonds in order to obtain the means of paying the contractors forthwith, and which provide for the redemption of the bonds by means of a fund raised by assessments. Such statutes are held to be valid.¹ They do not violate the constitutional pro-

² *Ramish v. Hartwell*, 126 Cal. 443. 58 Pac. 920 [1899].

³ *Violett v. City Council of Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896].

⁴ *Violett v. City Council of Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896].

⁵ *Voris v. Pittsburgh Plate Glass*

Company, 163 Ind. 599, 70 N. E. 249 [1904]; *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890].

¹ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; *Bauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. 616 [1877]; *Hellman v. Shoulters*, 114 Cal. 136, 44

vision forbidding the taking of property without due process of law, even where the bonds are interest bearing and are payable in installments,² at least as long as the property owner has the opportunity to pay the full amount of his assessment and thus stop interest.³ Such statutes have been held valid even where they fix the rate of interest which such bonds shall bear;⁴ though it has been contended unsuccessfully that by thus fixing the rate of interest they may preclude the city from borrowing money at a lower rate, and thus operate as a taking of property without due process of law.⁵

§ 141. Restriction of time of making objection.

Statutes are frequently found which require that objections to assessments must be made within some short space of time and that if not so made they shall be deemed to have been waived. Such statutes are usually held to be valid if the time given is sufficient to enable the property owner to present his objections fairly.¹ Thirty-day limitations have been upheld,² as in cases of assessments for street improvements,³ or for sew-

Pac. 915, 45 P. 1057; *People ex rel. Pollard v. Swigert*, 130 Ill. 608, 22 N. E. 787 [1890]; *Martin v. Tyler*, 4 N. D. 278, 25 L. R. A. 838, 60 N. W. 392, *Hennessy v. Douglass County*, 99 Wis. 129, 74 N. W. 983 [1898].

²*Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902].

³*Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902].

⁴*Hulbert v. City of Chicago*, 217 Ill. 286, 75 N. E. 486 [1905]; *Hulbert v. City of Chicago*, 213 Ill. 452, 72 N. E. 1097 [1905]; *Germond v. City of Tacoma*, 6 Wash. 365, 33 Pac. 961 [1893].

⁵*Hulbert v. City of Chicago*, 213 Ill. 452, 72 N. E. 1097 [1905].

¹*Chase v. Trout*, 146 Cal. 350, 80 Pac. 81 [1905]; *City of Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142 [1905]; *Hays v. Tippy*, 91 Ind. 102 [1883]; *Loomis v. City of Little Falls*, 176 N. Y. 31, 68 N. E. 105 [1903]; (affirming *Loomis v. City of Little Falls*, 72 N. Y. S. 774, 66 App. Div. 299 [1901]); *Union Pacific R. Co. v. Kansas City*, 73 Kan. 571, 85

Pac. 603 [1906]; *Germond v. City of Tacoma*, 6 Wash. 365, 33 Pac. 961 [1893].

²*Chase v. Trout*, 146 Cal. 350, 80 Pac. 81 [1905]; *City of Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142 [1905]; *Loomis v. City of Little Falls*, 176 N. Y. 31, 68 N. E. 105 [1903]; (affirming *Loomis v. City of Little Falls*, 72 N. Y. S. 774, 66 App. Div. 299 [1901]); *Germond v. City of Tacoma*, 6 Wash. 365, 33 Pac. 961 [1893].

Such a statutory provision has been held to be applicable to re-assessments; *Kansas City v. McGrew*, — Kan. —, 96 Pac. 484 [1908].

³*Union Pacific R. Co. v. Kansas City*, 73 Kan. 571, 85 Pac. 603 [1906]; *City of Kansas City v. Kimball*, 60 Kan. 224, 56 Pac. 78 [1899]; *Arends v. City of Kansas City*, 57 Kan. 350, 46 Pac. 702; *City of Argentine v. Simmons*, 54 Kan. 699, 38 Pac. 181; *Doran v. Barnes*, 54 Kan. 238, 38 Pac. 300 [1894]; *Simpson v. City of Kansas City*, 52 Kan. 88, 34 Pac. 406 [1893].

ers.⁴ A three day limitation has been upheld,⁵ even where on account of sickness the property owner was not able to file his remonstrance within the time limited.⁶ Such restrictions are held in some jurisdictions to apply to constitutional questions as well as to failure to comply with statutory requirements,⁷ while in other jurisdictions it is held that they cannot apply to constitutional questions.⁸ In some states, however, restrictions even less stringent than those previously given have been held to be invalid as a taking of property without due process of law.⁹ Limitations of sixty¹⁰ and forty¹¹ days have thus been held to be unreasonable and therefore invalid. "Any attempt to cut off his (the property owner's) right without having afforded him such just and reasonable opportunity to be heard is not properly a statute of limitations at all. It savors rather of spoliation and plunder."¹² The proposition has, in these jurisdictions, been assumed as almost axiomatic. It is said to be "too plain for discussion."¹³ A provision in a charter adopted by a city under a constitutional provision permitting such adoption, which requires the property owner to pay in the amount of the assessment as a condition precedent to contesting its validity, has been held to be unconstitutional, but rather on the ground that such power was not granted to cities by the constitutional provision permitting them to frame

⁴ *City of Kansas City v. Gibson*, 66 Kan. 501, 72 Pac. 222 [1903]; *Kansas City v. Gray*, 62 Kan. 198, 61 Pac. 746 [1900]; *Doran v. Barnes*, 54 Kan. 238, 38 Pac. 300 [1894]; *City of Topeka v. Gage*, 44 Kan. 87, 24 Pac. 82 [1890]; *Wahlgren v. City of Kansas City*, 42 Kan. 243, 21 Pac. 1068 [1889].

⁵ *Assessment for ditch; Hays v. Tippy*, 91 Ind. 102 [1883].

⁶ *Hays v. Tippy*, 91 Ind. 102 [1883].

⁷ *City of Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142 [1905].

⁸ *Hutcheson v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 848 [1899]; *Howell v. City of Tacoma*, 3 Wash. 711, 29 Am. St. Rep. 83, 29 Pac. 447 [1892].

⁹ *Barber Asphalt Paving Co. v. Munn*, 185 Mo. 552, 83 S. W. 1062 [1904]; *Schibel v. Merrill*, 185 Mo.

534, 83 S. W. 1069 [1904]; *Barber Asphalt Paving Co. v. Ridge*, 169 Mo. 376, 68 S. W. 1043 [1902]; *Richter v. Merrill*, 84 Mo. App. 150 [1900]; *Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896].

¹⁰ *Barber Asphalt Paving Co. v. Munn*, 185 Mo. 552, 83 S. W. 1062 [1904]; *Barber Asphalt Paving Co. v. Ridge*, 169 Mo. 376, 68 S. W. 1043 [1902]; *Richter v. Merrill*, 84 Mo. App. 150 [1900].

¹¹ *Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896].

¹² *Hayes v. Douglas County*, 92 Wis. 429, 446, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896].

¹³ *Barber Asphalt Paving Co. v. Ridge*, 169 Mo. 376, 68 S. W. 1043 [1902].

their own charters, than on the ground that such provision did not amount to due process of law.¹⁴ It has been doubted whether the legislature can limit the time within which *certiorari* can be brought, if the statute under which the assessment has been levied is unconstitutional.¹⁵

§ 142. Appeal not essential to due process of law.

If sufficient notice of the original making and apportionment of the assessment is given and a full hearing upon the merits is provided for, appeal is not essential to a compliance with the provision forbidding a taking of property without due process of law and may accordingly be dispensed with.¹ The fact that an appeal is not allowed in the case of improvements in towns, though it is in improvements in cities does not, by reason of

¹⁴ *Wilson v. City of Seattle*, 2 Wash. 543, 27 Pac. 474 [1891].

¹⁵ *Traphagen v. Township of West Hoboken*, 39 N. J. L. (10 Vr.) 232 [1877].

¹ *Hibben v. Smith*, 191 U. S. 310, 48 L. 195, 24 S. 88 [1903]; *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. 173, 4 S. 48; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. 616 [1877]; *People v. Hagar*, 66 Cal. 59, 4 Pac. 951; *People ex rel. Hanberg v. Cohen*, 219 Ill. 200, 76 N. E. 388 [1906]; *Deane v. Indiana Macadam & Construction Company*, 161 Ind. 371, 68 N. E. 686 [1903]; *Lake Erie & W. Ry. Co. v. Watkins*, 157 Ind. 600, 62 N. E. 443; *Bonfoy v. Goar*, 140 Ind. 292, 39 N. E. 56; *Reeves v. Groettendick*, 131 Ind. 107, 30 N. E. 889 [1891]; *Barber Asphalt Paving Company v. Edgerton*, 125 Ind. 455, 25 N. E. 436 [1890]; *McEnaney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540 [1890]; *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600 [1887]; *Ross v. Board of Supervisors of Wright County, Iowa*, 128 Iowa 427, 1 L.

R. A. (N. S.) 431, 104 N. W. 506 [1905]; *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902]; *Allerton v. Monona County*, 111 Ia. 560, 82 N. W. 922; *Chambliss v. Johnson*, 77 Ia. 611, 42 N. W. 427 [1889]; *Lambert v. Mills County*, 58 Ia. 666, 12 N. W. 715; *Griffith v. Pence*, 9 Kan. App. 253, 59 Pac. 677; *Sullivan v. Haug*, 82 Mich. 548, 10 L. R. A. 263, 46 N. W. 795; *Gillett v. McLaughlin*, 69 Mich. 547, 37 N. W. 551; *State ex rel. Hughes v. District Court of Ramsey County*, 95 Minn. 70, 103 N. W. 744 [1905]; *Rogers v. City of St. Paul*, 22 Minn. 494 [1876]; *Joplin Consolidated Mining Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406; *County of Dodge v. Acomi*, 61 Neb. 376, 85 N. W. 292 [1901]; *State, Britton, Pros. v. Blake*, 35 N. J. L. (6 Vr.) 208 [1871], 36 N. J. L. (7 Vr.) 442 [1872]; *Matter of Fowler*, 53 N. Y. 60; *Taylor v. Crawford*, 72 O. S. 560, 69 L. R. A. 805, 74 N. E. 1065 [1905]; *Bowersox v. Watson*, 20 O. S. 496 [1870]; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947 [1889]; *Dickson v. City of Racine*, 61 Wis. 545, 21 N. W. 620 [1884]; *Teegarden v. City of Racine*, 56 Wis. 545, 14 N. W. 614 [1883].

such discrimination, amount to a denial of due process of law.² So if notice and hearing are given upon the question of benefits as well as upon other questions, but on appeal the owner is not allowed to show that his land receives no benefit from the contemplated improvement, such restriction upon the issues to be tried on appeal does not violate the constitutional provision requiring due process of law.³

§ 143. Right of appeal.

If sufficient notice of the assessment proceeding has been given to constitute due process of law,¹ it is not necessary, as has already been stated,² that provision be made for an appeal from the decision of the assessing body.³ This principle is especially applicable where the assessment is, under the provisions governing such proceedings, regularly brought before a court for confirmation.⁴ Under a constitution providing that appeals and writs of error may be taken to certain specified divisions of the Supreme Court, and that such writs of error and appeals should be allowed from the final determination of the county court as might be allowed by law,⁵ it has been held that a statute providing that a writ of error shall issue from the Supreme Court in an assessment case only if the application for such writ is accompanied by an affidavit showing that the applicant did not receive notice of the filing of such assessment for confirmation or otherwise learn of its pendency until ten days previous to the entry of applicant's default therein, is constitutional, since proceedings for the confirmation of assessments are purely statutory and appeals from such proceedings are not controlled by the law relating to appeals in general.⁶ A statute denying the right of appeal from

² *Deane v. Indiana Macadam & Construction Company*, 161 Ind. 371, 68 N. E. 686 [1903].

³ *Ross v. Board of Supervisors of Wright County, Iowa*, 128 Ia. 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506 [1905].

¹ See § 119 et seq.

² See § 142.

³ *People ex rel. Hanberg v. Cohen*, 219 Ill. 200, 76 N. E. 388 [1906]; *Hart Bros. v. West Chicago Park Commissioners*, 186 Ill. 464, 57 N. E. 1036 [1900]; *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096

[1900]; *Deane v. Indiana Macadam & Construction Company*, 161 Ind. 371, 68 N. E. 686 [1903]; *State, Britton, Pros. v. Blake*, 35 N. J. L. (6 Vr.) 208 [1871].

⁴ *People ex rel. Hanberg v. Cohen*, 219 Ill. 200, 76 N. E. 388 [1906]; *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096 [1900].

⁵ Article VI., §§ 8 and 19, Constitution of Illinois.

⁶ *Hart Bros. v. West Chicago Park Commissioners*, 186 Ill. 464, 57 N. E. 1036 [1900].

assessments for street improvements in towns is not unconstitutional, though an appeal is given in like forms of assessment in cities.⁷ It has, on the other hand, been said that the legislature cannot deny the right of the property owner to seek relief from the courts if the assessment is void.⁸ Where the right of the property owner to attack the assessment is so restricted that it appears that the legislature intends to place such assessment practically beyond the reach of judicial power, it has been held that such restrictions are invalid.⁹

§ 144. Right of protest not essential to due process of law.

Statutes occasionally provide that property owners may by protest put an end to proceedings which, if not so ended, would have resulted in a public improvement and an assessment therefor. Such right of protest is by no means an essential feature of due process of law. A statute giving the right to residents to prevent the improvement and assessment if a majority of them protest against it, but not giving such right to non-resident owners does not deny due process of law to the latter.

§ 145. Constitutional provisions restricting taxation not applicable to local assessment.

In the various state constitutions are found many provisions restricting the exercise of the power of taxation which is elsewhere conferred upon the state legislature. While local assessment is generally regarded as an exercise of the power of taxation,¹ it is nevertheless held for many purposes not to be a tax within the more limited use of that term.² These constitutional provisions restricting the exercise of the power of taxation, are

⁷ *Deane v. Indiana Macadam & Construction Company*, 161 Ind. 371. 68 N. E. 686 [1903].

⁸ *Hutchinson v. City of Omaha*, 52 Neb. 345, 72 N. W. 218 [1897], (an obiter, since the statute providing that no court should entertain a complaint which the property owner had a legal right to make, and did make, to the board of equalization, was construed as not applying to cases where the assessment was void); *State, Peckham, Pros. v. May-*

or and Common Council of the City of Newark, 43 N. J. L. (14 Vr.) 576 [1881].

⁹ *Union Building Association v. City of Chicago*, 61 Ill. 439 [1871].

¹ *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 48 L. 1142, 24 S. 784 [1904], (modifying *Field v. Barber Asphalt Paving Co.*, 117 Fed. 925 [1902]).

² See § 89.

³ See § 42 et seq.

generally so worded as to show an intention of dealing with and restricting the exercise of the power of taxation in its more limited rather than its broader sense. It is very generally held, therefore, that such constitutional provisions do not apply to the exercise of the power of local assessment.³ The courts have not been unanimous in their holdings upon this point, however. In some cases it has been queried, but not decided whether such constitutional provisions were applicable to local assessments.⁴ In other cases it has been held that since an assessment is a tax, constitutional provisions applying to taxation must include local assessments.⁵ These latter cases have, however, been overruled by subsequent decisions.⁶ In view of the conflict of authority here indicated, and because the specific phraseology of the different constitutional provisions is sometimes insisted on as the ground for difference of judicial opinion, it is necessary therefore to consider in detail the different constitutional provisions on the subject.

§ 146. Specific provisions for equality and uniformity of taxation.

Provisions requiring taxation to be uniform, equal and proportionate are found in most American constitutions. These provisions are as follows: All taxes levied on property in this state shall be assessed in exact proportion to the value of such prop-

³ *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707 [1897]; *McGehee v. Mathis*, 21 Ark. 40 [1860]); not affected on this point by reversal in 71 U. S. (4 Wall.) 143, 18 L. 314 [1866]); *Chambers v. Satterlee*, 40 Cal. 497 [1871]; *Atlanta First Methodist Episcopal Church v. Atlanta*, 76 Ga. 181; *Kilgour v. Drainage Commissioners*, 111 Ill. 342 [1885]; *Law v. Madison, Smyrna & Graham Turnpike Company*, 30 Ind. 77 [1868]; *Yeomans v. Riddle*, 84 Ia. 147, 50 N. W. 886 [1891]; *Munson v. Board of Commissioners of The Atchafalaya Basin Levee District*, 43 La. Ann. 15, 8 So. 906 [1891]; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508 [1854]; *Lamar*

Water & Electric Light Company v. City of Lamar, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W. 756 [1895]; *City of Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; *Jones v. Holzapfel*, 11 Okla. 405, 68 Pac. 511 [1902]; *Storrie v. Houston City Street Railway Company*, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898]; *County of Harris v. Boyd*, 70 Tex. 237, 7 S. W. 713 [1888]; *Taylor v. Boyd*, 63 Tex. 533 [1885].

⁴ *Weeks v. Milwaukee*, 10 Wis. 242.

⁵ *Palmer v. Way*, 6 Colo. 106 [1881]; *Taylor, McBean & Co. v. Chandler*, 9 Heisk. (56 Tenn.) 349, 24 Am. Rep. 308 [1872].

⁶ See § 86. § 152. § 160.

erty, but no tax shall be assessed upon any debt for rent or hire of real or personal property, while owned by the landlord or hirer during the current year of such rental or hire, if such real or personal property be assessed at its full value.¹ All property in the state, not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law. The word "property," as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and other matters and things, real, personal and mixed, capable of private ownership; provided, that property used for free public libraries and free museums, growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, or to any county or municipal corporation within this state, shall be exempt from taxation. The legislature may provide, except in case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this state.² Land, and the improvements thereon, shall be separately assessed. Cultivated and uncultivated land, of the same quality, and similarly situated, shall be assessed at the same value.³ All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general laws which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal. Provided, That the household goods of every person being the head of a family, to the value of two hundred dollars, shall be exempt from taxation. Ditches, canals and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose. And provided further, That the provisions of this section shall not affect such special assessments for benefits and municipal improvements as the corporate authorities of cities, towns, or improvement districts may assess and collect under provisions to be prescribed by law.⁴ All taxes shall be uniform

¹ Article XI., § 211, Constitution of Alabama.

² Article XIII., § 1, Constitution of California [Amended 1894].

³ Article XIII., § 2, Constitution of California.

⁴ Article X., § 3, Constitution of Colorado.

upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, but the General Assembly may by general laws exempt from taxation such property as in the opinion of the General Assembly will best promote the public welfare.⁵ The legislature shall provide for a uniform and equal rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes.⁶ All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. The General Assembly may, however, impose a tax on such domestic animals as, from their nature and habits, are destructive of other property.⁷ All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal. Provided, That the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just, and all existing exemptions provided by the laws of the territory, shall continue until changed by the legislature of the state. Provided further, That duplicate taxation of property for the same purpose during the same year, is hereby prohibited.⁸ The General Assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property, such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and no otherwise.⁹ . . . The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall provide such regulations as shall secure a just valuation

⁵ Article VIII., § 1, Constitution of Delaware.

⁶ Article IX., § 1, Constitution of Florida.

⁷ Article VII., § 11, Constitution of Georgia.

⁸ Article VII., § 5, Constitution of Idaho.

⁹ Article IX., § 1, Constitution of Illinois.

for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law.¹⁰ The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family, shall be exempted from taxation.¹¹ All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just valuation thereof.¹² That the levying of taxes by the poll is grievous and oppressive, and ought to be prohibited; that paupers ought not to be assessed for the support of the Government; but every person in the state, or person holding property therein, ought to contribute his proportion of public taxes for the support of the Government, according to his actual worth in real or personal property; yet fines, duties or taxes may properly and justly be imposed or laid with a political view for the good government and benefit of the community.¹³ The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law: Provided, That the legislature shall provide an uniform rule of taxation for such property as shall be assessed by a state board of assessors, and the rate of taxation on such property shall be the rate which the state board of assessors shall ascertain and determine is the average rate levied upon other property upon which ad valorem taxes are assessed and assessed for state, county, township, school and municipal purposes.¹⁴ All assessments hereafter authorized shall be on property at its cash value.¹⁵ All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state: Provided, That the legislature may, by general law or special act, authorize municipal

¹⁰ Article X., § 1, Constitution of Indiana.

¹¹ Article XI., § 1, Constitution of Kansas.

¹² Article IX., § 8, Constitution of Maine.

¹³ Declaration of Rights, Article XV., Constitution of Maryland.

¹⁴ Article XIV., § 11, Constitution of Michigan.

¹⁵ Article XIV., § 12, Constitution of Michigan.

corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, or both, without regard to a cash valuation, and in such manner as the legislature may prescribe; and provided, further, that for the purpose of defraying the expenses of laying water pipes and supplying any city or municipality with water, the legislature may, by general or special law, authorize any such city or municipality having a population of five thousand or more to levy an annual tax or assessment upon the lineal foot of all lands fronting on any water main or water pipes laid by such city or municipality within corporate limits of said city, for supplying water to the citizens thereof, without regard to the cash value of such property, and to empower such city to collect any such tax assessments, or fines or penalties for failure to pay the same, or any fine or penalty for any violation of the rules of such city or municipality in regard to the use of water, or for any water rate due for the same.¹⁶ Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. The legislature may, however, impose a tax per capita upon such domestic animals as from their nature and habits are destructive of other property. Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. But the legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county.¹⁷ Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and all taxes shall be levied and collected by general laws.¹⁸ All property subject to taxation shall be taxed in proportion to its value.¹⁹ The necessary revenue

¹⁶ Article IX., § 3, Constitution of Minnesota.

¹⁷ § 112, Constitution of Mississippi.

¹⁸ Article X., § 3, Constitution of Missouri.

¹⁹ Article X., § 4, Constitution of Missouri.

for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state.²⁰ Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.²¹ The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the tax to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct, uniform as to the class on which it operates.²² All real property and possessory rights to the same, as well as personal property now existing or hereafter created, or corporations, shall be subject to taxation the same as property of individuals; provided, that the property of corporations formed for municipal, charitable, religious or educational purposes may be exempted by law.²³ The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed, and also excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes.²⁴ The General Court has power to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and residents within the said state, and upon

²⁰ Article XII., § 1, Constitution of Montana.

²¹ Article XII., § 7, Constitution of Montana.

²² Article IX., § 1, Constitution of Nebraska.

²³ Article VIII., § 2, Constitution of Nevada.

²⁴ Article X., § 1, Constitution of Nevada.

all estates within the same.²⁵ Property shall be assessed for taxation under general laws and by uniform rules, according to its true valuation.²⁶ Laws shall be passed taxing, by uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and, also, all real and personal property, according to its true value in money. The General Assembly may also tax trades, professions, franchises and incomes, provided that no income shall be taxed when the property from which the income is derived is taxed.²⁷ All taxes levied by any county, city, town or township shall be uniform and ad valorem upon all property in the same, except property exempted by this constitution.²⁸ Laws shall be passed taxing by uniform rule all property according to its true value in money.²⁹ . . . Laws shall be passed, taxing by uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property, according to its true value in money.³⁰ The property of corporations, now existing or hereafter created, shall be subject to taxation the same as the property of individuals.³¹ No tax duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxation shall be equal and uniform.³² The Legislative Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious or charitable purposes, as may be specially exempted by law.³³ All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious

²⁵ Part II., Article V., Constitution of New Hampshire.

²⁶ Article IV., § 7, par. 12. Constitution of New Jersey.

²⁷ Article V., § 3, Constitution of North Carolina.

²⁸ Article VII., § 9, Constitution of North Carolina.

²⁹ Article XI., § 176, Constitution of North Dakota.

³⁰ Article XII., § 2, Constitution of Ohio.

³¹ Article XII., § 4, Constitution of Ohio.

³² Article I., § 32, Constitution of Oregon.

³³ Article IX., § 1, Constitution of Oregon.

worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity.³⁴ All free governments are instituted for the protection, safety and happiness of the people. All laws, therefore, should be made for the good of the whole, and the burdens of the state ought to be fairly distributed among its citizens.³⁵ All property subject to taxation shall be taxed in proportion to its value.³⁶ All taxes upon property, real and personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of levying such tax.³⁷ The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, the products of which alone shall be taxed; and also excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes: Provided, however, That the General Assembly may impose a capitation tax upon such domestic animals as from their nature and habits are destructive of other property: And provided further, That the General Assembly may provide for a graduated tax on incomes, and for a graduated license on occupations and business.³⁸ . . . All taxation shall be equal and uniform.³⁹ All taxes to be raised in this state shall be uniform on all real and personal property, according to its value in money, to be ascertained by such rules of appraisement and assessment as may be prescribed by the legislature by general law so that every person and corporation shall pay a tax in proportion to the value of his, her or its property. And the legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be by the same methods as are provided for assessing and levying of taxes on individual property.⁴⁰ The legislature may vest the corporate

³⁴ Article IX., § 1, Constitution of Pennsylvania.

³⁵ Article I., § 2, Constitution of Rhode Island.

³⁶ Article I., § 6, Constitution of South Carolina.

³⁷ Article III., § 29, Constitution of South Carolina.

³⁸ Article X., § 1, Constitution of South Carolina.

³⁹ Article VI., § 17, Constitution of South Dakota.

⁴⁰ Article XI., § 2, Constitution of South Dakota.

authority of cities, towns and villages with power to make local improvements by special taxation of contiguous property or otherwise. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such tax shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.⁴¹ All property, real, personal or mixed, shall be taxed, but the legislature may except such as may be held by the state, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except one thousand dollars' worth of personal property in the hands of each taxpayer, as the direct product of the soil in the hands of the producer, and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value.⁴² Taxation shall be equal and uniform. All property in this state, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll-tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this state. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mining and agricultural pursuits shall never be required to pay an occupation tax; provided, that two hundred and fifty dollars' worth of household and kitchen furniture, belonging to each family in this state, shall be exempt from taxation, and provided further, that the occupation tax levied by any county, city or town, for any year, on persons or corporations pursuing any profession or business shall not exceed one-half of the tax levied by the state for the same period on such profession or business.⁴³ All property in the state, not

⁴¹ Article XL, § 10, Constitution of South Dakota.

⁴³ Article VIII., § 1, Constitution of Texas.

⁴² Article I., § 28, Constitution of Tennessee.

exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The word property, as used in this article, is hereby declared to include moneys, credits, bonds, stocks, franchises, and all matters and things (real, personal and mixed) capable of private ownership; but this shall not be so construed as to authorize the taxation of the stocks of any company or corporation, when the property of such company or corporation represented by such stocks has been taxed.⁴⁴ The legislature shall provide by law a uniform and equal rate of assessemnt and taxation on all property in the state, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property: Provided, That a deduction of debits from credits may be authorized: Provided, further, That the property of the United States, of the state, counties, cities, towns, school districts, municipal corporations, and public libraries, lots with the buildings thereon used exclusively for either religious worship or charitable purposes, and places of burial not held or used for private or corporate benefit, shall be exempt from taxation. Ditches, canals, reservoirs, pipes and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose. Provided further, relating to the remittance or abating of taxes of the indigent poor, that the taxes of the indigent poor may be remitted or abated at such time and in such manner as may be provided by law.⁴⁵ That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community.⁴⁶ That no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services.⁴⁷ All property, except as hereinafter

⁴⁴ Article XIII., § 2, Constitution of Utah.

⁴⁵ Article XIII., § 3, Constitution of Utah.

⁴⁶ Chap. I., Article VII., Constitution of Vermont.

⁴⁷ Article I., § 4, Constitution of Virginia.

provided, shall be taxed. All taxes, whether state, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.⁴⁸ Except as hereinafter provided, all assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law. The General Assembly may allow a lower rate of taxation to be imposed for a period of years by a city or town upon land added to its corporate limits, than is imposed on similar property within its limits at the time such land is added. Nothing in this constitution shall prevent the General Assembly, after the first day of January, 1913, from segregating, for the purpose of taxation, the several kinds or classes of property, so as to specify and determine upon what subjects, state taxes, and upon what subjects, local taxes, may be levied.⁴⁹ No city or town shall impose any tax or assessment upon abutting land-owners for street or other public local improvements, except for making and improving the walk-ways upon then existing streets and improving and paving alleys, and for either the construction, or for the use of sewers; and the same when imposed, shall not be in excess of the peculiar benefits resulting therefrom to such abutting land-owners. Except in cities and towns, no such taxes or assessments, for local public improvements, shall be imposed on abutting land-owners.⁵⁰ All property in this state, not exempted under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law.⁵¹ The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general laws as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property: Provided, That a deduction of debts from credits may be authorized: Provided further, That the property of the United States and of the state, counties, school districts, and other municipal corporations, and such other property

⁴⁸ Article XII., § 168, Constitution of Virginia.

⁴⁹ Article XIII., § 169, Constitution of Virginia.

⁵⁰ Article XIII., § 170, Constitution of Virginia.

⁵¹ Article VII., § 1, Constitution of Washington.

as the legislature may by general laws provide, shall be exempt from taxation.⁵² The legislature shall provide by general law for the assessing and levying of taxes upon all corporation property as near as may be by the same methods as are provided for the assessing and levying of taxes on individual property.⁵³ The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.⁵⁴ Taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value; but property used for educational, literary, scientific, religious or charitable purposes; all cemeteries and public property may, by law, be exempted from taxation. The legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations.⁵⁵ The legislature may, by law, authorize the corporate authorities of cities, towns and villages, for corporate purposes, to assess and collect taxes; but such taxes shall be uniform, with respect to persons and property within the jurisdiction of the authority imposing the same.⁵⁶ The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe.⁵⁷ No tax shall be imposed without the consent of the people or their authorized representatives. All taxation shall be equal and uniform.⁵⁸ All property, except as in this constitution otherwise provided, shall be uniformly assessed for taxation, and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal.⁵⁹

⁵² Article VII., § 2, Constitution of Washington.

⁵³ Article VII., § 3, Constitution of Washington.

⁵⁴ Article VII., § 9, Constitution of Washington.

⁵⁵ Article X., § 1, Constitution of West Virginia.

⁵⁶ Article X., § 9, Constitution of West Virginia.

⁵⁷ Article VIII., § 1, Constitution of Wisconsin.

⁵⁸ Article I., § 28, Constitution of Wyoming.

⁵⁹ Article XV., § 11, Constitution of Wyoming.

§ 147. Provisions requiring uniformity and equality of taxation not applicable to local assessments.

The question whether such provisions as those given in the foregoing section, requiring uniformity and equality of taxation, apply only to general taxation, or whether they also operate as a restriction upon the power of the legislature to provide for the levy of local assessments is a question which has often been presented for judicial decision. The great weight of modern authority is that such provisions do not operate as a restriction upon the power of the legislature to levy local assessments, being limited in their operation to general taxation.¹ The adoption

¹ Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; (affirming Reclamation District No. 108 v. Hagar, 4 Fed. 366 [1880]); City of San Diego v. Linda Vista Irrigation District, 108 Cal. 189, 35 L. R. A. 33, 41 Pac. 291 [1895]; In the matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891]; Mahoney v. Brauerman, 54 Cal. 565; Hagar v. Board of Supervisors of Yolo County, 47 Cal. 222 [1874]; Chambers v. Satterlee, 40 Cal. 497 [1871]; Taylor v. Palmer, 31 Cal. 240 [1866]; Emery v. San Francisco Gas Co., 28 Cal. 346 [1865]; Burnett v. Mayor and Common Council of the City of Sacramento, 12 Cal. 76, 73 Am. Dec. 518 [1859]; Edgerton v. Green Cove Springs, 19 Fla. 140 [1882]; Speer v. Mayor and Council of Athens, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890]; Hayden v. City of Atlanta, 70 Ga. 817 [1883]; Board of Commissioners of County of Monroe v. Harrell, 147 Ind. 500, 46 N. E. 124 [1896]; Reinken v. Fuehring, 130 Ind. 382, 30 Am. St. Rep. 247, 15 L. R. A. 624, 30 N. E. 414, 37 Am. & Eng. Corp. Cas. 354 [1891]; Palmer v. Stumph, 29 Ind. 329 [1868]; Goodrich v. Winchester Turnpike Co., 26 Ind. 119; Warren v. Henly, 31 Ia. 31 [1870]; Newman v. City of Emporia, 41 Kan. 583, 21 Pac. 593

[1889]; Ottawa County v. Nelson, 19 Kan. 234, 27 Am. Rep. 101; City of Ottawa v. Barney, 10 Kan. 270 [1872]; Hines v. City of Leavenworth, 3 Kan. 180 [1865]; Gosnell v. City of Louisville, 104 Ky. 201, 46 S. W. 722, 20 Ky. L. R. 519 [1898]; O'Mahoney v. Bullock, 97 Ky. 774, 31 S. W. 878. Holzhauer v. City of Newport, 94 Ky. 396, 22 S. W. 752 [1893]; Wolfe v. McHargue, 88 Ky. 251, 10 S. W. 809; City of Louisville v. Hyatt, 2 B. Mon. (41 Ky.) 177, 36 Am. Dec. 594 [1841]; City of Lexington v. McQuillan's Heirs, 9 Dana (39 Ky.) 513, 35 Am. Dec. 159 [1840]; Hill v. Fontenot, 46 La. Ann. 1563, 16 So. 475 [1894]; George v. Young, 45 La. Ann. 1232, 14 So. 137 [1893]; Minor v. Daspit, 43 La. Ann. 337, 9 So. 49 [1891]; Munson v. Board of Commissioners of The Atchafalaya Basin Levee District, 43 La. Ann. 15, 8 So. 906 [1891]; Excelsior Planting & Manufacturing Company v. Green, 39 La. Ann. 455, 1 So. 873 [1887]; Charneck v. Fordoehe & Grossé Tête Special Levee District Company, 38 La. Ann. 323 [1886]; Richardson v. Morgan, 16 La. Ann. 429 [1862]; City of Auburn v. Paul, 84 Me. 212, 24 Atl. 817 [1892]; Alexander v. Mayor of Baltimore, 5 Gill. (Md.) 383, 46 Am. Dec. 630; City of St. Paul v. St. Paul & Sioux City Railroad Company, 23 Minn. 469 [1877]; Edwards House Co. v. City of Jackson. — Miss. —, 45 So.

of such provision does not invalidate a pre-existing special law

14 [1907]; *Nugent v. City of Jackson*, 72 Miss. 1040, 18 So. 493 [1895]; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451 [1879]; *Vasser v. George*, 47 Miss. 713 [1873]; *Daily v. Swope*, 47 Miss. 367 [1872]; *Alcorn v. Hamer*, 38 Miss. 652 [1860]; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508 [1854]; *Heman Construction Co. v. Wabash R. Co.*, 206 Mo. 172, 104 S. W. 67 [1907]; *City of Sedalia ex rel. Taylor v. Smith*, 206 Mo. 346, 104 S. W. 15 [1907]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629 [1898]; *City of St. Joseph v. Owen*, 110 Mo. 445, 19 S. W. 713 [1892]; *Farrar v. City of St. Louis*, 80 Mo. 379 [1883]; *Adams v. Lindell*, 72 Mo. 198 [1880]; *City of St. Joseph v. Anthony*, 30 Mo. 537 [1860]; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276 [1858]; *Lockwood v. City of St. Louis*, 24 Mo. 22, *Adams v. Lindell*, 5 Mo. App. 197 [1878]; *Creamer v. Allen*, 3 Mo. App. 545 [1877]; *Directors of Alfalfa Irrigation District v. Collins*, 46 Neb. 411, 64 N. W. 1086; *State of Nebraska ex rel. Abbott v. Board of County Commissioners of Dodge County*, 8 Neb. 124, 30 Am. Rep. 819 [1879]; *Hurford v. City of Omaha*, 4 Neb. 336 [1876]; *Chancellor of State v. City of Elizabeth*, 66 N. J. L. (37 Vr.) 688, 52 Atl. 1130 [1901]; (affirming *Chancellor of State v. City of Elizabeth*, 65 N. J. L. (36 Vr.) 483, 47 Atl. 455 [1900], which followed *Chancellor of State v. City of Elizabeth*, 65 N. J. L. (36 Vr.) 479, 47 Atl. 454 [1900]); *State, Reynolds, Pros. v. Mayor and Aldermen of the City of Paterson*, 48 N. J. L. (19 Vr.) 435, 5 Atl. 896 [1886]; *State, Mann, Pros. v. Mayor and Common Council of Jersey City*, 24 N. J. L. (4 Zab.) 662 [1855]; *People ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y.

419, 55 Am. Dec. 266 [1851]; In the matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York for the Enlarging and Improving a Part of Nassau Street in the said City, 11 John Sup. Ct. (N. Y.) 77 [1814]; *Livingston v. New York*, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622; *Harper v. Commissioners of New Hanover County*, 133 N. C. 106, 45 S. E. 526 [1903]; *Hilliard v. City of Asheville*, 118 N. C. 845, 24 S. E. 738 [1896]; *City of Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; *Busbee v. Commissioners of Wake County*, 93 N. C. 143 [1885]; *Shuford v. Commissioners of Gaston County*, 86 N. C. 552 [1882]; *Cain v. Commissioners of Davie County*, 86 N. C. 8 [1882]; *Webster v. City of Fargo*, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]; (affirmed *Webster v. Fargo*, 181 U. S. 394, 45 L. 912, 21 S. 623, 645 [1901]); *Rolph v. City of Fargo*, 7 N. D. 640, 42 L. R. A. 646, 16 N. W. 242 [1898]; *Carlisle v. Hetherington*, 47 O. S. 235, 24 N. E. 488 [1890]. (distinguishing *Fields v. Commissioners of Highland County*, 36 O. S. 476 [1881]); *Thompson v. Treasurer of Wood County*, 11 O. S. 678 [1860]; *Reeves v. Treasurer of Wood County*, 8 O. S. 333 [1858]; *Hill v. Higdon*, 5 O. S. 243, 67 Am. Dec. 289 [1855]; *Seovill v. City of Cleveland*, 1 O. S. 126 [1853]; *Bonsal v. Lebanon*, 19 Ohio 418 [1850]; *Ridenour v. Saffin*, 1 Handy (Ohio) 464 [1855]; *Jones v. Holzapfel*, 11 Okl. 405, 68 Pac. 511 [1902]; *Kadlerly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222 [1903]; *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]; (affirmed 184 U. S. 61, 46 L. 431, 22 S. 290 [1902]); *Ladd v. Gambell*, 35 Ore. 393, 59 Pac. 113; *Masters v. City of Portland*, 24 Ore. 161, 33 Pac. 540 [1893]; *King v. City of Portland*, 2 Ore. 146

providing for local assessments according to frontage.² A curative statute validating assessments in certain classes of cities which were invalid because authorized only by a statute which was unconstitutional as based on an unconstitutional classification of municipal corporations,³ is not invalid as in violation of the clause requiring uniformity of taxation.⁴ In states in which there are no constitutional provisions requiring uniformity and equality of taxation, the legislature is of course regarded as having power to levy assessments upon the basis of benefits and apportioned in substantial accordance therewith.⁵

§ 148. Theory that such provisions are entirely inapplicable.

Two theories, however, different in form but not inconsistent in ultimate result, are advanced by the courts which uphold this rule. Both theories agree that local assessments must, in theory at least, be limited to the amount of benefits conferred by the improvement for which such assessment is levied, and fairly apportioned according to the amount of such assessment.¹ The difference between these theories consists in the reason assigned for such restriction and rule of apportionment, as the same is affected by the constitutional provisions requiring equality and

[1865]; *Anderson v. Lower Merion Township*, 217 Pa. St. 369, 66 Atl. 1115 [1907]; *Franklin v. Hancock*, 204 Pa. St. 110, 53 Atl. 644 [1902]; *City of Erie v. Griswold*, 184 Pa. St. 435, 39 Atl. 231 [1898]; *Beaumont v. Wilkes-Barre City*, 142 Pa. St. 198, 21 Atl. 888 [1891]; *City of Chester v. Black*, 132 Pa. St. 568, 6 L. R. A. 802, 19 Atl. 276 [1890]; *Shoemaker v. Harrisburg*, 122 Pa. St. 285, 16 Atl. 366 [1888]; *Cleveland v. Tripp*, 13 R. I. 50 [1880]; *In the matter of Dorrance Street*, 4 R. I. 230 [1853]; *Tripp v. City of Yankton*, 10 S. D. 516, 74 N. W. 447 [1898]; *Winona & St. P. R. Co. v. City of Watertown*, 1 S. D. 46, 44 N. W. 1072 [1890]; *County of Harris v. Boyd*, 70 Tex. 237, 7 S. W. 713 [1888]; *Texas Transportation Co. v. Boyd*, 67 Tex. 153, 2 S. W. 364; *Adams v. Fisher*, 63 Tex. 651 [1885]; *Taylor v. Boyd*, 63 Tex. 533 [1885]; *Allen v. Galveston*, 51 Tex. 302 [1879]; *Round-*

tree v. Galveston, 42 Tex. 626; *Lovenberg v. City of Galveston*, 17 Tex. Civ. App. 162, 42 S. W. 1024 [1897]; *Norfolk City v. Ellis*, 67 Va. (26 Gratt.) 224 [1875]; *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332 [1896]; *Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077 [1891]; *Austin v. City of Seattle*, 2 Wash. 667, 27 Pac. 557 [1891].

² *Beaumont v. Wilkes-Barre City*, 142 P. St. 198, 21 Atl. 888 [1891].

³ See § 176 et seq.

⁴ *City of Chester v. Black*, 132 Pa. St. 568, 6 L. R. A. 802, 19 Atl. 276 [1890].

⁵ *Ferguson v. Borough of Stamford*, 60 Conn. 432, 22 Atl. 782 [1891]; *City of Bridgeport v. New York & New Haven Railroad Company*, 36 Conn. 255, 4 Am. Rep. 63 [1869]; *Nichols v. City of Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636 [1854].

¹ See § 11, § 118, Chapter XIII.

uniformity of taxation. One theory is that such provisions by their very terms apply to general taxation for the purpose of raising public revenue and are not intended to apply to local assessments levied upon the theory of benefits to pay for the cost of constructing public improvements which confer an especial benefit upon the property assessed. Therefore, by this theory, such provisions do not in any way concern or affect local assessments.² Under this theory, while assessment must undoubtedly be apportioned, in theory at least, with reference to benefits, it is either because to do otherwise would be a taking of property without due process of law,³ or (which is possibly the same rule stated in a different form) because the very idea of an assessment presupposes such a method of apportionment, and without such method and basis of apportionment we have a form of extortion and confiscation and not an assessment, no matter by what name it may be called.⁴

² *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222 [1874]; *Taylor v. Palmer*, 31 Cal. 240 [1866]; *Emery v. San Francisco Gas Co.*, 28 Cal. 346 [1865]; *Burnett v. Mayor and Common Council of the City of Sacramento*, 12 Cal. 76, 73 Am. Dec. 518 [1859]; *Speer v. Mayor and Council of Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890]; *Hayden v. City of Atlanta*, 70 Ga. 817 [1883]; *Reinken v. Fuehring*, 130 Ind. 382, 30 Am. St. Rep. 247, 15 L. R. A. 624, 30 N. E. 414, 37 Am. & Eng. Corp. Cas. 354 [1891]; *Nugent v. City of Jackson*, 72 Miss. 1040, 18 So. 493 [1895]; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451 [1879]; *Vasser v. George*, 47 Miss. 713 [1873]; *Daily v. Swope*, 47 Miss. 367 [1872]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *City of St. Joseph v. Owen*, 110 Mo. 445, 19 S. W. 713 [1892]; *Farrar v. City of St. Louis*, 80 Mo. 379 [1883]; *Adams v. Lindell*, 72 Mo. 198 [1880]; (affirming *Adams v. Lindell*, 5 Mo. App. 197 [1878]); *Egyptian Levee Company v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276 [1858]; *Creamer v. Allen*, 3 Mo. App. 545 [1877]; *Hilliard v. City of Ashe-*

ville, 118 N. C. 845, 24 S. E. 738 [1896]; *City of Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; *Shuford v. Commissioners of Lincoln County*, 86 N. C. 552; *Cain v. Commissioners of Davie County*, 86 N. C. 8 [1882]; *Ridenour v. Sadlin*, 1 Handy (Ohio) 464 [1855]; *Kaddery v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222 [1903]; *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]; *Masters v. City of Portland*, 24 Or. 161, 33 Pac. 540 [1893]; *King v. City of Portland*, 2 Or. 146 [1865]; *Franklin v. Hancock*, 204 Pa. St. 110, 53 Atl. 644 [1902]; *City of Erie v. Griswold*, 184 Pa. St. 435, 39 Atl. 231 [1898]; *City of Chester v. Black*, 132 Pa. St. 568, 6 L. R. A. 802, 19 Atl. 276 [1890]; *In the Matter of Dorrance Street*, 4 R. I. 230 [1856]; *Taylor v. Boyd*, 63 Tex. 533 [1885]; *Allen v. Galveston*, 51 Tex. 302; *Roundtree v. Galveston*, 42 Tex. 626; *City of Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077 [1891]; *Austin v. City of Seattle*, 2 Wash. 667, 27 Pac. 557 [1891].

³ See § 118.

⁴ See § 11, § 665.

§ 149. Theory that such provisions are partially applicable.

The other theory is that such constitutional provisions are applicable in part and in part not applicable. As far as they restrict the method of apportionment to the valuation of the property assessed they do not apply because the theory of assessment is apportionment on the basis of benefits, and not of valuation. As far as they require assessments to be uniform and equal they are applicable. Under this theory, however, equality and uniformity mean one thing in the law of local assessments and another thing in the law of general taxation. Assessments have a uniformity and equality of their own, and that consists in an apportionment upon the theory of benefits. It is this uniformity and equality that under this theory is required by such constitutional provisions in the law of local assessments. Statutes have been held to be unconstitutional if they provide for the construction of improvements in such a way as not to insure a benefit to the property owner.¹ Thus where the benefit to be derived from the construction of a system of drains,² or levees,³ depended upon keeping them up and if they were not kept up the benefit conferred by their original construction would be far less than the assessment levied for such construction, a statute authorizing their original construction and an assessment therefor, but not an assessment for maintenance, has been held to be invalid.

§ 150. Special views of different jurisdictions—Alabama.

The views expressed by the courts of several of the states need further comment, however, since they have been in the past at variance with the views already set forth. In most cases, it may be added, these variant views have been modified either by change of judicial opinion or by express constitutional provision, so as to conform to those held by the majority of the courts. While it was always held in Alabama that in the absence of constitutional provisions the legislature had power to authorize public corporations to levy local assessments based on

¹ State, Kean. Pros. v. Driggs Drainage Company, 45 N. J. L. (16 Vr.) 91 [1883].

² State, Kean. Pros. v. Driggs Drainage Company, 45 N. J. L. (16 Vr.) 91 [1883].

³ O'Brien v. Wheelock, 184 U. S. 450, 46 L. 636, 22 S. 354 [1902]; (affirming O'Brien v. Wheelock, 95 Fed. 883, 37 C. C. A. 309 [1899]); Updike v. Wright, 81 Ill. 49 [1876].

special benefits accruing to private property by reason of public improvements,¹ it was nevertheless the original doctrine in that state that the provisions of their constitution requiring taxes to be "assessed in exact proportion to the value" of the property to be taxed, and forbidding the taking of private property for public use without compensation were both applicable to local assessments and accordingly prevented local assessments from being based on the theory of benefits and apportioned thereto.² This holding was, of course, directly contrary to the weight of authority which holds that a local assessment is not a tax within the meaning of such constitutional provision.³ It rested upon the theory that an assessment is a kind of tax and that accordingly it is subject to constitutional restrictions applicable to taxation.⁴ In a later case⁵ it was sought to distinguish the

¹ Mayor, Aldermen, etc., of Mobile v. Royal Street Railroad Company, 45 Ala. 322 [1871].

² Mayor, Aldermen, etc., of Mobile v. Royal Street Railroad Company, 45 Ala. 322 [1871]; Mayor, Aldermen, etc., of Mobile v. Dargan, 45 Ala. 310 [1871].

³ See § 147.

⁴ "A tax is an orderly rate levied on the property of the citizen according to its value, or a fixed sum levied on his person, for the public use, and as it is for the use of all, it ought in strict justice to be levied on the property of all. Here the levy is not upon the property of all the citizens for a public purpose but it is on the property of a few, for the public use—for the improvement of a public street. Most clearly all taxes are intended to be as nearly equal as possible. If they are local and for community or local purposes, the whole community is presumed to be interested in their appropriation; and for this reason all are required to contribute to supply them. A tax levied for national purposes is levied upon the whole people of the nation; a tax levied for a State falls on all its people; and in like manner a tax levied for a county is paid by the whole people of

the county. So must it be with a tax levied on the people of a city or town in order to make it just and equal. Such levies may include every thing that can be called property—everything that can be owned. Such taxes, to make them just, must be in proportion to the value of the property upon which the burden is imposed and they must be levied upon all and not upon a few only. This is said to be an inherent principle of taxation. It is the limit that use affixes to the word. (Citing Morford v. Unger, 8 Ia. 82; Covington v. Southgate, 15 B. Mon. (Ky.) 491; Merriek v. Amherst, 12 All. (94 Mass.) 504; Ryerson v. Utley, 16 Mich. 269; Wells v. Weston, 22 Mo. 385; Weeks v. Milwaukee, 10 Wis. 258; Const. Ala. 1868, Art. IX., § 1.) If this, then, is not a tax in the just and proper sense of that word it is a seizure of the private property of the citizen for public use without his consent, and without first making to the owner just compensation for the same. This the constitution of the State forbids. Const. Ala. 1868, Art. IV., § 36." Mayor, Aldermen, etc., of Mobile v. Dargan, 45 Ala. 310, 319, 320 [1871].

⁵ Irwin v. Mayor, etc., of Mobile, 57 Ala. 6 [1876].

earlier cases without overruling them, upon the theory that the constitutional provisions already referred to were adopted when the constitution of 1868, in which they were found, went into effect; that this constitution took effect June 25, 1868, when Congress declared that such constitution was adopted, and readmitted Alabama over the veto of the President; that in the case at bar the ordinance was passed May 22, 1868, prior to the time that the constitution of 1868 took effect; that the record did not show when the contract was let, and that the court would not assume, in order to invalidate the transaction that it was let subsequently to the time that the constitution of 1868 went into effect; and that accordingly such assessment would not be governed by the constitution of 1868 and the provisions therein already referred to. This attempt to distinguish the case at bar from the earlier cases was, however, based entirely on an oversight. Conceding the correctness of the theory advanced as to the inapplicability of the constitution of 1868 to the assessment in question, it must nevertheless be noted that the prior constitutions of Alabama contained similar provisions as to the taxation of lands.⁶ This oversight was observed in a later case in which the same question was presented,⁷ and the question of overruling the earlier cases or the later case was presented squarely, since the constitution of 1875, which controlled this case, contained provisions like those of the constitution of 1868. The earlier cases already cited were there overruled,⁸ and the doctrine laid down that these constitutional provisions had no application to local assessments, and that accordingly the legislature had power to provide for the levy of such local assessments.⁹ While overruling the earlier cases the court pointed

⁶ Constitution of Alabama, Article VI., § 8 [1819]; Article VI., § 8 [1861]; Article IV., § 38 [1865]; Mayor and Aldermen of Birmingham v. Klein, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386 [1889].

⁷ Mayor and Aldermen of Birmingham v. Klein, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386 [1889].

⁸ Mayor and Aldermen of Birmingham v. Klein, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386 [1889]; (overruling Mayor, Aldermen, etc., of Mobile v. Royal Street Railroad Com-

pany, 45 Ala. 322 [1871] and Mayor, Aldermen, etc., of Mobile v. Dargan, 45 Ala. 310 [1871]).

⁹ "Are the provisions of Art. XI. referring as we have seen to general taxes and taxation and to such only, expressed limitations on the power of the legislature with respect to local assessments on property to pay for local improvements, which benefit that particular property. We think not. The overwhelming weight of authority is against such a construction and in favor of the validity of

out that they were cases in which the assessment was apportioned according to frontage, and that in such earlier cases were intimations that if the assessments had been made according to benefits *eo nomine*, they might have been sustained. The doctrine laid down in *Mayor and Aldermen of Birmingham v. Klein*,¹⁰ has since been followed in later cases,¹¹ and Alabama may now be considered as in line on this point with the weight of authority.¹²

§ 151. Arkansas.

The provision of the former constitution of Arkansas: "All property subject to taxation shall be taxed according to its value—that value to be ascertained in such manner as the General Assembly shall direct: making the same equal and uniform throughout the state. No species of property from which a tax may be collected shall be taxed higher than another species

such assessments. In considering the question, jurists and judges have proceeded on the theory that such charges were not taxes in the ordinary sense or within the meaning and intent of constitutional provisions similar to those of Alabama, but that they are in the nature of compensation for a benefit peculiar to the owner of the abutting property and traceable to him: that such assessments are not exacted for the general public welfare, and do not go to the support of governmental agencies from the existence and maintenance of which each citizen derives a like benefit, but that they are demandable because the government has expended an equivalent sum in improving the property against which they are laid, and thereby not the public, but the individual owner of the property improved has been to that extent, the gainer. A tax, it is said, is a contribution to the general fund, the amount of which is taken from the individual and nothing which benefits him individually as distinguished from the mass of citizens is given in the place of it. He pays, and by the amount he pays is poorer than he was before. Not s

with an assessment of the class we are considering. The property owner pays it, but in legal contemplation he loses nothing. He receives the value of his money in the betterment of his property and in addition to this he is benefited to the same extent that all other citizens are in that a thoroughfare of the city in which his property is situated and he probably lives is improved. The authorities almost universally take such an imposition though confessedly laid under the taxing power out of the category of taxes and taxation as those terms are employed in organic limitations on legislative power to levy or authorize the levying of taxes, and in general statutes." *Mayor and Aldermen of Birmingham v. Klein*, 89 Ala. 461, 465, 466, 8 L. R. A. 369, 7 So. 386 [1889].

¹⁰ 89 Ala. 461, 8 L. R. A. 369, 7 So. 386 [1889].

¹¹ *City Council of Montgomery v. Pirdsong*, 126 Ala. 632, 28 So. 522 [1899].

¹² *Elyton Land Co. v. Mayor, etc., of City of Birmingham*, 89 Ala. 477, 7 So. 901; *Hare v. Kennerly*, 83 Ala. 608, 3 So. 683; *Shultes v. Eberly*, 82 Ala. 242, 2 So. 345.

of property of equal value,"¹ was held not to apply to local assessments.² Accordingly a statute providing for a special levee tax, and requiring the land to be valued at not less than ten dollars an acre is not invalid under this clause.³ Under a similar constitutional provision, "Laws shall be passed, taxing by a uniform rule, . . . all real and personal property according to its true value in money,"⁴ it was held that such provision was applicable to local assessments, that they must be apportioned according to the value of the property, and that if apportioned according to frontage, such assessments were invalid.⁵ The present constitution of Arkansas provides: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper. Provided, further, That the following property shall be exempt from taxation: Public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; school buildings and apparatus; libraries and grounds used exclusively for school purposes, and buildings and grounds and materials used exclusively for public charity."⁶ "All laws exempting property from taxation other than as provided in this constitution shall be void."⁷ "Nothing in this constitution shall be

¹ Article VII., Title Revenue, § 2, Constitution of Arkansas [1836].

² *McGehee v. Mathis*, 21 Ark. 40 [1860]; (reversed on another point in *McGee v. Mathis*, 71 U. S. (4 Wall.) 143, 18 L. 314 [1866]); (following *Washington v. State*, 13 Ark. 752 [1853] on the point that this provision does not apply to local taxation.)

³ *McGehee v. Mathis*, 21 Ark. 40 [1860].

⁴ Article X., § 2, Constitution of Arkansas [1868].

⁵ *Peay v. City of Little Rock*, 32 Ark. 31 [1877]; "We can scarcely expect absolute equality in all cases, or benefit commensurate with the

burden of taxes assessed. But the principle upon which this approximation to equality is to be maintained must be preserved inviolate in this that all property subject to taxation shall be uniformly assessed according to value, a rule applicable to all taxation, whether for general or local and special purposes. . . . This valuation and assessment cannot be arbitrarily determined either by law or by an ordinance." *Peay v. City of Little Rock*, 32 Ark. 31, 38, 39 [1877].

⁶ Art. XVI., § 5, Constitution of Arkansas [1874].

⁷ Art. XVI., § 6, Constitution of Arkansas [1874].

so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property owners owning property adjoining the locality affected; but such assessments shall be ad valorem and uniform.”⁸ Under these provisions it has been held that special assessments must be according to value and not according to frontage.⁹ Furthermore, if part of the property affected by the improvement is exempted, while other property similarly situated is assessed, the requirement of uniformity is violated.¹⁰ Assessments for benefits levied according to the value of the property are held under this provision to be constitutional.¹¹ It has been said, however, to be within the power of the legislature to assess either according to the value of the land affected or according to the value of the benefits added by the improvement, without violating this constitutional provision.¹² This observation was in part obiter as in this case the benefits were assessed upon the basis of the valuation of the land affected. Three judges concurred in this opinion and decided the case on the theory that assessments levied in proportion to the increased value of the land caused by the improvement for which such assessment was levied was an ad valorem assessment. The fourth judge rendered an opinion in which he did not discuss this theory. Even under the theory that assessments must be apportioned according to the benefits received it has been held to be within the power of the legislature to require a property owner to construct a sidewalk in front of his land, on the theory that such requirement could be made under the police power and not under the power of taxation.¹³

§ 152. Colorado.

In Colorado it was held originally that the clause of the constitution providing for uniformity of taxation included local

⁸ Art. XIX., § 27, Constitution of Arkansas [1874].

⁹ *Town of Monticello v. Banks*, 48 Ark. 251, 2 S. W. 852 [1886].

¹⁰ *Town of Monticello v. Banks*, 48 Ark. 251, 2 S. W. 852 [1886]; *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184 [1886].

¹¹ *Fitzgerald v. Walker*, 55 Ark. 148, 17 S. W. 702 [1891]; *Little*

Rock v. Katzenstein, 52 Ark. 107, 12 S. W. 198 [1889]; *City of Little Rock v. Board of Improvements, etc.*, 42 Ark. 152 [1883].

¹² *Ahern v. Board of Improvement, District No. 3 of Texarkana*, 69 Ark. 68, 61 S. W. 575 [1901].

¹³ *James v. Pine Bluff*, 49 Ark. 199, 4 S. W. 760 [1887].

assessments for special benefits as well as taxes in the narrower sense of the term, and that accordingly assessments referable to the power of taxation as distinguished from the police power could not be apportioned according to benefits.¹ This view was adhered to in subsequent cases;² and in a still later case the Supreme Court in response to a question submitted to it by the legislature declined to overrule its former decisions upon *ex parte* argument.³ Soon afterwards, however, the same question was presented in litigation in which adverse interests were represented, and it was then held that the constitutional requirement of uniformity did not apply to local assessments and that it was therefore within the power of the legislature to provide for local assessments, apportioned according to benefits and not according to valuation.⁴ This last view is in accordance with the weight of authority,⁵ and has since been followed consistently by the courts of Colorado.⁶ Even while the earlier rule was in force in Colorado, the courts upheld assessments, based on the theory of the performance of a legal duty and not upon the theory of benefits, even though such assessments were not apportioned upon a basis of valuation,⁷ the court holding that assessments based upon the theory of legal duty were referable to the exercise of the police power and not to the exercise of the taxing power. Among assessments of this class were assessments for the construction of sidewalks⁸ and sewers.⁹ The importance of this distinction for this purpose has of course been diminished by the change of view of the Colorado courts, since now assessments for all improvements of a public character, which confer a special and peculiar benefit to certain property may be levied on such property in proportion to the benefits conferred without violating the constitutional requirement of uniformity.

¹ *Palmer v. Way*, 6 Colo. 106 [1881].

² *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889]; *City of Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899 [1889]; *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455 [1884].

³ *In re House Resolutions concerning Street Improvements*, 15 Colo. 598, 26 Pac. 323 [1890].

⁴ *City of Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041 [1892].

⁵ See § 147.

⁶ *City of Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467 [1905].

⁷ *City of Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899 [1889]; *Palmer v. Way*, 6 Colo. 106 [1881].

⁸ *Palmer v. Way*, 6 Colo. 106 [1881].

⁹ *City of Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899 [1889]; *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825 [1887].

§ 153. Illinois.

The constitution of Illinois of 1848 contained the following provisions: "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform with respect to persons and property within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property within the limits of municipal corporations belonging to individuals shall be taxed for the payment of debts contracted under authority of law."¹ "The General Assembly shall provide for levying a tax by valuation so that every person shall pay a tax in proportion to the value of his or her property. . . ."² Under these provisions it was held that the doctrine of equality and uniformity of taxation was applicable to local assessments in a very limited and qualified manner. Local assessments were held to be referable to the power of eminent domain as has already been stated.³ From this view it was held to follow that compensation must be made for the assessment, either in money or in benefits,⁴ and that if the assessment exceeded the amount of the benefits it was a violation of the constitution, since it could not be upheld to the extent of such excess, under the doctrine of eminent domain; nor could it be upheld as to such excess under the doctrine of taxation, since it lacked the equality and uniformity prescribed by the constitution.⁵ General principles often are laid down with constant reference to the particular application of them which the court intended to make. In this instance the deduction made by the Supreme Court of Illinois was that while assessments were valid if apportioned according to benefits *co nomine*,⁶ they were invalid if apportioned according to frontage.⁷ The explanation constantly given for this re-

¹ Art. IX., § 5, Constitution of Illinois [1848].

² Art. IX., § 2, Constitution of Illinois [1848].

³ See § 101.

⁴ City of Chicago v. Ward, 36 Ill. 9 [1864].

⁵ City of Chicago v. Ward, 36 Ill. 9 [1864].

⁶ City of Chicago v. Baer, 41 Ill. 306 [1866]; Trustees of the Illinois

and Michigan Canal v. City of Chicago, 12 Ill. 403 [1851].

⁷ St. John v. City of East St. Louis, 50 Ill. 92 [1869]; Holbrook v. Dickinson, 46 Ill. 285 [1867]; Wright v. City of Chicago, 46 Ill. 44 [1867]; Bedard v. Hall, 44 Ill. 91 [1867]; City of Chicago v. Baer, 41 Ill. 306 [1866]; City of Ottawa v. Spencer, 40 Ill. 211 [1866]; City of Chicago v. Ward, 36 Ill. 9 [1864]; City of Chicago v. Larned, 34 Ill. 203 [1864].

sult was that such an assessment was a violation of the rule requiring equality and uniformity in taxation.⁸ To escape the result arrived at in the foregoing cases, that assessments by frontage must be invalid, the following provision was inserted in the constitution which went into effect in Illinois in 1870: "The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property or otherwise. For all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." In a case decided soon after the adoption of the constitution of 1870 it was said that the rules of equality and uniformity of taxation were not strictly applicable to special assessments for local improvements; but that they must be levied, it seemed, on the principle of the value of the property assessed in proportion to the benefits thereto.¹⁰ Under this provision it was finally held that the power of local assessment thus specifically given was free from the constitutional limitations of equality and uniformity.¹¹ The latter provision in the constitution of 1870 was as follows: "The General Assembly shall provide such revenue as may be needful by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."¹² Under these provisions the power

⁸ "In that case (i. e. *City of Chicago v. Larned*, 34 Ill. 203) it was held that in taxation, equality and uniformity were indispensable to its constitutionality and that the same principle applied to assessments for public improvements and that an assessment upon the size or width of the front of the lot without reference to its value was invalid as being in violation of the principle of equality and uniformity." *Holbrook v. Dickinson*, 46 Ill. 285, 287, 288 [1867].

⁹ Constitution of Illinois, 1870, Art. IX., § 9.

¹⁰ *Hundley and Rees v. Commissioners of Lincoln Park*, 67 Ill. 559 [1873].

¹¹ *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901]; *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889]; *Murphy v. People*, 120 Ill. 234, 11 N. E. 202; *City of Springfield v. Green*, 120 Ill. 269, 11 N. E. 261; *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471 [1887]; *City of Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686 [1886]; *Enos v. City of Springfield*, 113 Ill. 65 [1886]; *Craw v. Village of Tolono*, 96 Ill. 255, 36 Am. Rep. 143 [1880]; *White v. People ex rel. City of Bloomington*, 94 Ill. 604 [1880]; *Bigelow v. City of Chicago*, 90 Ill. 49 [1878]; *Fagan v. City of Chicago*, 84 Ill. 227.

¹² Art. IX., § 1, Constitution of Illinois [1870].

of local assessment if attempted to be granted to any public corporation other than those mentioned in Article IX., Section 9, already quoted, must be exercised in compliance with the constitutional requirement of equality and uniformity of taxation.¹³ Accordingly when the legislature attempted to give to a drainage district the power of local assessment it was held that such power could be granted only to such public corporations as were mentioned in Article IX., Section 9; and that if the power of taxation for the construction of a levee was given to a drainage district it was limited by the requirements of uniformity and equality of taxation.¹⁴ Accordingly, as a result of this holding, an amendment to the constitution of Illinois was adopted as follows: "The General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others and provide for the organization of drainage districts and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state by special assessments upon the property benefited thereby."¹⁵ Under this amendment it is held that assessments for drainage purposes are not subject to the constitutional requirement of equality and uniformity of taxation as the latter have, under the constitution in its present form, nothing to do with local assessments.¹⁶

§ 154. Kentucky.

In Kentucky at a time when there was no specific constitutional provision requiring uniformity of taxation, an assessment for benefits was held to be invalid upon grounds which were sufficient to overthrow all assessments.¹ The reason assigned for holding such assessment invalid was that if a tax it must be apportioned according to the value of the property taxed, while if a taking of private property for public use the exaction could not be in the form of money, since the constitutional require-

¹³ *Updike v. Wright*, 81 Ill. 49 [1876].

¹⁴ *Updike v. Wright*, 81 Ill. 49 [1876].

¹⁵ Constitution of 1870, Art. IV., § 31, adopted as amendment [1878].

¹⁶ *Moore v. People ex rel. Lewis*, 106 Ill. 376 [1883].

¹ *Sutton's Heirs v. Louisville*, 35 Ky. (5 Dana) 28 [1837].

ment for compensation would require a return of the same amount of money, and the transaction would therefore be a mere farce. The assessment was one in which the cost of land taken for widening a street was assessed upon the owners of abutting property—a kind of assessment which has caused more trouble than any other.² The court receded from this extreme position in subsequent cases and it was held that the very nature of the power of taxation, of which local assessment was a branch, and the constitutional provisions forbidding the taking of property without due compensation,³ made it necessary to apportion an assessment substantially upon the basis of the benefits conferred by the improvement for which the assessment was levied, and forbade arbitrary exactions, irrespective of such basis of apportionment, but that if apportioned substantially upon a basis of benefits, such assessment might be valid.⁴ “The distinction between constitutional taxation and the taking of private property for public use by legislative will, may not be definable with perfect precision. But we are clearly of the opinion that whenever the property of a citizen shall be taken from him by the sovereign will and appropriated without his consent to the benefit of the public the exaction should not be considered a tax unless similar contributions be made by that public itself or shall be exacted rather by the same public will from such constituent members of the same community generally as own the same kind of property. Taxation and representation go together. And representative responsibility is one of the chief conservative principles of our form of government. When taxes are levied, therefore, they must be imposed on the public in whose name and for whose benefit they are required and to whom those who impose them are responsible. And although there may be a discrimination in the subjects of taxation, still persons in the same class and property of the same kind must generally be subjected alike to the same common burden. This alone is taxation, according to our notion of constitutional taxation in Ken-

² See § 112, § 113, § 308 et seq.

³ “Nor shall any man’s property be taken or applied to public use without the consent of his representatives and without just compensation being previously made to him.”

Article X., § 12. Constitution of Kentucky.

⁴ *Howell v. Bristol*, 71 Ky. (8 Bush.) 493, [1871]; *City of Lexington v. McQuillan’s Heirs*, 39 Ky. (9 Dana) 513, 35 Am. Dec. 159 [1840].

tucky.”⁵ In a later constitution of Kentucky provisions were inserted requiring equality of taxation, as follows: “Taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.”⁶ All property shall be assessed at its fair cash value.⁷ All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises.⁸ These provisions were held to add nothing to the constitutional requirements already in force, but to be merely declaratory of the principles in force in Kentucky.⁹ Local assessments are not taxes within the meaning of these provisions requiring taxation in proportion to value.¹⁰ The sole uniformity and equality requisite under these provisions is, as before their adoption, an apportionment upon a substantial basis of benefits.

§ 155. Louisiana.

The original constitution of Louisiana contained no provision requiring equality or uniformity of taxation. It was, therefore, held in a case not involving local assessments, that the legislature was practically unrestricted in its exercise of the power of taxation.¹ While the law was in this condition, a local assessment for public improvements was held to be valid, in part,

⁵ *City of Lexington v. McQuillan's Heirs*, 39 Ky. (9 Dana) 513, 517, 35 Am. Dec. 159 [1849].

⁶ Sec. 171, Constitution of Kentucky.

⁷ Sec. 172, Constitution of Kentucky.

⁸ Sec. 174, Constitution of Kentucky.

⁹ Sections 171 and 174 of the present constitution of Kentucky announce “nothing new but are merely declaratory of what was always the law of taxation in this state.” *Holzhauser v. City of Newport*, 94 Ky. 396, 22 S. W. 752 [1893].

¹⁰ *Gosnell v. City of Louisville*, 104 Ky. 201, 46 S. W. 722, 20 Ky. L. R. 519 [1898]; *Holzhauser v. City of Newport*, 94 Ky. 396, 22 S. W. 752 [1893].

¹¹ “The constitution of this state having affixed no limits to the exercise of the power of taxation by the legislature, it is difficult to suppose even a case in which the exercise of that power could be considered unconstitutional or properly become the subject of judicial interference.” *Le Breton v. Moreau*, 4 Mart. (La.) N. S. 138, 142 [1826].

on the theory that there was no provision requiring uniformity and equality of taxation, and in part upon the theory that the basis of apportionment was such that the assessment was uniform and equal according to its nature.² The validity of such assessments was thereafter assumed without discussion.³ Subsequently in the later constitutions of Louisiana provisions were introduced requiring equality and uniformity of taxation, as follows: "Taxation shall be equal and uniform throughout the state."⁴ Taxation shall be equal and uniform throughout the limits of the authority levying the tax, and all property shall be taxed in proportion to its value, to be ascertained as directed by law; provided, the assessment of property shall never exceed the actual cash value thereof; and provided further, that the taxpayers shall have the right of testing the correctness of their assessments before the courts of justice. In order to arrive at this equality and uniformity the General Assembly shall, at its first session after the adoption of this constitution, provide a system of equality and uniformity in assessments based upon the relative value of property in different portions of the state. The valuations put upon property for the purposes of state taxation shall be taken as the proper valuation for purposes of local taxation, in every subdivision of the state.⁵ It was at first held in a case not involving local taxation that such provisions applied only to state taxes and had no application either to local taxes or to assessments.⁶ In following out this theory the court held or in many cases, assumed without discussion, that such provisions had no application to local assessments.⁷ Subsequently after a change in the personnel of the court, the majority of the court began to hold that such provisions were applicable to

² *Oakey v. Mayor*, 1 La. 1 [1830].

³ *Blanchet v. Municipality No. 2*, 13 La. 322 [1839].

⁴ Article 127, Constitution of Louisiana [1845]; Article 123, Constitution of Louisiana [1852].

⁵ Art. 225, Constitution of Louisiana.

⁶ *Second Municipality v. Duncan*, 2 La. Ann. 182 [1847]; (a case involving a school tax.)

⁷ *Municipality Number Two for the opening of Roffignac Street*, 7 La.

Ann. 76 [1852]; *Municipality No. Two for the Opening of Euphrosine Street*, 7 La. Ann. 72 [1852]; *O'Leary v. Sloo*, 7 La. Ann. 25 [1852]; *Boulat v. Municipality Number One*, 5 La. Ann. 363 [1850]; *Municipality Number One v. Young*, 5 La. Ann. 362 [1850]; *Matter of Claiborne Street*, 4 La. Ann. 7 [1849]; *Matter of Exchange Alley*, 4 La. Ann. 4 [1849]; *City of Lafayette v. Male Orphan Asylum*, 4 La. Ann. 1 [1849].

local assessments.⁸ As a deduction from this rule, they held in some cases that such assessments must be apportioned on a basis of valuation, and not on the basis of benefits or of any approximation thereto.⁹ In this case the majority attempted to distinguish the earlier cases on the ground that the constitutional provisions in question were found in the constitution then in force¹⁰ and that the earlier cases were under constitutions not containing such provisions.¹¹ The minority dissented on the ground that the provision of this character in the constitution then in force¹² was taken literally from the constitution of 1845,¹³ and that since such provision had been held under the prior constitution not to be applicable to local assessments, this construction must be presumed to have been adopted as part of the new constitution. In other cases the majority held that such provisions applied to local assessments, but that these provisions were not violated by the assessments in question, they being as equal and uniform as in their nature was possible.¹⁴ The next case that came before the Supreme Court of Louisiana was one involving drainage assessments. On the original hearing, the view that constitutional provisions requiring equality and uniformity of taxation are applicable to local assessments

⁸ *City of New Orleans v. Elliott*, 10 La. Ann. 59 [1855]; *Municipality Number Two v. Dunn*, 10 La. Ann. 57 [1855]; *Municipality Number Two Praying for the Opening of Benton Street v. White*, 9 La. Ann. 446 [1854]; (decided by a vote of three to two).

⁹ *Municipality Number Two Praying for the Opening of Benton Street v. White*, 9 La. Ann. 446 [1854]: "It being impossible to ascertain the precise degree of benefit which is derived by any or by all of the property holders within the district from any public improvement that may be determined on by the local authorities, there is no other mode of apportioning a tax for such improvements which will be equal and uniform but that of an *ad valorem* tax on all property holders within the district, or by paying the expenses out of the funds derived from general

taxation as was done previous to the Act of 1832." *Municipality Number Two Praying for the Opening of Benton Street v. White*, 9 La. Ann. 446, 451 [1854].

¹⁰ Article 123 Constitution of Louisiana [1852].

¹¹ See the majority opinion in *Municipality Number Two Praying for the Opening of Benton Street v. White*, 9 La. Ann. 446 [1854]; (distinguishing *Blanchet v. Municipality No. 2*, 13 La. 322 [1839]).

¹² Article 123, Constitution of Louisiana [1852].

¹³ Article 127, Constitution of Louisiana [1845].

¹⁴ *City of New Orleans v. Elliott*, 10 La. Ann. 59 [1855]. The assessments in question were said to be "as equal and uniform as the nature of the thing admits of." *Municipality No. 2 v. Dunn*, 10 La. Ann. 57, 58 [1855].

was adhered to.¹⁵ The next case involving this question came up after a partial change in the composition of the Supreme Court. The view entertained in the cases immediately preceding was abandoned and that entertained by the earlier cases and by the weight of authority, namely, that provisions requiring equality and uniformity of taxation are not applicable to local assessments, was adopted.¹⁶ This was followed by a rehearing of the New Orleans Drainage Company's case,¹⁷ and at such rehearing¹⁸ the view entertained at the original hearing was abandoned and it was held that such constitutional provisions were not applicable to local assessments. This view has been adhered to consistently in the later cases and Louisiana may be classed with those holding the majority view.¹⁹

§ 156. Massachusetts.

The constitution of Massachusetts gives the legislature power "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident, and estates lying within the said commonwealth; and also to impose and levy reasonable duties and exercises upon any produce, goods, wares, merchandise and commodities, whatsoever, brought into, produced, manufactured, or being within the same."¹ In its application to local assessments this provision

¹⁵ New Orleans Draining Company, Praying for the Confirmation of a Tableau, 11 La. Ann. 338 [1856]; (decided by a vote of two to one).

¹⁶ Yeatman v. Crandall, 11 La. Ann. 220 [1856].

¹⁷ New Orleans Draining Company Praying for the Confirmation of a Tableau, 11 La. Ann. 338 [1856].

¹⁸ New Orleans Draining Co. Praying for the Confirmation of a Tableau, 11 La. Ann. 351 [1856].

¹⁹ As holding this view see *City of Shreveport v. Prescott*, 51 La. Ann. 1895, 46 L. R. A. 193, 26 So. 664 [1899]; *Rosetta Gravel Paving & Improvement Co. v. Jollisaint*, 51 La. Ann. 804, 25 So. 477; *Fayssoux v. Denis*, 48 La. Ann. 850, 19 So. 760 [1896]; *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475 [1894]; *State ex rel. Hill v. Judges*, 46 La. Ann. 1292,

16 So. 219 (obiter) [1894]; *Ellis v. Pontchartrain Levee District*, 43 La. Ann. 33, 8 So. 914; *Munson v. Board of Commissioners of the Atchafalaya Basin Levee District*, 43 La. Ann. 15, 8 So. 906 [1891]; *Barber Asphalt Paving Company v. Gogreve*, 41 La. Ann. 251, 5 So. 848 [1889]; *Excelsior Planting & Manufg. Co. v. Green*, 39 La. Ann. 455, 1 So. 873; *Charnoek v. Fardoche and Grosse Tête Special Levee District Company*, 38 La. Ann. 328 [1886]; *City of New Orleans v. Estate of Burthe*, 26 La. Ann. 497; *City of New Orleans Praying for the Opening of Casacaloo and Moreau Streets*, 20 La. Ann. 497 [1868]; *Wallace v. Shelton*, 14 La. Ann. 498 [1859]; *Surgi v. Snetchman*, 11 La. Ann. 387 [1856].

¹ Part II., Chap. 1, § 1, Art. IV., Constitution of Massachusetts.

is held to require that the assessment must be apportioned to the benefits conferred by the improvement for which such assessment is levied, and must be limited to the amount thereof.² On the one hand an assessment so apportioned and limited is not invalidated by this clause in the constitution.³ On the other hand an assessment not so apportioned and limited is rendered invalid by the effect of this clause.⁴

§ 157. Michigan.

The courts of Michigan at first hesitated to commit themselves upon the question of the applicability of the constitutional provision concerning uniformity of taxation to local assessments. In a case arising under the laws passed prior to the adoption of the constitution it was held such provision was not self-executing, that it could not become operative until the legislature had provided some new rule in conformity with such requirement, and that such constitutional provisions could not affect assessments made before the legislature had provided such rule.¹ Subsequently the court divided upon the question of whether such provisions were applicable to local assessments.² Finally the view entertained by the majority of the courts was adopted and it was held that these provisions were applicable to the valuation and taxation of property for general purposes but not to local assessments for benefits.³

§ 158. Minnesota.

The constitution of Minnesota contained the provision originally: "All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the state."¹ This provision was held to apply to

² *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903].

³ *Warren v. Street Commissioners of the City of Boston*, 187 Mass. 290, 72 N. E. 1022 [1905]; *Lincoln v. Board of Street Commissioners of the City of Boston*, 176 Mass. 210, 57 N. E. 356 [1900].

⁴ *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903]; *Weed v. Mayor and Aldermen of Boston*, 172 Mass.

28, 42 L. R. A. 642, 51 N. E. 204 [1898].

¹ *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853].

² *Woodbridge v. City of Detroit*, 8 Mich. 274 [1860].

³ *Motz v. City of Detroit*, 18 Mich. 494 [1869].

⁴ Art. IX., § 1, Constitution of Minnesota [1857].

local assessments,² and to require them to be apportioned on the basis of valuation of the property assessed and not on the basis of the amount of benefits conferred.³ To avoid the effect of such holding, the constitution of Minnesota was amended in 1869 by adding to Article IX., Section 1, the following provision: "The legislature may by general law or special act authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements or upon the property to be benefited by such improvements without regard to a cash valuation and in such manner as the legislature may prescribe."⁴ Under this amendment the clause requiring equality of taxation and a cash valuation does not prevent the legislature from apportioning assessments substantially according to benefits;⁵ but it does apply to assessments in excess of the amount of the benefits conferred or so apportioned as to ignore the question of benefits.⁶

§ 159. South Carolina.

The constitution of South Carolina contains provisions for equality and uniformity of taxation.¹ The provision requiring uniformity and equality within the jurisdiction of the local corporation imposing the tax was found in the earlier constitution of 1868, but not in those of 1779 and 1787. Prior to the adoption of such constitutional provision local assessments were held to be valid.² After its adoption, the constitutional provision forbidding the taking of property except by the law of the land was held to invalidate all

² *Stinson v. Smith*, 8 Minn. 366, 8 Gil. 326 [1863].

³ *Bidwell v. Coleman*, 11 Minn. 78, 11 Gil. 45 [1865]; *Stinson v. Smith*, 8 Minn. 366, 8 Gil. 326 [1863].

⁴ Laws 1869 Ch. 51.

⁵ *State of Minnesota ex rel. City of Duluth v. District Court of St. Louis County*, 61 Minn. 542, 64 N. W. 190 [1895]; *Maltby v. Tautges*, 50 Minn. 248, 52 N. W. 858 [1892]; *State of Minnesota ex rel. Burger v. District Court of Ramsay County*, 33 Minn. 295, 23 N. W. 222 [1885]; *Noonan v. City of Stillwater*, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444; *City of St. Paul v. Mullen*, 27

Minn. 78, 6 N. W. 424 [1880]; *Rogers v. City of St. Paul*, 22 Minn. 494 [1876].

⁶ *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175 [1901]; *State of Minnesota ex rel. Merchant v. District Court for St. Louis County*, 66 Minn. 161, 68 N. W. 860 [1896]; *State of Minnesota ex rel. Merrick v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885].

¹ Article I., § 6; Article III., § 29 and Article X., § 5, Constitution of South Carolina.

² *City Council v. Pinekney*, 1 Treadway (S. C.) 42 [1812].

assessments for local improvements except those improvements which, like sidewalks, were upheld by the court under the police power.³ Under this provision it has finally been held by the Supreme Court of South Carolina, that local assessments even for sidewalks and other improvements under the police power are invalid.⁴ The theory upon which this result was reached was that the constitutional provision in question applied to local assessments and prevented the municipal corporation from subdividing the city into taxing districts, and thereby prevented the assessment of the property specially benefited by the local improvement. South Carolina thus seems to be committed to the view contrary to that entertained by the overwhelming weight of authority. It may be noted, however, that the sidewalks and drains for which the assessments in the case in question were levied were made necessary only by the change of grade of the street. The result reached in the South Carolina case has been reached in other jurisdictions⁵ without invoking the theory adopted in South Carolina.

§ 160. Tennessee.

The constitution of Tennessee contains the following provisions: " . . . All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct so that taxes shall be equal and uniform throughout the state. No species of property upon which a tax may be collected shall be taxed higher than any other species of property of the same value . . . " ¹ "The General Assembly shall have power to authorize the several counties and incorporated towns in this state to impose taxes for county and corporation purposes respectively in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to state taxation." ² The original holding of the Supreme Court of Tennessee was that local assessments

³ *Mauldin v. City Council of Greenville*, 42 S. C. 293, 46 Am. St. Rep. 723, 27 L. R. A. 284, 20 S. E. 842.

⁴ *Mauldin v. City Council of Greenville*, 53 S. C. 285, 69 Am. St. Rep. 855, 43 L. R. A. 101, 31 S. E. 252 [1898]; (overruling *Mauldin v. City Council of Greenville*, 42 S. C. 293, 46 Am. St. Rep. 723, 27 L. R. A. 284,

20 S. E. 842 [1893]); *Stehmeyer v. City Council of Charleston*, 53 S. C. 259, 31 S. E. 322 [1898].

⁵ See § 382.

¹ Art. II., § 28. Constitution of Tennessee.

² Art. II., § 29. Constitution of Tennessee.

referable to the power of taxation as distinguished from those referable to the police power, were controlled by these provisions, and that they must be equal, uniform and according to value.³ Under this theory assessments for street improvements⁴ and for drainage purposes⁵ were invalid if not apportioned according to valuation. This theory of course forbade apportionment except on a basis of valuation or some approximation thereto. It was adopted as the doctrine of Tennessee when the question first came before the courts⁶ and was adhered to till a very recent time.⁷ One of the reasons given for this holding was that in other states there was a customary law of assessments ante-dating constitutional restrictions, but in Tennessee there was no such customary law.⁸ Finally, however, the court abandoned its former holding, overruled its earlier cases and adopted the doctrine held by the weight of authority, that such constitutional provisions have no application to local assessments.⁹ Assessments based on the theory of the performance of a legal duty, which the court regarded as referable to the police power rather than to the power of taxation were never, in Tennessee, held to be limited by the constitutional provisions in question. Such assessments could therefore be made according to frontage without violating this constitutional provision.¹⁰

§ 161. Virginia.

The constitution of Virginia contained the following provision: "Taxation, except as hereinafter provided, whether imposed by

³ Reelfoot Lake Levee District v. Dawson, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041 [1896]; Taylor, McBean and Co. v. Chandler, 56 Tenn. (9 Heisk.) 349, 24 Am. Rep. 308 [1872].

⁴ Taylor, McBean and Co., v. Chandler, 56 Tenn. (9 Heisk.) 349, 24 Am. Rep. 308 [1872].

⁵ Reelfoot Lake Levee District v. Dawson, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041 [1896].

⁶ Taylor, McBean and Co. v. Chandler, 56 Tenn. (9 Heisk.) 349, 24 Am. Rep. 308 [1872].

⁷ Reelfoot Lake Levee District v. Dawson, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041 [1896].

⁸ Taylor, McBean and Co. v. Chandler, 56 Tenn. (9 Heisk.) 349, 24 Am. Rep. 308 [1872].

⁹ Arnold v. Mayor and Aldermen of Knoxville, 115 Tenn. 195, 3 L. R. A. (N. S.) 837, 90 S. W. 469 [1905].

¹⁰ Mayor and City Council of Nashville v. Berry, 2 Shannon's Cases 561 [1877]; Whyte v. Mayor and Aldermen of Nashville, 32 Tenn. (2 Swan.) 364 [1852]; Washington v. Mayor and Aldermen of Nashville, 31 Tenn. (1 Swan.) 177 [1851]; Mayor and Aldermen v. Mayberry, 25 Tenn. (6 Humph.) 368, 44 Am. Dec. 315 [1845].

the state, county or corporate bodies, shall be equal and uniform and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value."¹ Under this provision it was held that local assessments were not controlled by the constitutional requirement of equality and uniformity, which concerned general taxation alone.² Subsequently in cases presenting circumstances of peculiar hardship and oppression the correctness of the former holding was doubted.³ A statute providing that the assessment in addition to being a lien on the property "shall also be a personal debt of the owner of the property," was held to be unconstitutional as in violation of the foregoing provision requiring equality and uniformity.⁴ In a later case the original doctrine was re-affirmed and it was held that an assessment apportioned according to benefits and not involving any question of personal liability was not affected by the constitutional requirement of equality and uniformity.⁵ The question has been, to a great extent, settled in Virginia by a constitutional provision already quoted,⁶ which forbids local assessments for all but a few specified purposes. An assessment was levied before the adoption of such constitutional provision, and at the time of the adoption thereof it had been perfected as to some of the tracts to be assessed but not as to all. It was held that the adoption of such constitutional provision rendered it impossible to perfect such as-

¹ Art. X., § 1, Constitution of Virginia.

² *Davis v. City of Lynchburg*, 84 Va. 861, 6 S. E. 230 [1888]; *Green v. Ward*, 82 Va. 324 [1886]; *R. and A. R. R. Co. v. City of Lynchburg*, 81 Va. 473 [1866]; *Saunders v. City of Richmond*, 72 Va. (31 Gratt.) 571, 31 Am. Rep. 742 [1879]; *Norfolk City v. Ellis*, 67 Va. (26 Gratt.) 224 [1875].

³ *McCrowell v. City of Bristol*, 89 Va. 652, 20 L. R. A. 653, 16 S. E. 867 [1893]; *City of Norfolk v. Chamberlain*, 89 Va. 196, 16 S. E. 730 [1892]; In speaking of the leading case of *People ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y.

419, 55 Am. Dec. 266 [1851] the court said: "The doctrine held in that case if viewed in the light of the present constitution of Virginia cannot, it would seem, be considered otherwise than as unwarranted and dangerous in the extreme." *City of Norfolk v. Chamberlain*, 89 Va. 196, 201, 16 S. E. 730 [1892].

⁴ *Asberry v. City of Roanoke*, 91 Va. 562, 42 L. R. A. 636, 22 S. E. 360 [1895].

⁵ *Violett v. City Council of Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896].

⁶ See § 107.

assessments thereafter, and that under the requirement of equality and uniformity the assessments already levied could not be enforced.⁷

§ 162. West Virginia.

The constitution of West Virginia contains provisions requiring equality and uniformity of taxation.¹ "The legislature may by law authorize the corporate authorities of cities, towns and villages, for corporate purposes, to assess and collect taxes; but such taxes shall be uniform with respect to persons and property, within the jurisdiction of the authority imposing the same."² It has been held that the former provision applies only to laws applying to the entire state and not to laws applicable to cities.³ The latter provision was held to be addressed to the legislature, not self-executing, prospective in operation and not operative to repeal a law in force when adopted.⁴ Accordingly, until the legislature should pass a law under such latter constitutional provision, assessments under laws in force when the constitution was adopted were not affected by such constitutional provision. Decision of the question of the general applicability of such constitutional provisions to local assessments was thus avoided. In later cases it has been held that provisions requiring uniformity and equality of taxation do not apply to assessments.⁵

§ 163. Wisconsin.

The constitution of Wisconsin contains the provision, "The rule of taxation shall be uniform."¹ As far as this section alone was concerned it was held that it applied to and restricted

⁷ *Fulkerson v. City of Bristol*, 105 Va. 555, 54 S. E. 468 [1906].

¹ Art. VIII., § 1, Constitution of West Virginia [1863]; Art. X., § 1, Constitution of West Virginia [1872].

² Art. X., § 9, Constitution of West Virginia [1872].

³ *Douglass v. Town of Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548 [1876]; (citing *Gilkerson v. Frederick Justices*, 13 Gratt. (Va.) 577).

⁴ *Douglass v. Town of Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548 [1876]; (citing a similar assessment

case: *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853]; and also cases not involving assessments: *Groves v. Slaughter*, 15 Pet. (40 U. S.) 449, 10 L. 800 [1841]; *Slack v. Maysville and Lexington R. R. Co.*, 13 B. Mon. (52 Ky.) 1; *Cass v. Dillon*, 2 O. S. 607 [1853]).

⁵ *City of Parkersburg v. Tavenner*, 42 W. Va. 486, 26 S. E. 179; *Wilson v. Town of Philippi*, 39 W. Va. 75, 19 S. E. 553 [1894].

¹ Article VIII., § 1, Constitution of Wisconsin.

local assessments.² However, the constitution contained another provision: "It shall be the duty of the legislature and they are hereby empowered to provide for the organization of cities and incorporated villages and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit so as to prevent abuses in assessments and taxation and in contracting debts by such municipal corporations."³ This latter provision was held to except local assessments from the general constitutional requirement of uniformity and equality in taxation,⁴ on the theory that the term "assessment" there used meant local assessment in usual significance of the term, including the idea of apportionment on the theory of benefits.⁵ In this way the Wisconsin courts have reached the same result as that held in most jurisdictions, namely, that constitutional requirements of uniformity and equality of taxation do not apply to local assessments.⁶

§ 164. Restriction of purposes of taxation.

Constitutional provisions are found restricting the purposes for which taxation may be imposed. The constitution of Arkansas provides: ". . . The General Assembly may delegate the taxing power, with the necessary restrictions to the state's subordinate political and municipal corporations to the extent of providing for their existence, maintenance and well-being, but no further."¹ "The legislature shall not have the right to levy

² *Hale v. Kenosha*, 29 Wis. 599; *Lumsden v. Cross*, 10 Wis. 282; *Weeks v. City of Milwaukee*, 10 Wis. 242 [1860].

³ Art. XI., § 3, Constitution of Wisconsin.

⁴ *Weeks v. City of Milwaukee*, 10 Wis. 242 [1860].

⁵ It is generally held that such use of the term assessment does not include local assessments. See § 3.

⁶ *Meggett v. City of Eau Claire*, 81 Wis. 326, 51 N. W. 566 [1892]; *Teegarden v. City of Racine*, 56 Wis. 545, 14 N. W. 614 [1883]; *Dalrymple v. City of Milwaukee*, 53 Wis. 178, 10 N. W. 141; *Warner v. Knox*, 50 Wis. 429, 7 N. W. 372 [1880]; *Johnson v. City of Milwaukee*, 40 Wis.

315 (1876); *Bond v. City of Kenosha*, 17 Wis. 284 [1863]; *State ex rel. Christopher v. City of Portage*, 12 Wis. 562 [1860]; *Weeks v. City of Milwaukee*, 10 Wis. 242 [1860]; *Lumsden v. Cross*, 10 Wis. 282; "We are of the opinion that the provision of the constitution relating to uniformity in taxation does not apply to a tax of this character. It is more properly speaking of the nature of an "assessment" or special tax imposed for the purpose of municipal and local improvements." *Bond v. City of Kenosha*, 17 Wis. 284, 288, 289 [1863].

¹ Constitution of Arkansas, Article II., § 23 [1874].

taxes or impose burdens upon the people except to raise revenue sufficient for the economical administration of the government in which may be included the following purposes . . . ”² These provisions are regarded as applying to general taxation only, and to have no reference to local assessments levied for special benefits. Accordingly such provisions do not restrict the legislature from granting the power of levying local assessments for purposes other than those expressed in such provisions.³

§ 165. Specific provisions protecting the obligation of contracts.

In the Constitution of the United States and in those of many of the states are found provisions intended to prevent state legislation which should impair the obligation of contracts, and expressed in very similar terms. Among them are provisions which have been considered by the courts in cases involving assessments, as follows: “No state shall . . . pass any . . . law impairing the obligation of contracts . . . ”¹ “No . . . law impairing the obligation of contracts shall ever be passed.”² “No . . . law impairing the obligation of contracts . . . shall be passed.”³ “No . . . law impairing the obligation of contracts shall ever be passed.”⁴ “The legislature shall not pass any . . . law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made.”⁵ “The General Assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts; but may by general laws authorize courts to carry into effect upon such terms as shall be just and equitable, the manifest intention of the parties and officers by curing omissions, defects and errors in instruments and proceedings arising out of their want of conformity with the laws of this state.”⁶ “No . . . law impairing the obligation of contracts shall ever be passed.”⁷ “No . . . law impairing the obligation

² Article III., § 48, Constitution of Texas.

³ *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707 [1897]; *Storrie v. Houston City Street Railway Company*, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898].

¹ Art. I., § 10, Constitution of United States [1787].

² Art. I., § 16, Constitution of California [1879].

³ Art. II., § 14, Constitution of Illinois.

⁴ Art. I., § 24, Constitution of Indiana [1851].

⁵ Art. IV., § VII., Par. 3, Constitution of New Jersey.

⁶ Art. II., § 28, Constitution of Ohio [1851].

⁷ Art. I., § 21, Constitution of Oregon [1857].

of contracts . . . shall be passed.”⁸ “No . . . law impairing the obligation of contracts shall be made.”⁹ “No . . . law impairing the obligations of contracts shall ever be passed.”¹⁰

§ 166. Assessment not a contract within such provisions.

In determining the question of the extent to which these provisions restrict the power of the legislature in enacting new legislation concerning local assessments or in amending or repealing existing legislation, it is generally held that the laws which determine the method of levy and apportionment of an assessment, the assessment itself, and the remedies given therefor are none of them contracts within the meaning of these constitutional provisions. Accordingly such laws may be modified at the will of the legislature,¹ as long at least as the liability of the prop-

⁸ Art. I., § 17, Constitution of Pennsylvania.

⁹ Art. I., § 16, Constitution of Texas.

¹⁰ Art. I., § 23, Constitution of Washington [1889].

¹ *City of Worcester v. Worcester Consolidated Street Railway Co.*, 196 U. S. 539, 25 S. 327 [1905]; (affirming *City of Worcester v. Worcester Consolidated Street Railway Co.*, 182 Mass. 49, 64 N. E. 581 [1902]); *New Orleans City and Lake Railroad Company v. Louisiana ex rel. City of New Orleans*, 157 U. S. 219, 39 L. 679, 15 S. 581 [1895]; (affirming *State ex rel. City of New Orleans v. New Orleans City and Lake Railroad Co.*, 42 La. Ann. 550, 7 So. 606 [1890]); *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 35 L. 446, 11 S. 790 [1891]; (affirming *Essex Public Road Board v. Skinkle*, 49 N. J. L. (20 Vr.) 65, 6 Atl. 435 [1886] which had been affirmed in *Essex Public Road Board v. Skinkle*, 49 N. J. L. (20 Vr.) 641, 10 Atl. 379 [1887]); *Garrison v. City of New York*, 88 U. S. (21 Wall) 196, 22 L. 612 [1874]; *Dougherty v. Henarie*, 47 Cal. 9 [1873]; *Field v. City of Chicago*, 198 Ill. 224, 64 N. E. 840; *Smith v. People ex rel. Detrick*, 140 Ill. 255, 29 N. E. 676 [1893]; *Mar-*

ion and Monroe Gravel Road Co. v. McClure, 66 Ind. 468 [1879]; *Bate v. Sheets*, 64 Ind. 209 [1878]; *State ex rel. Monroe Gravel Road Co. v. Stout*, 61 Ind. 143 [1878]; *Stone v. Street Commissioners of Boston*, 192 Mass. 297, 78 N. E. 478 [1906]; *City of Springfield v. Springfield Street Railway*, 182 Mass. 41, 64 N. E. 577 [1901, 1902]; *O'Neill v. City of Hoboken*, 72 N. J. L. (43 Vr.) 67, 60 Atl. 59 [1905]; *City of East Orange v. Hussey*, 72 N. J. L. (43 Vr.) 71; (*sub nomine* *Mayor of City of East Orange v. Hussey*, 59 Atl. 1060 [1905]); *State. Estate of Brown, Pros. v. Town of Union*, 62 N. J. L. 142, 40 Atl. 632 [1898]; *Jones v. Landis Township*, 50 N. J. L. (21 Vr.) 374, 13 Atl. 251; *State. Mount Pleasant Cemetery Co., Pros. v. Mayor and Common Council of Newark*, 50 N. J. L. (21 Vr.) 66, 11 Atl. 147 [1887]; *State. Schulting, Pros. v. City of Passaic*, 47 N. J. L. (18 Vr.) 273 [1885]; *Rader v. Township of Union*, 44 N. J. L. (15 Vr.) 259; *Baldwin v. City of Newark*, 38 N. J. L. (9 Vr.) 158 [1875]; *State. Walter, Pros. v. Town of Union in the County of Hudson*, 33 N. J. L. (4 Vr.) 359 [1869]; *Bonney v. Bridgewater*, 31 N. J. L. (2 Vr.) 133; *State. New Jersey Railroad and*

erty owner is not materially affected thereby.² The assessment is said to be not a contract but a remedy in which there is no vested right.³ Rights existing under a statute in force when a new constitution is adopted are not affected by such constitution if it contains no provision which specifically abrogates such pre-existing rights.⁴

§ 167. Changes in procedure and remedies not prevented by such provisions.

Provisions as to procedure¹ or as to the method of collecting the assessment² are not contracts, and may be modified by the legislature at least in so far as they do not increase the liability of the property owner above that which rested upon him when the assessment was levied. Thus mandamus may be granted by statute as a remedy to enforce a pre-existing liability of a street railway company to maintain in good condition from curb to

Transportation Company, *Pros. v. Mayor and Common Council of the City of Newark*, 27 N. J. L. (3 Dut.) 185 [1858]; *Lennon v. Mayor, Aldermen and Commonalty of City of New York*, 55 N. Y. 361 [1874]; *Brewster v. City of Syracuse*, 19 N. Y. 116 [1859]; In the Matter of the Petition of Treacy to Vacate an Assessment, 59 Barb. (N. Y.) 525 [1871]; *Tilden v. Mayor, Aldermen and Commonalty of the City of New York*, 56 Barb. (N. Y.) 340 [1870]; In the Matter of the Petition of Meade to Reduce an Assessment, 13 Hun. (N. Y.) 349 [1878]; *Ladd v. City of Portland*, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654 [1898]; *City of Chester v. Black*, 132 Pa. St. 568, 6 L. R. A. 802, 19 Atl. 276 [1890]; *Pray v. Northern Liberties*, 31 Pa. St. 69 [1850]; *Storrie v. Houston City Street Railway Company*, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898]; *Town of Underhill v. Town of Essex*, 64 Vt. 28, 23 Atl. 617 [1891]; *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902]; *City of Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26 [1894].

² *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902]; *City of Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26 [1894].

³ *Bate v. Sheets*, 64 Ind. 209 [1878].

⁴ *Iloertz v. Jefferson Southern Pond Draining Co.*, 119 Ky. 824, 84 S. W. 1141, 27 Ky. L. R. 278 [1905].

¹ *State, Estate of Brown, Pros. v. Town of Union*, 62 N. J. L. (33 Vr.) 142, 40 Atl. 632 [1898].

² *New Orleans City and Lake Railroad Company v. Louisiana ex rel. City of New Orleans*, 157 U. S. 219, 39 L. 679, 15 S. 581 [1895]; (affirming *State ex rel. City of New Orleans v. New Orleans City and Lake Railroad Co.*, 42 La. Ann. 550, 7 So. 606 [1890]); *Jones v. Landis Township*, 50 N. J. L. (21 Vr.) 374, 13 Atl. 251; *Rader v. Township of Union*, 44 N. J. L. (15 Vr.) 259; *Baldwin v. Newark*, 38 N. J. L. (9 Vr.) 259; *Walter v. Town of Union*, 32 N. J. L. (4 Vr.) 350; *Bonney v. Bridge-water*, 31 N. J. L. (2 Vr.) 133; *State v. Newark*, 27 N. J. L. (3 Dut.) 185.

curb the street on which its tracks are situated.³ So a statute passed after assessments are levied and providing for compulsory arbitration as a method of compromising disputes, and for refunding any excess of the amount of the assessment over benefits conferred, does not impair the obligation of a contract.⁴ So where an assessment is levied under a statute providing that the court shall vacate an assessment if not in conformity to law, a subsequent statute providing that where proper the court may modify such assessment without vacating it, is not unconstitutional because it applies to prior assessments.⁵ Where an assessment is levied under a statute giving the property owner a right to test the validity of an assessment by a suit in equity, a statute passed after the assessment was levied and before suit was brought thereon, depriving the property owner of such right, was held not to be unconstitutional.⁶ No specific constitutional provision is referred to in the opinion, but the court seems to consider the provision against taking property without due process of law as the one in point. The theory suggested for the holding is that as long as the property owner is protected against the taking of his property, he has no constitutional right to protection against a cloud on his title.

§ 168. Change relieving property owner at expense of public corporation.

Since a city is a public corporation and possesses only such powers of government and taxation as are conferred upon it by

³ *New Orleans City and Lake Railroad Company v. Louisiana ex rel. City of New Orleans*, 157 U. S. 219, 39 L. 679, 15 S. 581 [1895]; (affirming *State ex rel. City of New Orleans v. New Orleans City and Lake Railroad Co.*, 42 La. Ann. 550, 7 So. 606 [1890]).

⁴ *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 35 L. 446, 11 S. 790 [1891]; (affirming *Essex Public Road Board v. Skinkle*, 49 N. J. L. (20 Vr.) 65, 6 Atl. 435 [1886] which had been affirmed in *Essex Public Road Board v. Skinkle*, 49 N. J. L. (20 Vr.) 641, 10 Atl. 379 [1887]).

⁵ *Matter of Treacy*, 59 Barb. (N. Y.) 525 [1871]; (distinguishing,

Matter of Eager, 58 Barb. (N. Y.) 557 [1871] as a case where the proofs were taken prior to the change of statute; and, *Matter of Remsen*, 59 Barb. (N. Y.) 317 [1871] as a case where the petition was presented prior to such change of statute.); In the *Matter of the Petition of Beams to Vacate Assessment for Flagging, etc., Mott Street*, 17 How. Pr. (N. Y.) 459 [1859].

⁶ *Lennon v. Mayor, Aldermen and Commonalty of the City of New York*, 55 N. Y. 361 [1874]; *Eno v. Mayor, Aldermen and Commonalty of the City of New York*, 7 Hun. (N. Y.) 320 [1876]; (affirming *Eno v. Mayor, etc.*, 53 How. (N. Y.) 382 [1877]); (not affected on this point

the legislature,¹ a statute which increases the burden cast upon the city and relieves the property owner from corresponding liability is not invalid as impairing the obligation of a contract.² Thus a statute relieving a street railway company from liability to pave that part of the street between its rails, and substituting an increase in the general tax in lieu thereof, is not objectionable as against the complaint of the city.³ So by change of statute after an improvement has been constructed a public corporation may be deprived of the right to reimburse itself, by means of local assessments, for the cost of such improvement;⁴ or the cost of an improvement may be made a personal charge upon a city, although it was begun under a statute making such cost payable only out of the assessments therefor.⁵ If an improvement is constructed under a statute which imposes one-half of the cost upon the county and the other half upon the owners of abutting property, and a subsequent statute imposes the entire cost upon the county, a general taxpayer has no ground of complaint.⁶ In these cases, it may be added, the question was as to the power and duty of the public corporation to pay the amount thus imposed upon it by statute. A different question might be presented if the contractor were complaining of the change of statute and were attempting to assert his rights as they existed when the contract was entered into. On the other hand it has

by the reversal in *Eno v. Mayor, Aldermen and Commonalty of the City of New York*, 68 N. Y. 214 [1877]).

¹ See Chapter VI.

² *City of Worcester v. Worcester Consolidated Street Railway Co.*, 196 U. S. 539, 25 S. 327 [1905]; (affirming *City of Worcester v. Worcester Consolidated Street Railway Co.*, 182 Mass. 49, 64 N. E. 581 [1902]); *City of Springfield v. Springfield Street Railway Co.*, 182 Mass. 41, 64 N. E. 577 [1901, 1902]; *O'Neill v. City of Hoboken*, 72 N. J. L. (43 Vr.) 67, 60 Atl. 50 [1905]; *City of East Orange v. Hussey*, 72 N. J. L. (43 Vr.) 71; *sub nomine Mayor of East Orange v. Hussey*, 59 Atl. 1060 [1905].

³ *City of Worcester v. Worcester Consolidated Street Railway Co.*, 196 U. S. 539, 25 S. 327 [1905];

(affirming *City of Worcester v. Worcester Consolidated Street Railway Co.*, 182 Mass. 49, 64 N. E. 581 [1902]); *City of Springfield v. Springfield Street Railway Co.*, 182 Mass. 41, 64 N. E. 577 [1901, 1902].

⁴ *Stone v. Street Commissioners of Boston*, 192 Mass. 297, 78 N. E. 478 [1906]; *City of East Orange v. Hussey*, 72 N. J. L. (43 Vr.) 71; *sub nomine Mayor of East Orange v. Hussey*, 59 Atl. 1060 [1905].

⁵ *O'Neill v. City of Hoboken*, 72 N. J. L. (43 Vr.) 67, 60 Atl. 50 [1905]; *Rader v. Township Committee of Union*, 39 N. J. L. (10 Vr.) 509; (affirmed 41 N. J. L. (12 Vr.) 617).

⁶ *Durrett v. Davidson*. — Ky. —, 8 L. R. A. (N. S.) 546, 93 S. W. 25 [1906].

been said that where work has been done or a contract entered into under a statute which allowed the city to reimburse itself by assessment for the cost of such improvement, the repeal of such assessment statute cannot affect the right of a city to enforce its equitable right to compel the property owners to reimburse it for the cost of such improvement.⁷ The right to levy an assessment may be taken away by a constitutional amendment which takes effect after the improvement is made but before the assessment is perfected,⁸ even if the effect of such change of law will be to prevent the enforcement of assessments already perfected under the constitutional requirement of equality and uniformity of taxation. A statute requiring a municipal corporation to make restitution of an amount unlawfully exacted by it from a property owner as a local assessment, is not invalid, although it is in its effect retroactive.⁹ The legislature may change the powers of a drainage district, since it is a public or quasi public corporation and its charter is therefore not an executed contract.¹⁰

§ 169. Change increasing burden of property owner.

If the change in statute will result in an increase of the burden of some or all of the property owners, it has been held that such statute cannot apply to prior assessments.¹ The point of time to be taken as fixing the rights of the parties is a question upon which different opinions have been expressed. It has been said that it is the date of the passage of the improvement ordinance,² the date when the contract is entered into,³ and the date that

⁷ *City of Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26 [1894]; (distinguishing *Wilson v. City of Seattle*, 2 Wash. 543, 27 Pac. 474 [1891] as a case where no work had been done and no contract entered into before the change of statute; while in the case at bar the contract had been let and the work partly done before such change.)

⁸ *Fulkerson v. City of Bristol*, 105 Va. 555, 54 S. E. 468 [1906].

⁹ *State ex rel. v. Hoffman*, 35 O. S. 435 [1880].

¹⁰ Such districts are "created for public purposes, are in no sense pri-

vate corporations but on the other hand they are at least quasi public corporations and as such the laws providing for their organization are subject to be changed, modified or repealed as the wisdom of the legislature may direct." *Smith v. People ex rel. Detrick*, 140 Ill. 355, 29 N. E. 676 [1893].

¹ *City of Dallas v. Ellison*, 10 Tex. Civ. App. 28, 30 S. W. 1128 [1895].

² *Cincinnati v. Seasingood*, 46 O. S. 296, 21 N. E. 630 [1887].

³ *Houston v. McKenna*, 22 Cal. 550 [1863].

the assessment is levied.⁴ Where, after the improvement ordinance is passed and before the assessment ordinance is passed, the legislature changes the rule of law controlling as to the land to be included in the assessment district, it has been held that the property owners have a constitutional right to have the assessment levied according to the provisions in force when the ordinance was passed.⁵ The rights of the property owners did not rest solely on the constitutional provision, since the courts construed the statute as being entirely prospective in its operation. Other views have been held on this point, however. An improvement ordinance was passed at a time when the statute in force provided that assessments could be levied upon "contiguous" property benefited by such improvement. Subsequently the statute was amended by omitting the word "contiguous." After such amendment, a supplemental petition was filed in the proceeding in which the city was seeking to appropriate land by eminent domain at the cost of the property benefited, and it was held that the statute as amended controlled the proceeding, and that under such supplemental petition it was possible to assess property benefited, even though not contiguous to the proposed street.⁶ Where no constitutional provision forbade special legislation of this type, it has been held that the legislature could provide for levying a supplemental assessment, the original assessment being valid, for the purpose of paying to the contractor who had constructed the improvement a sum over and above the contract price, which additional payment the city could not have made under its charter, without such special authority.⁷ Legislation has been sustained which alternately relieves the property owner and then restores his original burden. The legislature of Indiana repealed all laws authorizing assessments or the collection of existing assessments for gravel roads.⁸ This statute was held to be constitutional even as to assessments made before its enactment.⁹ By a subsequent statute¹⁰ the leg-

⁴ *Dougherty v. Henarie*, 47 Cal. 9 [1873].

⁵ *Cincinnati v. Seasongood*, 46 O. S. 296, 21 N. E. 630 [1887].

⁶ *In the Matter of Westlake Ave.*, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

⁷ *Brewster v. City of Syracuse*, 19 N. Y. 116 [1859].

⁸ Act of March 13, 1875: Acts 1875, Reg. Sess., p. 80.

⁹ *Marion Township Gravel Road Co. v. Sleeth*, 53 Ind. 35.

¹⁰ Act of March 2, 1877: Acts 1877, Reg. Sess., p. 72.

islature provided that such assessments might be collected whenever such corporation had incurred an indebtedness in reliance upon such assessments. This statute was held to be constitutional.¹¹ This statute was not, however, a curative statute, and did not authorize the collection of assessments which were void when levied.¹² At one time under the California law a contract for a street improvement became a nullity if not performed within the time agreed upon, and the property owner was not liable for assessments to pay the cost of such improvement. When a contract had once been discharged by such breach, a subsequent statute attempting to revive such contract and to make valid an assessment for street work done thereunder, was unconstitutional.¹³ On the other hand, if the statute provides that an extension of time might be granted before the time fixed in the original contract has expired, and that if such extension is granted the contract remains valid and in force, a provision in the state constitution subsequently adopted, forbidding an extension of time, cannot apply to contracts entered into before the adoption of such constitutional provision,¹⁴ and a contract entered into before such constitutional provision is adopted, and extended thereafter, does not become a new contract of the date of such extension; and is not subject to such constitutional provision.¹⁵ A statute which provides for the organization of an irrigation district on the vote of a majority of its electors and imposes a certain liability on the property therein as a means of paying the bonds issued for the cost of such improvement and the interest thereon, is in legal effect a contract when acted upon and the district is once organized, in so far that the legislature cannot by a subsequent statute increase the burden upon the property within the district.¹⁶

¹¹ Marion and Monroe Gravel Road Co. v. McClure, 66 Ind. 468 [1879]; State ex rel. Monroe Gravel Road Co. v. Stont, 61 Ind. 143 [1878].

¹² Marion and Monroe Gravel Road Co. v. McClure, 66 Ind. 468 [1879].

¹³ Fanning v. Schammel, 68 Cal. 428, 9 Pac. 427 [1886]; People v. McCune, 57 Cal. 153 [1880]; Brady v. King, 53 Cal. 44 [1878]; People

of the State of California v. Lynch, 51 Cal. 15, 21 Am. Rep. 677 [1875].

¹⁴ Ede v. Knight, 93 Cal. 159, 28 Pac. 860 [1892]; Ede v. Cogswell, 79 Cal. 278, 21 Pac. 767 [1889].

¹⁵ Ede v. Knight, 93 Cal. 159, 28 Pac. 767 [1889].

¹⁶ Merchants' National Bank of San Diego v. Escondido Irrigation District, 144 Cal. 329, 77 Pac. 937 [1904].

§ 170. Other forms of statutory change.

Where an assessment is levied and confirmed at a time when such confirmation is conclusive as to damages and benefits, a subsequent statute allowing an appeal, and providing for a vacation of the order of confirmation in case of illegality, does not impair the obligation of a contract, since neither the assessment nor the confirmation thereof is a contract.¹ The legislature may increase the requirements as to the facts to be established in an action to recover an assessment, and make such increased requirements apply even in case of actions on prior assessments.² A property owner has no contractual right in the consequences which, by law, follow in case of his delinquency. Such consequences may therefore be changed by law, without impairing the obligation of contracts. Where the contract was let at a time when interest could not be charged on assessments, but before the assessment was levied, the statute was so modified as to permit of interest on assessments, it was held that interest might be allowed thereon.³ The original assessment statute contained no provision for an attorney's fee in case of the collection of assessments by suit. Subsequently after an assessment had been levied a statute was passed allowing an attorney's fee as part of the costs in such case. This statute was held to be valid as not impairing the obligation of any contract.⁴ After judgment has been entered assessing certain towns for contributions for portions of the expense of maintaining a bridge or highway not within their limits, a subsequent statute may be passed relieving such towns from such

¹ *Garrison v. City of New York*, 88 U. S. (21 Wall.) 196, 22 L. 612 [1874]; In the Matter of Widening Broadway, in the City of New York, 61 Barb. (N. Y.) 483 [1872]; In the Matter of Widening Broadway in the City of New York, 42 How. (N. Y.) 220 [1872]; In the Matter of the Petition of Beekman to Vacate Assessments, 19 Howard (N. Y.) 518 [1860]; In the Matter of the Petition of Beams, to Vacate Assessments, 17 Howard (N. Y.) 459 [1859].

² *Bate v. Sheets*, 64 Ind. 209 [1878]; (It may be doubted, however if the increased requirements in

this case exceeded those which should be established to justify an assessment. The later statute provided that in order to recover on an assessment the plaintiff must establish the fact that the evidence adduced before the board of commissioners showed, and that the board found as a fact, that the proposed drain was necessary and conducive to the public health, convenience or welfare, or of public benefit or utility.)

³ *Dougherty v. Henarie*, 47 Cal. 9 [1873].

⁴ *Dowell v. Talbot Paving Co.*, 138 Ind. 675. 38 N. E. 389.

liability in the future. There is no vested right in such assessment.⁵

§ 171. Contracts concerning assessments protected by such provisions.

If a contract relates to, or is connected with, a local assessment, the fact that a local assessment forms the subject matter of the contract does not prevent the contract from being protected by the constitutional provisions, already quoted, which prohibit legislation impairing the obligation of contracts. Accordingly the legislature cannot enact valid statutes after such contracts have been entered into modifying the rights and liabilities of the parties thereto.¹ Thus, where contracts have been entered into in reliance upon the right to levy assessments to pay the cost of such improvements, a subsequent statute cannot take away the right to levy such assessment to the prejudice of the parties to the contract,² as by requiring the contractor to rely upon the personal liability of the property owner and taking away his right to proceed against the property.³ A contract was entered into in reliance upon the power of the city to levy assessments not exceeding fifty per cent of the value of the land to be estimated after the improvement was made and the contract contained a provision relieving the city from liability thereon, the contractor agreeing to look for his sole compensation to the assessments. Subsequently, and before the assessment ordinance was passed, the statute was so amended as to limit the maximum amount of the assessment to twenty-five per cent of the value of the land as assessed for taxation. It was held that the legislature could not take away or restrict the power of levying assessments to the prejudice of the prior contractor.⁴

Town of Underhill v. Town of Essex, 64 Vt. 28, 23 Atl. 617 [1891]; (criticising *Strafford v. Sharon*, 61 Vt. 126, 4 L. R. A. 499, 17 Atl. 793, 18 Atl. 308.)

¹ *Merchants' National Bank of San Diego v. Escondido Irrigation District*, 144 Cal. 329, 77 Pac. 937 [1904]; *Fanning v. Schammel*, 68 Cal. 428, 9 Pac. 427 [1886]; *Crawford v. Hedrick*, 9 Ind. App. 356, 36 N. E. 771 [1893]; *Firth v. Broadhead*, 7 Mo. App. 563; *Dikeman v.*

Dikeman, 11 Paige's Ch. (N. Y.) 484 [1845]; *Goodale v. Fennell*, 27 O. S. 426, 22 Am. Rep. 321 [1875]; *Flew-ellin v. Proetzel*, 80 Tex. 191, 15 S. W. 1043 [1891].

² *Crawford v. Hedrick*, 9 Ind. App. 356, 36 N. E. 771 [1893]; *Firth v. Broadhead*, 7 Mo. App. 563.

³ *Firth v. Broadhead*, 7 Mo. App. 563.

⁴ *Goodale v. Fennell*, 27 O. S. 426, 22 Am. Rep. 321 [1875].

Where the contract is made when the assessment may equal a certain per cent of the value of the property assessed, but before the assessing ordinance is passed, such percentage is reduced, it has been questioned whether the legislature could divest the corporation of such power.⁵ A valid contract cannot be abrogated by a subsequent change in constitutional provisions of the state constitution, as the Constitution of the United States protects the parties to the contract against such impairment of their rights.⁶ Whether a purchaser at a tax sale acquires rights when the sale is made or only when the sale is consummated and his title perfected is a question upon which there is a conflict of authority. It has been held that a purchaser at a sale of realty to pay an assessment has a right based on contract; so that he cannot be deprived of part or all of his rights by a subsequent statute extending the time within which the owner may redeem.⁷ On the other hand it has been held that no right accrues until the sale is fully consummated, and that up to that time the proceedings are entirely under legislative control.⁸

§ 172. Contract for exemption from assessment.

A contract for exemption of certain property from taxation and local assessment, is, if valid, a contract the obligation of which cannot be impaired by subsequent legislation of the state.¹ Thus, a state received lands from the United States under an arrangement whereby it was agreed that the proceeds of the lands or the lands themselves should be applied as far as necessary in reclaiming such lands from cultivation by drains and levees. The state then sold such lands under a statute which provided "all said swamp and overflowed land shall be exempt from taxation for the term of ten years or until they shall be reclaimed." Such statute was held to be a contract which could not be abrogated as to lands already sold by the subsequent repeal thereof. The term "taxation" in such statute was held to include "special taxes" for levees and drains. Accord-

⁵ Fennell v. Howells, 2 Cin. Sup. Ct. Rep. (Ohio) 150; (The case was determined, however, by construing the statute as not applying to improvements already commenced.)

⁶ Ede v. Knight, 93 Cal. 159, 28 Pac. 860 [1892].

⁷ Dikeman v. Dikeman, 11 Paige's Ch. (N. Y.) 484 [1845].

⁸ Gault's Appeal, 33 Pa. St. 94 [1859].

¹ McGee v. Mathis, 71 U. S. (4 Wall.) 143, 18 L. 314 [1866]; (reversing McGee v. Mathis, 21 Ark. 40 [1860]).

ingly, it was held that such lands already sold could not be assessed during such period of ten years.² It is necessary, however, to have the clause forbidding the impairment of the obligation of contracts apply, that a valid contract exist. In another case land was transferred by the United States to a state under a similar arrangement, but no contract was entered into by the state with the purchasers of such land. Subsequently the state passed a statute assessing such land. It was held that the arrangement between the United States and the state was one which was left to the good faith of the state; that if it was a contract it was between those two governments and only the United States could complain of the breach; and that the grantee from the state was not a party to such contract and had no rights thereunder.³ A statute or ordinance exempting certain land from local assessment is not a contract, and may therefore be repealed or altered by the legislature.⁴ Thus a statute providing that no assessment for the extension of a street should be levied on lands which had been assessed for the opening of the street so extended,⁵ or a statute providing that property once assessed for the constructing of a street shall not be assessed for a subsequent improvement thereof,⁶ or for either the subsequent repair or repairing thereof,⁷ are none of them contracts within the meaning of these constitutional provisions, but are subject to alteration at the will of the legislature. So

² *McGee v. Mathis*, 71 U. S. (4 Wall.) 143, 18 L. 314 [1866] (reversing *McGehee v. Mathis*, 21 Ark. 40 [1860]).

³ *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; (affirming *Reclamation District No. 108 v. Hagar*, 4 Fed. 366 [1880]); *Reclamation District No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945 [1884].

⁴ *Bradley v. McAtee*, 70 Ky. (7 Bush.) 667, 3 Am. Rep. 309 [1870]; *State, Estate of Brown, Pros. v. Town of Union*, 62 N. J. L. (33 Vr.) 142, 40 Atl. 632 [1898]; *State, Mount Pleasant Cemetery, Pros. v. Mayor and Common Council of Newark*, 50 N. J. L. (21 Vr.) 66, 11 Atl. 147 [1887]; *State, Schulting, Pros.*

v. City of Passaic, 47 N. J. L. (18 Vr.) 273 [1885]; *State, Agens, Pros. v. Mayor and Common Council of Newark*, 37 N. J. L. (8 Vr.) 415, 18 Am. Rep. 729 [1874]; 35 N. J. L. (6 Vr.) 168 [1871]; *Tilden v. Mayor, Aldermen and Commonalty of the City of New York*, 56 Barb. (N. Y.) 340 [1870]; *Ladd v. City of Portland*, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654 [1898].

⁵ *State, Schulting, Pros. v. City of Passaic*, 47 N. J. L. (18 Vr.) 273 [1885].

⁶ *Ladd v. City of Portland*, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654 [1898].

⁷ *Tilden v. Mayor, Aldermen and Commonalty of the City of New York*, 56 Barb. (N. Y.) 340 [1870].

a provision in a charter of a cemetery company exempting its land from assessment unless otherwise ordered by the board chosen freeholders of the county where such land is situated is not a contract, but may be modified by the legislature.⁸ So a franchise granted to a street railway company, and by constitutional provision,⁹ made subject to legislative control, may be modified by a statute passed after a mortgage has been given by such street railway company, so as to increase the liability which may be imposed on such street railway company for street improvements; and such statute is not unconstitutional even as against the interest of such mortgagee.¹⁰ A statute requiring a street railway company to pave nine feet of the width of a street for every line of its track may be enacted so as to affect a street railway already incorporated where the state has reserved the right of amending its charter.¹¹ A statute fixing a certain rate of taxation against a railroad and providing that such rate of taxation is to be "in lieu of all taxes whatsoever"¹² or in lieu of "all assessments and taxes,"¹³ is not a contract and may be modified subsequently by the legislature.

§ 173. Change of law assumed to be prospective only.

Unless clearly retrospective a change of law is assumed to be prospective only. The constitution of Illinois provides: "The General Assembly shall provide in all cases where it may be necessary to sell real estate for the non-payment of taxes or special assessments for state, county, municipal or other purposes, that a return of such unpaid taxes or assessments shall be made to some general officer of the county having authority to receive state and county taxes; and there shall be no sale of said property for any of said taxes or assessments, but by

⁸ State, Mount Pleasant Cemetery Co., Pros. v. Mayor and Common Council of Newark, 50 N. J. L. (21 Vr.) 66, 11 Atl. 147 [1887].

⁹ Art. I., § 17, Constitution of Texas.

¹⁰ Storrie v. Houston City Street Railway Company, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898].

¹¹ Fair Haven & Westville Railroad Co. v. New Haven, 203 U. S. 379 [1906]; (affirming Fair Haven and

Westville Railroad Co. v. City of New Haven, 77 Conn. 667, 60 Atl. 651 [1905]); Fair Haven and Westville Railroad Company v. City of Fair Haven, 75 Conn. 442, 53 Atl. 960 [1903].

¹² City of St. Paul v. St. Paul and Sioux City Railroad Company, 23 Minn. 469 [1877].

¹³ First Division of the St. Paul and Pacific Railroad Company v. City of St. Paul, 21 Minn. 526 [1875].

said officer upon the order or judgment of some court of record."¹ This provision was held to be self-executing as to applications for judgment made after the new constitution took effect.² As to applications made before such new constitution took effect it is not applicable even if the sale is made after such constitution took effect.³ Thus, prior to the adoption of the new constitution an application for judgment against certain lands for taxes and assessments was made; and the judgment rendered on such application was eventually affirmed.⁴ A sale upon such judgment was not controlled by such provision of the new constitution.⁵ A constitutional provision requiring uniformity of taxation, does not abrogate existing local laws for special assessments in force when such constitutional provision is adopted.⁶ A statute which provides for state aid in constructing highways and which contains no provision for assessing the cost of the improvement upon the owners of abutting property prevents local assessments as to subsequent improvements, but does not prevent the collection of assessments under improvements which have been begun when the change in statute was made.⁷ If a new constitution is adopted after an improvement ordinance is passed, but before any action is taken thereunder, it has been held that the provisions of such constitution control.⁸

§ 174. Change of judicial decision as impairing obligation of contract.

Whether a change of judicial decision can amount to a law impairing the obligation of contracts within the meaning of the constitutional prohibition is a question that is occasionally presented for consideration. As a general proposition and without regard to assessment cases particularly it has been held by the Supreme Court of the United States that a change of judicial

¹ Article IX., § 4, Constitution of Illinois.

² Webster v. City of Chicago, 62 Ill. 302; Hills v. City of Chicago, 60 Ill. 86.

³ Garrick v. Chamberlain, 97 Ill. 620 [1881].

⁴ Dunham v. City of Chicago, 55 Ill. 357 [1870].

⁵ Garrick v. Chamberlain, 97 Ill. 620 [1881].

⁶ Beaumont v. Wilkesbarre City, 142 Pa. St. 198, 21 Atl. 888 [1891].

⁷ Anderson v. Cortelyou, — N. J. L. —, 68 Atl. 118 [1907]; (reversing Cortelyou v. Anderson, 73 N. J. L. (44 Vr.) 427, 63 Atl. 1095 [1906]); Haines v. Board of Chosen Freeholders of Burlington County, 73 N. J. L. (44 Vr.) 82, 62 Atl. 186 [1905].

⁸ City of St. Louis v. Lang, 131 Mo. 412, 33 S. W. 54 [1895].

opinion, whether concerning a rule of common law or concerning the construction and effect of a rule of written law is not a law impairing the obligation of contracts within the prohibition of the Federal Constitution. The state courts have, as a general rule, taken the same view.¹ In assessment cases the weight of authority is in accordance with the general principles already stated.² Thus, the Supreme Court of Texas once held that a homestead was not protected by constitutional exemption against sales for liens of local assessments for street improvements.³ Subsequently the Supreme Court overruled its earlier decision and held that a homestead was exempted by such constitutional provision as against sales to satisfy liens for street improvements.⁴ In a case that involved an assessment against a homestead levied after the earlier of these decisions and prior to the later, it was held that such change of judicial decision was not an impairment of the obligation of contract even as against a lien acquired, as was the one in the case at bar, in reliance upon such earlier decision.⁵ In some cases the change of judicial decision has been held to apply to assessments levied before such change, on grounds somewhat narrower than those indicated by the broad principles already stated. If the validity of the specific statute has not been passed upon, it has been held that a judicial decision concerning a similar statute does not prevent the court from rendering a different and inconsistent decision concerning a similar statute, and such subsequent inconsistent opinion does not impair the obligation of a contract.⁶ The Supreme Court of California had once held that under the California statute, an extension of time granted after the contract had once, under the statute in force, become void and unenforceable, revived such contract and rendered it valid.⁷ In a

¹ See Page on Contracts, § 1744.

² *Wood v. Brady*, 150 U. S. 18, 37 L. 981, 14 S. 6 [1893]; (dismissing appeal from *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52 [1891]); *Lewis v. Symmes*, 61 O. S. 471, 76 Am. St. Rep. 428, 56 N. E. 194 [1899]; *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154 [1896].

³ *Lufkin v. City of Galveston*, 58 Tex. 545 [1883].

⁴ *Higgins v. Bordages*, 88 Tex. 458,

53 Am. St. Rep. 770, 31 S. W. 52, 803 [1895].

⁵ *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154 [1896].

⁶ *Wood v. Brady*, 150 U. S. 18, 37 L. 981, 14 S. 6 [1893]; (dismissing appeal from *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52 [1891]); *Lewis v. Symmes*, 61 O. S. 471, 76 Am. St. Rep. 428, 56 N. E. 194 [1899].

⁷ *Taylor v. Palmer*, 31 Cal. 240 [1866].

later case arising under a similar statute it was held that such extension, granted after the expiration of the time fixed by the contract, was void.⁸ While similar, however, the language of the two statutes was not identical and the later case was decided on the theory that the doctrine of the earlier case was to be limited to the very language used in the statute there construed. The law being in this condition, it was held that the change of judicial decision was applicable to assessments levied before such later decision was rendered, and did not impair the obligation of contract within the meaning of the constitutional prohibition. "But assuming for the purposes of this case that there may be a vested right under an erroneous decision, it is carrying the doctrine to an unwarrantable extent to say that the construction placed by the court upon one statute implies an obligation on its part to put the same construction upon a different statute, though the language of the two may be similar. The argument that the language being similar, a like construction should be put upon both acts, is one properly addressed to the state court; but when the court has assumed to distinguish between the two acts, it is not within our province to say that the distinction is not well taken. The acts in this case, though similar, are not identical, and there is certainly some ground for saying that the construction of the two should not be the same. The point made by the plaintiff in error that the decision in *Beveridge v. Livingston* was made retroactive, is answered by the fact that courts are bound in their very nature to declare what the law is and has been and not what it shall be in the future, and that if they were absolutely bound by their prior decisions, they would be without the power to correct their own errors."⁹ In Ohio an act referring to a specifically named county and requiring a specific improvement to be made was held to be constitutional.¹⁰ Subsequently a statute less objectionable, as describing the county by population, instead of naming it, and as empowering the officers to make the improvement instead of requiring them to make it, was held to be unconstitutional as in violation of the provision requiring laws of a general nature to

⁸ *Beveridge v. Livingstone*, 54 Cal. 54 [1879].

⁹ *Wood v. Brady*, 150 U. S. 18, 22, 23, 37 L. 981, 14 S. 6 [1893]; (dis-

missing appeal from *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52 [1891]).

¹⁰ *State ex rel. Hibbs v. Board of Commissioners of Franklin County*, 35 O. S. 458 [1880]; See § 176 et seq.

be uniform.¹¹ Subsequently an assessment was levied under a statute similar to that considered in *State, ex rel. Hibbs v. Board of Commissioners of Franklin County*,¹² which was enacted, and under which the improvement was made prior to the change of judicial opinion. It was held that such assessment could not be enforced, that the doctrine of the later case could be applied, and that no contractual rights were involved, since the question arose between the county which was seeking to reimburse itself by local assessments and the property owners.¹³ The Ohio scheme of classifying cities was for a long time held to be constitutional¹⁴ and improvements made and assessments levied under the authority of statutes based on such scheme of classification were held to be valid.¹⁵ Subsequently such scheme of classification was held to be unconstitutional.¹⁶ The question was then presented as to the effect of such decisions upon the validity of assessments for improvements already undertaken. The court held that such assessments were enforceable and the property owners could not have an injunction in equity against the collection of such assessment.¹⁷ If the decision in reliance upon which the assessment has been levied, is that of an inferior court, the case is still simpler, as a court of last resort is not bound by the decisions of inferior court. At one time the court of appeals, an intermediate court in Missouri, had held that an assessment ordinance was not necessary.¹⁸ Some four months after this decision the council ordered the clerk to issue tax bills, and omitted to pass an assessment ordinance. Within three weeks thereafter, the Supreme Court held that an assessment ordinance was necessary.¹⁹ It was held that the tax bills issued between the dates of these two decisions were invalid.²⁰ It was once

¹¹ *Hixson v. Burson*, 54 O. S. 470, 43 N. E. 1000 [1896]; See § 176 et seq.

¹² 35 O. S. 458 [1880].

¹³ *Lewis v. Symmes*, 61 O. S. 471, 76 Am. St. Rep. 428, 56 N. E. 194 [1899].

¹⁴ See § 189.

¹⁵ *State v. Hudson*, 44 O. S. 137, 5 N. E. 225; *Scheer v. Cincinnati*, 15 W. L. B. 137.

¹⁶ *State ex rel. Attorney-General v. Beacom*, 66 O. S. 491, 90 Am. St.

Rep. 599, 64 N. E. 427; *State ex rel. Knisely v. Jones*, 66 O. S. 453, 90 Am. St. Rep. 592, 64 N. E. 424.

¹⁷ *Shoemaker v. City of Cincinnati*, 68 O. S. 603, 68 N. E. 1, 48 O. L. B. 582 [1903].

¹⁸ *Gilfillan v. Morris*, 43 Mo. App. 590.

¹⁹ *Gilfillan v. Eddy*, 123 Mo. 546, 27 S. W. 471.

²⁰ *City of Sedalia to use of Sedalia National Bank v. Donohue*, 190 Mo. 407, 89 S. W. 386 [1905].

held by the Supreme Court of Illinois that "just compensation" for private property taken for public use need not be estimated by the judicial department, but might lawfully be made by commissioners of the board of public works and similar executive and ministerial officers. Subsequently the Supreme Court held that such earlier decisions were erroneous but that as the legislature had acted in reliance thereon, the proceedings should be upheld and the rights acquired thereunder protected.²¹ This objection, it may be added, could not be raised against the assessment for benefits; and further, under the statutory proceeding, then in force, an opportunity for a hearing in court on application for judgment for sale was given.

§ 175. Provisions forbidding retroactive legislation.

Provisions which forbid retroactive legislation are often found in state constitutions, usually in connection with provisions which forbid the impairment of the obligation of contracts. Such provisions have been treated, notwithstanding their wider scope, in substantially the same way as provisions which forbid impairing the obligation of contracts.¹ Statutes which modify or otherwise affect prior assessments are generally held to be valid as long, at least, as they do not increase the burden upon the property owner. Under a constitutional provision forbidding retroactive legislation a city ordinance which amends a prior ordinance defective in its method of apportionment of the assessment among the property owners has been held to be valid.²

§ 176. Provisions forbidding special legislation.

A group of constitutional provisions restrict the power of the legislature to enact assessment laws by forbidding the legislature to enact special or local laws, and by requiring it to make provision for public corporations by general laws. On account of their effect on assessment laws these provisions must be considered in so far as such effect extends.

§ 177. Provisions for incorporating by general laws.

The constitution of Arkansas provides: "The general assembly shall pass no special act conferring corporate powers except for charitable, educational, penal or reformatory purposes where the corporations created are to be and remain under the patron-

²¹ *Rich v. City of Chicago*, 59 Ill. 286 [1871].

¹ See § 166 *et seq.*

² *Bacon v. Mayor and Aldermen of Savannah*, 105 Ga. 62, 31 S. E. 127 [1898].

age and control of the state.”¹ The constitution of Illinois provides: “No corporation shall be created by special laws or its charter extended, changed or amended except those for charitable, educational, penal or reformatory purposes which are to be and remain under the patronage and control of the state, but the general assembly shall provide by general laws for the organization of all corporations hereafter to be created.”² These provisions refer to private corporations and not to public corporations or quasi corporations.³ There is, therefore, nothing in such provisions to prevent the delegation to a levee board of power to levy assessments for the construction of a levee;⁴ nor to prevent local or special legislation with respect to drainage.⁵ The constitution of Kansas provides: “The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed.”⁶ The Supreme Court of Kansas has held that such provision applies to cities and prevents special legislation.⁷ Accordingly a statute conferring corporate power upon a single city entitled “an act to legalize proceedings and assessments of the mayor and councilmen of the city of Emporia in 1871” with a subject matter as special as its title was held to be invalid as in violation of the foregoing clause of the constitution.⁸ This holding is contrary to the opinion already set forth,⁹ that provisions of this sort are not applicable to public corporations. The result reached in this case might have been reached under another provision of the constitution, namely: “Provisions shall be made by general law for the organization of cities, towns and villages; . . .”¹⁰ The view that provisions of this sort apply to public corporations as well as to private corporations seems to be the one that is generally entertained.¹¹

¹ Art. XII., § 2, Constitution of Arkansas [1874].

² Art. XI., § 1, Constitution of Illinois [1870].

³ *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894]; *Owners of Lands v. People ex rel. Stookey*, 113 Ill. 296 [1886].

⁴ *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894].

⁵ *Owners of Lands v. People ex rel. Stookey*, 113 Ill. 296 [1886].

⁶ Art. XII., § 1, Constitution of Kansas [1859].

⁷ *Gilmore v. Norton*, 10 Kan. 369 [1872].

⁸ *Gilmore v. Norton*, 10 Kan. 369 [1872].

⁹ See *ante* this section, notes 3, 4 and 5.

¹⁰ Art. XII., § 5, Constitution of Kansas [1859].

¹¹ See § 180 *et seq.*

§ 178. Provisions forbidding special legislation where general laws are applicable.

The constitution of Arkansas contains the provision: "In all cases where a general law can be made applicable no special law shall be enacted."¹ The constitution of Illinois contains the provision: ". . . In all other cases where a general law shall be applicable no special law shall be enacted."² These general provisions are addressed to the legislature, not to the courts, and outside of the enumerated classes of laws concerning which no special statute is permitted by the express terms of the constitution, the legislature is the sole judge to determine whether a general law is applicable or whether a special law is necessary.³ The constitution of New Jersey provides: ". . . The legislature shall pass general laws providing for the cases enumerated in this paragraph and for all other cases which, in its judgment, may be provided for by general laws."⁴ Under this provision the legislature has a wide range of discretion as to the topics which can be covered by general laws, and if the courts can enforce this provision at all they can do so only in a plain case of legislative evasion.⁵ Accordingly, a statute creating a special sewerage district to be called the "Passaic Valley Sewerage District" has been held to be valid where the pollution of the streams within such district is without parallel in the state, and there is no reason to anticipate that such condition would be reached in the near future in any other territory in the state outside of such district.⁶

§ 179. Provisions requiring notice of application for special legislation.

In some of the constitutions which permit special legislation to a greater or less extent, are found provisions which require notice

¹ Art. V., § 24, Constitution of Arkansas [1874].

² Art. IV., § 22, Constitution of Illinois [1870].

³ *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894]; *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184 [1886]; *Owners of Lands v. People ex rel. Stookey*, 113 Ill. 296 [1886].

⁴ Article IV., § 7, par. XI, Constitution of New Jersey [as amended 1875].

⁵ *Van Cleve v. Passaic Valley Sewerage Commissioners*, 71 N. J. L. 183, 58 Atl. 571 [1904].

⁶ *Van Cleve v. Passaic Valley Sewerage Commissioners*, 71 N. J. L. 183, 58 Atl. 571 [1904].

of the intention to apply for such special legislation to be given by publication. "No local or special law shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall be at least thirty days prior to the introduction into the general assembly of such bill, and in the manner to be provided by law. The evidence of such notice having been published shall be exhibited in the general assembly before such act shall be passed."¹ "No local or special law shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law and shall be published at least thirty days prior to the introduction into the legislature of such bill and in the manner to be provided by law. The evidence of such notice having been published shall be exhibited in the legislature before such act shall be passed."² Under provisions of this sort it is held that the question whether the notice required by the constitution has been given or not, is a question to be decided solely by the legislature.³ Evidence upon such question outside of the journals of the legislature will not be received by the courts.⁴ A city ordinance for improving a street is not a special law within the meaning of this constitutional provision and the constitutional requirement as to notice does not apply, the statutory rule being paramount.⁵

§ 180. Effect of specific constitutional provisions—California.

The old constitution of California provided: "Corporations may be formed under general laws but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."¹ While this section was in force the

¹ Art. V., § 25, Constitution of Arkansas [1874].

² Art. III., § 57, Constitution of Texas.

³ Davis v. Gaines, 48 Ark. 370, 3 S. W. 184 [1886]; Speer v. Mayor and Council of Athens, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890].

⁴ Speer v. Mayor and Council of Athens, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890].

⁵ Connor v. City of Paris, 87 Tex. 32, 27 S. W. 88 [1894].

¹ Art. IV., § 31, Constitution of California [1849].

legislature had power to create a reclamation district by special act.² The constitution of California of 1879 provided: "Corporations for municipal purposes shall not be created by special laws but the legislature by general laws shall provide for the incorporation, organization and classification in proportion to population of cities and towns, which laws may be altered, amended or repealed. . . ." ³ Under this provision the legislature has power by a general law to affect the charter of the city and county of San Francisco.⁴ While under such provisions the legislature can provide for the organization of special assessment districts, such as drainage districts,⁵ by general laws as distinguished from special legislation for each particular district, the legislature may group such districts in a class distinct from municipal corporations such as cities and villages; and may provide for the formation of such districts in a manner distinct from that in which cities and villages are formed and may confer upon such districts powers different from those conferred upon cities and villages.⁶ The constitution of California also provides: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: First. Regulating the jurisdiction and duties of justices of the peace, police judges and of constables. . . ." ⁷ A statute making the warrant, assessment and diagram prima facie evidence of the regularity and correctness of the assessment and of the right of the plaintiff to recover thereon, is not a local or special law regulating the

²Swamp Land District No. 150 v. Silver, 98 Cal. 51, 32 Pac. 866 [1893]; (created by the act of March 30, 1874, Statutes 1873-1874, p. 867).

³Art. XI., § 6, Constitution of California [1879].

⁴Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615 [1887]; "As the foregoing statutes apply to all municipal corporations in the state, if they are not general law it would be impossible to frame one which is general." Thomason v. Ashworth, 73 Cal. 73, 78, 14 Pac. 615 [1887]; (citing on the question of what constitutes a general law: Chicago R. R. Co. v. Iowa, 94 U. S. 155, 24 L. 94; Brooks v. Hyde, 37 Cal. 376;

Kniekerbocker v. People, 102 Ill. 218; Hymes v. Aydelott, 26 Ind. 431; Me-Annich v. Mississippi, etc., R. R. Co., 20 Ia. 338; Kilgore v. Magee, 85 Pa. St. (4 Norris) 401; Wheeler v. Philadelphia, 77 Pa. St. (27 P. F. Smith) 338).

⁵In the Matter of Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675 [1891].

⁶In the Matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675 [1891].

⁷Art. IV., § 25, Constitution of California [1879].

practice of the courts within the meaning of this provision and is constitutional.⁸

§ 181. Illinois.

In the absence of specific constitutional provisions, the legislature may create towns with special charters¹ and may create a town six miles square as well as a municipal corporation with less territory.² The present constitution of Illinois provides: "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say, for . . . incorporating cities, towns or villages, or changing or amending the charter of any town, city or village," ". . . regulating the rate of interest on money."³ The subject of drainage is not enumerated in this section. Accordingly it does not prevent the legislature from passing a special law with respect to drainage.⁴ Classification of cities upon a reasonable basis of population is not prohibited by such provision.⁵ A law which provides a method of making payment and then further provides that certain provisions as to method of payment shall not apply to cities containing a population of fifty thousand or more, except in cases where such special assessment exceeds in the aggregate the sum of fifteen thousand dollars, is not special legislation within the meaning of this clause of the constitution.⁶ This provision of the constitution did not repeal or alter the charters of cities, towns and villages which were in force when the constitution was adopted, but merely provided that such existing charters could thereafter be amended or altered only by a general law. Accordingly the legislature may pass a general law leaving it to existing cities, towns and villages to adopt such amendment or not, as they may see fit. The general law must apply alike to all cities, towns and villages. It cannot be permitted to one city to adopt one provision and to another city to adopt another and different law on the same subject. It is, however, within the discretion of the legislature whether the amend-

⁸ Dowling v. Conniff, 103 Cal. 75, 36 Pac. 1034 [1894]; McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71 [1893].

¹ Greeley v. People of the State of Illinois, 60 Ill. 19 [1871].

² Greeley v. People of the State of Illinois, 60 Ill. 19 [1871].

³ Art. IV., § 22, Constitution of Illinois [1870].

⁴ Owners of Lands v. People ex rel. Stookey, 113 Ill. 296 [1886].

⁵ Cummings v. City of Chicago, 144 Ill. 563, 33 N. E. 854 [1893].

⁶ Cummings v. City of Chicago, 144 Ill. 563, 33 N. E. 854 [1893].

ment which cities, towns and villages are permitted to adopt is limited to one subject or extends to many subjects.⁷ In a subsequent case it has been held that even if the correctness of such view was doubtful as an original question, the long use of such option of adopting provisions of the general law, and the repeated recognition by the courts of such right, do not now leave the question open.⁸ A classification not based on any fair distinction of population, but framed so as to permit of special legislation, is in violation of this provision and is invalid.⁹ Thus a statute which provides that in city of a population of less than fifty thousand and more than twenty thousand an ordinance for a public improvement to be paid for by special assessment cannot be adopted unless the owners of one-half of the property abutting on the improvement shall petition therefor, followed by an amendment which prescribes a different rule for local improvements in municipalities containing a population of from twenty-eight thousand to fifty thousand, leaving this the rule for municipalities having a population of from twenty thousand to twenty-eight thousand is invalid as in violation of this constitutional provision.¹⁰ It is not a violation of the clause prohibiting special legislation regulating the interest on money to fix the rate of interest which installments of special assessments payable in the future shall bear.¹¹

§ 182. Iowa.

The constitution of Iowa provides: "The general assembly shall not pass local or special laws in the following cases: For the incorporation of cities and towns. . . ." Under this provision a statute classifying cities upon a reasonable basis of population is held to be valid.² Thus a statute applying to cities having a population of over thirty thousand has been held to be

⁷ *Guild Jr. v. City of Chicago*, 82 Ill. 472 [1876].

⁸ *Linek v. City of Litchfield*, 141 Ill. 469, 31 N. E. 123 [1893].

¹⁰ *L'Hote v. Village of Milford*, 212 Ill. 418, 103 Am. St. Rep. 234, 72 N. E. 399 [1904].

¹⁰ *L'Hote v. Village of Milford*, 212 Ill. 418, 103 Am. St. Rep. 234, 72 N. E. 399 [1904].

¹¹ *McChesney v. People ex rel. Johnson*, 99 Ill. 216 [1881].

¹ Art. III., § 30, Constitution of Iowa [1857].

² *Tuttle v. Polk and Hubbel*, 92 Ia. 433, 60 N. W. 733 [1894]; *Owen v. City of Sioux City*, 91 Ia. 190, 59 N. W. 3; *Iowa Railroad Land Co. v. Soper*, 39 Ia. 112; *Haskel v. City of Burlington*, 30 Ia. 232.

valid though at the time of its enactment Des Moines was the only city within such class.³

§ 183. Kentucky.

The constitution of Kentucky provides: "The cities and towns of this commonwealth for the purpose of their organization and government shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. . . ." ¹ Under this section the legislature may provide that where a city of the first class sues to enforce a lien for the cost of street improvements, copies of the ordinance, contract and apportionment shall be evidence of every fact necessary to enable plaintiff to recover, on the theory that such matters affect the municipal government.²

§ 184. Louisiana.

The constitution of Louisiana provides: "No local or special law shall be passed on any subject not enumerated in article 46 of this constitution unless notice of the intention to apply therefor shall have been published . . . at least thirty days prior to the introduction into the general assembly of such bill." ¹ This statute has been held not to apply to a statute providing for the organization of a levee district corporation and conferring upon it the power to levy special assessments, on the ground that such power as to levees is expressly conferred upon the legislature by other constitutional provisions,² and that such power is therefore not limited by the article in question.³

§ 185. Minnesota.

The constitution of Minnesota provides: "The legislature shall provide general laws for the transaction of any business that may be prohibited by section one of this amendment, and all such

³ Tuttle v. Polk and Hubbel, 92 Ia. 433, 60 N. W. 733 [1894].

¹ § 156, Constitution of Kentucky [1891].

² Richardson v. Mehler, 111 Ky. 408, 63 S. W. 957, 23 Ky. L. R. 917 [1901]; (holding valid § 2838 Statutes of Kentucky.)

¹ Article 48, Constitution of Louisiana.

² Articles 213 and 214, Constitution of Louisiana.

³ Excelsior Planting and Manufacturing Company v. Green, 39 La. Ann. 455, 1 So. 873 [1887].

laws shall be uniform in their operation throughout the state.”¹ “ . . . The legislature shall pass no local or special law regulating the affairs of or incorporating, erecting or changing the lines of any county, city, . . . provided, however, that the inhibitions of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated. The legislature may repeal any existing special or local law, but shall not amend, extend or modify any of the same.”² Under these provisions it is held that an act classifying cities on a reasonable basis of population is not unconstitutional.³ A statute providing for a form of city government which it was optional with each city to adopt or not to adopt, was held to be unconstitutional as in violation of these provisions.⁴ Accordingly it has been held that where an improvement has been authorized and made by an officer deriving his authority from such unconstitutional statute, an assessment cannot be levied for the cost of such improvement.⁵ Subsequently the following constitutional amendment was adopted: “The legislature may provide general laws relating to affairs of cities, the application of which may be limited to cities of over fifty thousand inhabitants or to cities of fifty and not less than twenty thousand inhabitants, or to cities of twenty and not less than ten thousand inhabitants, or to cities of ten thousand inhabitants or less which shall apply equally to all such cities of either class.”⁶ Under this provision a classification of cities by a statute applying only to those having a population of fifty thousand or over is valid, even if the subject matter of the statute is not one which would reasonably be affected by such difference in population.⁷

¹ Art. IV., § 34, Constitution of Minnesota [amended 1881].

² Art. IV., § 33, Constitution of Minnesota [amended 1881; amended again 1892]; The provision prior to amendment was: “The legislature is prohibited from enacting any special or private law in the following cases: . . . 7th. For granting corporate powers or privileges except to cities. . . . 9th. For incorporating any town or village.” Art. IV., § 33, Constitution of Minnesota.

³ State of Minnesota ex rel. City of Duluth v. District Court of St. Louis County, 61 Minn. 542, 64 N. W. 190 [1895].

⁴ State ex rel. Childs v. Copeland, 66 Minn. 315, 61 Am. St. Rep. 410, 34 L. R. A. 777, 69 N. W. 27 [1896].

⁵ State of Minnesota ex rel. City of St. Paul v. District Court of Ramsey County, 72 Minn. 226, 71 Am. St. Rep. 480, 75 N. W. 224 [1898].

⁶ Art. IV., § 36, Constitution of Minnesota, Amendment 1898, Laws 1899, page V.

⁷ State ex rel. Minnesota Loan and Trust Company v. Ames, 87 Minn. 23, 91 N. W. 18 [1902]; Alexander v. City of Duluth, 77 Minn. 445, 80 N. W. 623.

§ 186. Missouri.

The constitution of Missouri provides: "The general assembly . . . shall not pass any local or special law authorizing the creation, extension or impairment of liens; regulating the affairs of counties, cities, townships, wards or school districts; . . . regulating the practice or jurisdiction of or changing the rules of evidence in any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators or other tribunals, or providing or changing the methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate."¹ "Any city having a population of more than one hundred thousand may frame a charter for its own government consistent with and subject to the constitution and laws of this state. . . ."² Under these provisions an act which makes a special tax bill for an assessment *prima facie* evidence of the liability of the property is not unconstitutional as far as it affects bills issued after the enactment of the charter.³ So a provision in a charter framed by a city⁴ which provides that every special tax bill shall be a lien on the land assessed on the date of the receipt to the board of public works therefor, which lien shall continue for two years unless suit be brought to collect such bill within that time, provided that every plaintiff shall, within ten days after the suit is commenced, file in the office of the city treasurer a statement showing the tax bill sued on, when suit is brought, against whom it is brought and in what court it is brought, has been held, under these constitutional provisions not to be unconstitutional in so far as the statute requires such notice to be filed, prescribes what it shall contain and requires the city treasurer to note the filing thereof.⁵ The provision that a failure to file such notice frees the land from the lien and the judgment, and prevents the sale of the land on such judgment, which provision is not restricted to *bona fide* grantees but is made applicable to the owner, is inconsistent with the laws of the state and is therefore contrary to the constitutional provision authorizing

¹ Article IV., § 53, Constitution of Missouri [1875].

² Article IX., § 16, Constitution of Missouri [1875].

³ *Eyerman v. Blaksley*, 78 Mo. 145 [1883]; *City of St. Louis* to use of

Creamer v. Oeters, 36 Mo. 456 [1865].

⁴ *Charter of Kansas City*, Article IX., § 18.

⁵ *Haag v. Ward*, 186 Mo. 325, 85 S. W. 391 [1904].

certain cities to frame their charters.⁶ A statute which provides that the whole cost of improving a street shall be charged against the adjoining property and is to be "levied, collected and paid in the manner and at the time now provided by law or charter of said cities" is held to show plainly that the legislature intends such act to apply only to charters existing at the time of such enactment; which intention renders such statute unconstitutional.⁷

§ 187. New Jersey.

The constitution of New Jersey provides: "No private, special or local bill shall be passed unless public notice of the intention to apply therefor and of the general object thereof shall have been previously given. The legislature at the next session after the adoption thereof and from time to time thereafter shall prescribe the time and mode of giving such notice, the evidence thereof, and how such evidence shall be preserved."¹ "The legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say: Laying out, opening, altering and working roads or highways. Vacating any road, town plat, street, alley or public grounds. Regulating the internal affairs of towns and counties, appointing local officers or commissioners to regulate municipal affairs. . . ."² Under such provisions an act authorizing "towns" to construct certain improvements by assessment has been held to be constitutional on the theory that "towns" included all bodies corporate less than counties.³ An act which concerns cities only and places them in a separate class is not unconstitutional as affected by these provisions;⁴ even if it provides that assessments shall be collected in conformity with existing laws in force in the city where the improvement is made.⁵ A statute entitled "an act

⁶ *Haag v. Ward*, 186 Mo. 325, 85 S. W. 391 [1904].

⁷ *Murnane v. City of St. Louis*, 123 Mo. 479, 27 S. W. 711 [1894].

¹ Article IV., § 7, par. 9, Constitution of New Jersey [amended 1875].

² Article IV., § 7, par. 11, Constitution of New Jersey [1844] (amended 1875).

³ *State, Estate of Brown, Pros. v. Town of Union*, 62 N. J. L. (33 Vr.) 142, 40 Atl. 632 [1898].

⁴ *In re Report of Commissioners*

of Elizabeth, 49 N. J. L. (20 Vr.) 488, 10 Atl. 363 [1887]; *State, Jelliff, Pros. v. Mayor and Common Council of the City of Newark*, 48 N. J. L. (19 Vr.) 101, 2 Atl. 627 [1886]; *State, Green, Pros. v. Hotaling*, 44 N. J. L. (15 Vr.) 347 [1882]; (affirmed 46 N. J. L. (17 Vr.) 207 [1884]).

⁵ *State, Jelliff, Pros. v. Mayor and Common Council of the City of Newark*, 48 N. J. L. (19 Vr.) 101, 2 Atl. 627 [1886].

authorizing municipalities governed by commissioners to pave and improve streets” containing a subject-matter appropriate to such title was held to be unconstitutional on the ground that it was a classification of cities based on the nature of the governing body, and that no substantial reason existed why the powers enumerated in the act should be conferred upon municipalities governed by commissioners and not upon others.⁶ After the constitution of New Jersey was so amended as to forbid special legislation for cities, a general law was passed affecting city government, containing no express provisions for repeal of existing special laws but providing that “it shall or may be lawful” to assess in a certain specified manner. It was held that such general law repealed the pre-existing city charter.⁷

§ 188. New York.

The constitution of New York provided: “The legislature shall not pass a private or local bill in any of the following cases: . . . Laying out, opening, altering, working or discontinuing roads, highways or alleys, or for draining swamps or other low lands. . . .”¹ This provision does not include the improvement of city streets nor the levying of assessments to pay therefor.² The constitution of New York further provided: “The legislature shall by general laws confer upon the boards of supervisors of the several counties of the state such further powers of local legislation and administration as the legislature may from time to time deem expedient.”³ Under these two sections⁴ it was held that a statute giving to the board of supervisors in any county containing a city of over one hundred thousand inhabitants, where territory in the county contiguous to the city has

⁶ State, Dobbins, Pros. v. Board of Commissioners of the Long Branch Police Sanitary and Improvement Commission, 59 N. J. L. (30 Vr.) 146, 36 Atl. 482 [1896].

⁷ State, Central New Jersey Land & Improvement Company v. Mayor and Council of the City of Bayonne, 56 N. J. L. (27 Vr.) 297, 28 Atl. 713 [1893].

¹ Article III., § 18, Constitution of New York [1900].

² In the matter of the application

of Woolsey, 95 N. Y. 135 [1884]; (reversing Matter of Woolsey, 29 Hun. 626 [1883]); Matter of Lexington Avenue, 92 N. Y. 629 [1883]; (affirming without opinion Matter of Lexington Avenue, 29 Hun. 303 [1883]; People of the State of New York ex rel. Gage v. Lohnas, 54 Hun. 604, 8 N. Y. Supp. 104 [1889].

³ Article III., § 27, Constitution of New York [1900].

⁴ Article III., § 18, and Article III., § 27, Constitution of New York [1900].

been mapped out into streets and avenues, power to lay out, open, grade and construct such streets and avenues, and to provide for assessments upon the property benefited by such improvement was constitutional.⁵

§ 189. Ohio.

The constitution of Ohio provides: "The general assembly shall pass no special act conferring corporate power."¹ This provision is held to apply to public corporations as well as to private corporations.² A statute authorizing county commissioners to grant further time for the completion of free turnpike roads and for paying for the same, applicable to a public turnpike company incorporated by a special act under the old constitution of Ohio whose road was uncompleted and the assessments for which were not completed when the present constitution was adopted, was held not to violate this provision.³ The constitution of Ohio also provides: "All laws of a general nature shall have a uniform operation throughout the state. . . ." ⁴ This section was inserted to prevent the evils experienced under the old constitution, of laws operating over only a portion of the state.⁵ It applies only to laws of a general nature. Accordingly where an assessment had, through a mistaken view of the law, been levied upon land to a depth greater than that allowed by law and the property had thereby been charged with the entire cost of the improvement which should have been borne in part by the public corporation, it was held that a special statute reciting these facts and requiring the public corporation to refund to the property owner the excess over his rightful proportion of the expense was constitutional.⁶ Under this section it was held that a classification of cities on a basis of population was valid.⁷

⁵ In the matter of the Application of Church for the Appointment of Commissioners, etc., 92 N. Y. 1 [1883].

¹ Article XIII., § 1, Constitution of Ohio [1851].

² City of Cincinnati v. Taft, 63 O. S. 141, 58 N. E. 63 [1900]; State ex rel. City of Columbia v. Mitchell, 31 O. S. 592 [1877]; State v. City of Cincinnati, 23 O. S. 445 [1873];

State ex rel. Attorney-General v. City of Cincinnati, 20 O. S. 18 [1870].

³ Foster v. Commissioners of Wood County, 9 O. S. 540 [1859].

⁴ Article II., § 26, Constitution of Ohio [1851].

⁵ Lehman v. McBride, 15 O. S. 573 [1864].

⁶ State ex rel. v. Hoffman, 35 O. S. 435 [1889].

⁷ Welker v. Potter, 18 O. S. 85 [1868].

The classification here made was a reasonable one, the act applying to cities of the first class having at the last Federal census less than one hundred thousand inhabitants.⁸ Subsequently the legislature extended the detail of its classification until every large city in the state was in a separate grade and class and might be given a separate form of government and separate powers from those of every other city. This scheme of classification was long held valid.⁹ After the earlier cases, the court upholds the constitutionality thereof on the ground that it "has been repeatedly recognized in this court and the reasons for adhering to that construction of the constitution are cogent and satisfactory."¹⁰ In the cases following, the constitutionality of such classification is upheld chiefly on the doctrine of *stare decisis*, without the expression of great satisfaction with the correctness of the doctrine.¹¹ In the cases that followed the constitutionality of the system of classification, when upheld on the doctrine of *stare decisis*, was upheld with expressions of grave doubt as to the propriety of the classification.¹² The constitutionality of this scheme of classification was upheld on the sole ground that the original act has been held as valid,¹³ and that under the act in question, supplementary to the original act, bonds had been issued and sold in reliance upon such former judgment.¹⁴ Cases in which the provisions of the statute were held to be so restricted as to amount to a mere evasion of the constitutional requirement became more frequent.¹⁵ The entire scheme of classification was denominated "isolation under the form of classification."¹⁶ Finally the prior decisions were overruled and it

⁸ Welker v. Potter, 18 O. S. 85 [1868].

⁹ City of Cincinnati v. Taft, 63 O. S. 141, 58 N. E. 63 [1900]; State ex rel. v. Baker, 55 O. S. 1, 44 N. E. 516 [1896]; Parsons v. Columbus, 50 O. S. 460, 34 N. E. 677 [1893]; State v. Toledo, 48 O. S. 112, 26 N. E. 1061 [1891]; State v. Brewster, 39 O. S. 653 [1883]; Welker v. Potter, 18 O. S. 85 [1868].

¹⁰ State v. Brewster, 39 O. S. 653 [1883].

¹¹ State ex rel. v. Baker, 55 O. S. 1, 44 N. E. 516 [1896]; State ex rel. v. Cincinnati, 52 O. S. 419, 40 N. E.

508 [1895]; State v. Hudson, 44 O. S. 137, 5 N. E. 225 [1886].

¹² State ex rel. v. Wall, 47 O. S. 499, 24 N. E. 897 [1890].

¹³ Walker v. Cincinnati, 21 O. S. 14, 8 Am. Rep. 24.

¹⁴ City of Cincinnati v. Taft, 63 O. S. 141, 58 N. E. 63 [1900].

¹⁵ State ex rel. v. Cowles, 64 O. S. 162, 59 N. E. 895 [1901]; Hixson v. Burson, 54 O. S. 470, 43 N. E. 1000 [1896]; City of Cincinnati v. Steinkamp, 54 O. S. 284, 43 N. E. 490 [1896]; State ex rel. v. Smith, 48 O. S. 211, 26 N. E. 1069 [1891].

¹⁶ State ex rel. v. Cowles, 64 O. S. 162, 59 N. E. 895 [1901].

was held that such a classification as has been described was a mere evasion of the plain provisions of the constitution, and therefore invalid.¹⁷ Under this section and before the system of classification previously described was held to be unconstitutional, a statute providing for a street improvement to be paid for by local assessment, applicable to all cities of the first class having at the last federal census a population of less than one hundred thousand was held to be valid.¹⁸ When this statute was passed it applied to Cleveland only, but Toledo subsequently became a city of the first class within the classification of the statute, and this case involved an assessment levied by Toledo. So a law providing for the improvement of streets in cities of the first grade of the second class, the improvement to be paid by local assessments, was held to be constitutional though applicable only to Columbus.¹⁹ Even while the general system of classification was held to be valid, a subdivision which not only placed but one city in each class, but made it impossible that any other city could come into such class was held invalid.²⁰ Thus a statute applicable to cities of the second class having at the last Federal census a population of over thirty-one thousand was held invalid.²¹ After the system of classification herein described was held to be unconstitutional, the question arose as to the effect of assessments levied under acts passed with reference to such system of classification. In one case legislation identical with that involved in the case under consideration as far as its substantial features were concerned had previously been upheld by the Supreme Court.²² The statute in question with reference to the same city was held, though unconstitutional, to be enforceable on the theory of *res adjudicata*.²³ An additional reason for upholding the statute was found in the fact that if the act in question was unconstitutional, the repealing clause thereof was inoperative as

¹⁷ State ex rel. v. Beacom, 66 O. S. 491, 90 Am. St. Rep. 599, 64 N. E. 427 [1902]; State ex rel. Knisely v. Jones, 66 O. S. 453, 90 Am. St. Rep. 592, 64 N. E. 424 [1902].

¹⁸ Welker v. Potter, 18 O. S. 85 [1868].

¹⁹ Parsons v. City of Columbus, 50 O. S. 460, 34 N. E. 677 [1893].

²⁰ State ex rel. City of Columbus v. Mitchell, 31 O. S. 592 [1877].

²¹ State ex rel. City of Columbus v. Mitchell, 31 O. S. 592 [1877].

²² Scheer v. Cincinnati, 15 W. L. B. (Ohio) 66 [1886]; (followed in State ex rel. Attorney-General v. Hudson, 44 O. S. 137, 5 N. E. 225 [1886]).

²³ Shoemaker v. City of Cincinnati, 68 O. S. 603, 68 N. E. 1 [1903].

well as the rest of the act; that the act was one of a series upon the same subject, which in substance give the same protection to the rights of the property owner; and that the first, at least, of such acts was uniform in its operation. Accordingly it seems to be suggested that the assessment could be upheld under such prior act. A like result was reached by the Circuit Court in a case, in which, however, a recurrence to the prior constitutional statute would have limited the amount of the assessment to twenty-five per cent of the taxable value of the property. The assessment was levied before the decisions of the Supreme Court, overthrowing the scheme of classification. The Circuit Court held that such assessments were valid and collectable.²⁴ Local laws for the construction of roads in specified counties were at first upheld.²⁵ Thus an act applicable to a specific county requiring the county commissioners to levy a special tax and with the proceeds to construct a specifically described road, was held to be valid.²⁶ Subsequently, but before the decisions overthrowing the classification statute, a similar act, applicable to a particular county therein named, and requiring a specific improvement, set forth in great detail, to be made if approved by the county commissioners, and to be paid for by local assessments apportioned according to benefits, was held to be invalid.²⁷ Moreover such law was a local law, while the subject of roads was one in its nature general and therefore controlled by the constitutional provision quoted. A further objection to this act was the fact that it conferred corporate power on "any village owning any part of the lands necessary to be acquired for the purpose of carrying out the provisions" of such act, authorizing it to dedicate such land for such purpose.²⁸ Soon after a law applicable to "any county which by the last Federal census had, or which at any subsequent Federal census may have a population of not less than thirty-five thousand one hundred and ninety and

²⁴ *Price v. Toledo*, 25 Ohio C. C. 617 [1903].

²⁵ *State ex rel. v. Board of Commissioners of Franklin County*, 35 O. S. 458 [1880].

²⁶ *State ex rel. v. Board of County Commissioners of Franklin County*, 35 O. S. 458 [1880]; (not a case of special assessment).

²⁷ *State ex rel. v. Commissioners*,

54 O. S. 333, 43 N. E. 587 [1896]; (In effect overruling on this point *State ex rel. Hibbs v. Board of County Commissioners of Franklin County*, 35 O. S. 458 [1880]).

²⁸ *State ex rel. v. Commissioners*, 54 O. S. 333, 43 N. E. 587 [1896]; (citing on this point *Commissioners v. Stall*, 50 O. S. 653, 35 N. E. 887 [1893]).

not to exceed thirty-five thousand and two hundred," might construct free turnpikes was held to be unconstitutional.²⁹ The question of the effect of such change of judicial opinion upon the validity of local assessments was soon presented to the court. An act similar to that considered in *State ex rel. Hibbs v. Board of County Commissioners of Franklin County*³⁰ was passed on April 12, 1893, before the rendition of the decisions overruling the former case; and the improvement was begun before the rendition of such decisions. Payment of the assessments was refused by certain of the property owners. It was held that the law was unconstitutional and that, as the specific statute had never been passed upon or held to be valid, the court was not bound to uphold the assessments levied under such unconstitutional statute.³¹ The Supreme Court of the United States, held in a case arising in the Circuit Court of the United States and thence coming on error to the Supreme Court of the United States, that the Federal courts should follow the earlier decision of the state courts where the rule of law was clearly settled, and the rights of the parties in the case at bar were fixed before the date of the later decision overruling such earlier decision. Accordingly a statute requiring a specifically named township to construct a designated improvement, to issue bonds therefor, and to levy local assessments to meet the cost of such bonds was upheld.³² A similar question with an important point of difference was subsequently presented to the Supreme Court of the United States.³³ Under a statute similar to those already discussed, an improvement had been constructed, but to secure the sale of the bonds issued to pay for the improvement the property owners liable to assessment signed an agreement that the improvement was legally made and constructed. The case came before the United States Court. The Circuit Court upheld the validity of the bonds on the theory that it was not bound to follow the later holdings of the Supreme Court of Ohio³⁴ on the theory that where a case orig-

²⁹ *Hixson v. Burson*, 54 O. S. 470, 48 N. E. 1000 [1896]; (not an assessment case).

³⁰ 35 O. S. 458, [1880].

³¹ *Lewis v. Symmes*, 61 O. S. 471, 76 Am. St. Rep. 428, 56 N. E. 194 [1899].

³² *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 45 L. 280, 21 S. 174 [1900]; (reversing *Loeb v. Trustees of Columbia Township, Hamilton County, Ohio*, 91 Fed. 37 [1899]).

³³ The case arose under a statute passed in 1890.

³⁴ See *Page on Contracts*, § 1744.

inated in the United States courts, they are not bound to follow the latest holding of the state courts where the latter courts have at different times held different views upon the question involved. The Supreme Court of the United States upheld the validity of the bonds on the theory that by signing the agreement referred to the property owners had virtually, although not technically, estopped themselves from taking advantage of the unconstitutionality of the act.³⁵ Statutes classifying counties with reference to the class and grade of cities located therein have, from their nature, a clearer tendency to local legislation than those concerning cities themselves. The classification thus adopted has ordinarily nothing to do with the subject matter of the statute; forms no just basis for the distinction in legal authority sought to be made, and is ordinarily an attempt to legislate specially, using the classification by cities while held valid to conceal the fact that special legislation is enacted. Thus an act authorizing the construction of sidewalks and the levy of an assessment therefor in any village of any city of the first grade of the first class in which no sidewalks had already been constructed under certain enumerated sections of the Revised Statutes was held invalid as resting upon an improper basis of classification.³⁶ So an act applicable to "any county containing a city of the second grade of the first class," there being only one city of that grade and class, was held unconstitutional.³⁷

§ 190. Pennsylvania.

The constitution of Pennsylvania provides: "The legislature shall not pass any local or special laws . . . regulating the affairs of counties, cities or townships . . . authorizing the laying out, opening or maintaining roads, highways, streets or alleys . . . creating offices or prescribing the powers and duties of officers in counties, cities . . . regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts . . . or other tribunals."¹ A classification of cities based on essential distinctions which make necessary legislation for one class different

³⁵ *Shepard v. Barron*, 194 U. S. 553.
48 L. 1115, 24 S. 737 [1904].

³⁶ *Costello v. Wyoming*, 49 O. S.
202, 30 N. E. 613 [1892].

³⁷ *Mott v. Hubbard*, 59 O. S. 199,
53 N. E. 47 [1898].

¹ Article III., § 7, Constitution of
Pennsylvania [1874].

from that required for another class, is constitutional.² Under this section an act classifying the cities of the state into three classes has been held to be valid.³ So an assessment act made applicable to cities of the third class or any city of less than ten thousand inhabitants theretofore incorporated, as might accept it, has been upheld as constitutional.⁴ The fact that it was left optional with each city to accept the provisions of the statute or not was at first held to make such statute unconstitutional⁵ but on re-hearing this view was abandoned and the statute held to be constitutional,⁶ a view which has since been adhered to.⁷ However, an act relating to one class of cities only, is valid if it affects the powers and duties of the cities, the number, character and duty of officers and the like, and it affects all the cities of that class alike; but invalid if it relates to matters not under municipal control or affecting municipal government.⁸ Under this theory an act which provided that in the construction of streets and sewers in cities of the second class a board of viewers should be created which should assess damages and benefits arising from such improvements was held to be unconstitutional, since it made such classification upon a matter not affecting municipal power or control. Furthermore it affected the powers and practice of the courts of law in Allegheny county and created in this one county an oppressive system for assessing damages and benefits.⁹ Other objections to the system were that the decision of the council as to the number of petitioners was final, and that the decision of the viewers was final unless on appeal to the city councils and thence to the courts—an appeal

² Philadelphia Company's Petition, 210 Pa. St. 490, 60 Atl. 93 [1904].

³ City of Reading v. Savage, 124 Pa. St. 328, 16 Atl. 788 [1889]; Wheeler v. Philadelphia, 77 Pa. St. 338 [1875].

⁴ City of Meadville v. Dickson, 129 Pa. St. 1, 18 Atl. 513 [1889]; City of Reading v. Savage, 124 Pa. St. 328, 16 Atl. 788 [1889]; (distinguishing City of Scranton School District's Appeal, 113 Pa. St. 176, 6 Atl. 158 [1886], and overruling City of Reading v. Savage, 120 Pa. St. 198, 13 Atl. 919 [1888]).

⁵ City of Reading v. Savage, 120 Pa. St. 198, 13 Atl. 919 [1888].

⁶ City of Reading v. Savage, 124 Pa. St. 328, 16 Atl. 788 [1889].

⁷ City of Meadville v. Dickson, 129 Pa. St. 1, 18 Atl. 513 [1889].

⁸ Pittsburg's Petition for Board of Viewers, 138 Pa. St. 401, 21 Atl. 757, 759, 761 [1890]; Wyoming Street, 137 Pa. St. 494, 21 Atl. 74 [1890].

⁹ Pittsburg's Petition for Board of Viewers, 138 Pa. St. 401, 21 Atl. 757, 759, 761 [1890]; Wyoming Street, 137 Pa. St. 494, 21 Atl. 74 [1890]. See also Scranton City v. Ansley, 34 Pa. Super. Ct. 133 [1907].

which was made hard and technical and for which too short a time was given. These last objections, however, were not the basis of decision in the cases cited. Classification, with separate legislation for each class, can be upheld, however, only if there exists an evident necessity therefor springing from manifest peculiarities which distinguish the cities of one class from those of the others, and which make necessary certain legislation for one class which would be useless and detrimental to the others.¹⁰ Accordingly the act which classified the cities of Pennsylvania into seven classes and provided differences in the organization of the government of each class was said to be "classification run mad,"¹¹ and was held to be unconstitutional.¹² An assessment authorized under such classification statute is invalid.¹³

§ 191. Wisconsin.

The constitution of Wisconsin provides: "The legislature is prohibited from enacting any special or private laws in the following cases: . . . 6th. For assessment or collection of taxes or for extending the time for collection thereof. 7th. For granting corporate powers or privileges except to cities. 8th. For incorporating any city, town or village or to amend the charter thereof."¹ "The legislature shall provide general laws for the transaction of any business that may be prohibited by section thirty-one of this article, and all such laws shall be uniform in their operation throughout the state."² Under this section, before amendment, it has been held that an "act to authorize the improvement of certain streets in the third ward of the city of Milwaukee and to authorize the levy of a special tax in said ward" is in effect an amendment to the city charter, and a grant of corporate powers to the city and not a special act for the assessment or collection of taxes; and that is, therefore, not in

¹⁰ Appeal of Ayars, 122 Pa. St. 266, 2 L. R. A. 577, 16 Atl. 356 [1888].

¹¹ Appeal of Ayars, 122 Pa. St. 266, 279, 2 L. R. A. 577, 16 Atl. 356 [1888]; (quoting Commonwealth v. Patton, 85 Pa. St. 258).

¹² Shoemaker v. Harrisburg, 122 Pa. St. 285, 16 Atl. 366 [1888]; Appeal of Ayars, 122 Pa. St. 266, 2 L. R. A. 577, 16 Atl. 356 [1888].

¹³ Shoemaker v. Harrisburg, 122

Pa. St. 285, 16 Atl. 366 [1888]. To the same effect see City of Meadville v. Dickson, 129 Pa. St. 1, 18 Atl. 513 [1889].

¹ Article IV., § 31 (adopted as an amendment, 1871; amended further in 1892 by adding "city" in paragraph 9).

² Article IV., § 32, Constitution of Wisconsin (adopted as amendment 1871).

violation of this section of the constitution.³ An act providing for the drainage of certain lands in a specified county and for the appointment of a board of drainage commissioners possessed of corporate powers to carry out the proposed system of drainage was upheld on the theory that the main purpose of such act was the promotion of the public health and welfare under the police power, and not assessment for benefits under the power of taxation.⁴ Under this section a classification of cities may be made, but there must be a substantial difference on which such classification is based; the classification must be germane to the purpose of the act; it must not be based solely on the circumstances existing at the date of the enactment of the statute, but must also be prospective in its operation; and the characteristics of each class must be so far different from those of other members of that class as reasonably to suggest the propriety of different legislation.⁵ Accordingly a statute which is applicable to Milwaukee county only,⁶ or a statute giving power for a certain year to a city of the first class⁷ are each in violation of these constitutional provisions. The legislature may provide a general charter and leave it to the option of cities to adopt it or the whole of any sub-chapter therein,⁸ but a city cannot be authorized to adopt a part of a sub-chapter.⁹ Thus it cannot adopt a section authorizing it to assess for sprinkling, but not the sections prescribing the procedure in such cases.¹⁰ Applying these principles to legislation concerning assessments, a statute concerning street assessments¹¹ applying to "any city having a population of two hundred thousand inhabitants or more," is valid, as it is construed as applying to all cities as soon as they attain that population.¹² The legislature may classify cities both on a basis of population and also as to whether they are

³ Warner v. Knox, 50 Wis. 429, 7 N. W. 372 [1880].

⁴ State ex rel. Baltzell v. Stewart, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947 [1889].

⁵ State v. Board of Trustees, 121 Wis. 44, 98 N. W. 954 [1904]; Johnson v. City of Milwaukee, 88 Wis. 383, 60 N. W. 270 [1894].

⁶ Wagner v. Milwaukee County, 112 Wis. 601, 88 N. W. 577 [1901].

⁷ Burnham v. City of Milwaukee, 98 Wis. 128, 73 N. W. 1018 [1897].

⁸ Adams v. City of Beloit, 105 Wis. 363, 47 L. R. A. 441, 81 N. W. 869 [1900].

⁹ State v. Mayor and Common Council of La Crosse, 107 Wis. 654, 84 N. W. 242 [1900].

¹⁰ Dawley v. City of Antigo, 120 Wis. 302, 97 N. W. 1119 [1904]; Borgman v. City of Antigo, 120 Wis. 296, 97 N. W. 936 [1904].

¹¹ Ch. 310, Laws of 1893.

¹² Boyd v. City of Milwaukee, 92 Wis. 456, 66 N. W. 603 [1896].

acting under general laws or charters. Accordingly a statute which applies to all cities with special charters having a population of three thousand or more, and "authorized by such charters to construct sewers," has been held to be constitutional on the theory that by a fair construction, such statute applied to all cities whose charters expressly or impliedly authorize them to construct sewers.¹³ Prior to the amendment of the constitution it was held that a statute,¹⁴ amending the charter of the city of Madison by authorizing the council to order the construction of a sewer from a point in the marsh in the second and third wards to Lake Monona and to charge the expense upon the lots situated upon said marsh was valid.¹⁵ The constitution of Wisconsin provides: "The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable."¹⁶ Under this provision, a statute providing a special system for the drainage and reclamation of certain lands in a specific county is not invalid, on the theory that the drainage of swamps and marshes is not one of the ordinary functions of town or county officers.¹⁷

§ 192. Specific provisions restricting statute to one subject expressed in title.

A group of constitutional provisions require the legislature to confine each statute to but one subject, or to state that subject in the title, or both. These provisions as considered in assessment law are as follows: ". . . Each law shall contain but one subject which shall be clearly expressed in its title, except general appropriation bills, general revenue bills and bills adopting a code, digest or revision of statutes. . . ." ¹ "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any such subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title." ² "No bill except general appropriation bills shall be

¹³ Johnson v. City of Milwaukee, 88 Wis. 383, 60 N. W. 270 [1894].

¹⁴ Ch. 213, P. and L. Laws 1871, Wisconsin.

¹⁵ Massing v. Ames, 37 Wis. 645 [1875].

¹⁶ Article IV., § 23. Constitution of Wisconsin [1848].

¹⁷ Bryant v. Robbins, 70 Wis. 258, 35 N. W. 545 [1887].

¹ Article IV., § 2. Constitution of Alabama [1875].

² Article IV., § 24. Constitution of California.

passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.”³

“ . . . No act hereafter passed shall embrace more than one subject and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed. . . . ”⁴ “No law enacted by the General Assembly shall relate to more than one subject and that shall be expressed in the title. . . . ”⁵ “Every law enacted by the General Assembly shall embrace but one object, which shall be expressed in the title.”⁶ “No law shall embrace more than one object, which shall be expressed in its title. . . . ”⁷ “No law shall embrace more than one subject, which shall be expressed in its title.”⁸ “To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object and that shall be expressed in the title. . . . ”⁹ “No private or local bill which may be passed by the legislature shall embrace more than one subject and that shall be expressed in the title.”¹⁰ “No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated only as to so much thereof as shall not be so expressed.”¹¹ “No bill, except general appropriation bills, shall be passed concerning more than one subject, which shall be clearly expressed in its title.”¹² “No bill shall embrace more than one subject and that shall be expressed in the title.”¹³ “No private or local bill, which may be passed by the legislature shall embrace more than one subject and that shall be expressed in the title.”¹⁴

³ Article V., § 21, Constitution of Colorado [1876].

⁴ Article IV., § 13, Constitution of Illinois [1870].

⁵ Section 51, Constitution of Kentucky.

⁶ Article 29, Constitution of Louisiana.

⁷ Article IV., § 20, Constitution of Michigan [1850].

⁸ Article IV., § 27, Constitution of Minnesota.

⁹ Article IV., § 7, par. 4, Constitution of New Jersey.

¹⁰ Article III., § 16, Constitution of New York.

¹¹ Article II., § 61, Constitution of North Dakota.

¹² Article III., § 3, Constitution of Pennsylvania.

¹³ Article II., § 19, Constitution of Washington.

¹⁴ Article IV., § 18, Constitution of Wisconsin.

§ 193. Purpose of such provisions.

The provisions that no act shall relate to more than one subject were intended to prevent log-rolling as far as possible; that is, to make it impossible to include a number of different subjects in one bill, thus securing a majority that could not have been secured for any one of them separately. The provision requiring the subject to be expressed in the title was in part to prevent the practice of striking out, at a period late in the session, all of some bill which had progressed so far as to be nearly ready for a final vote, and substituting therefor a bill upon some totally different subject. In part, it was to secure the attention of the legislators to the subject of the bill by having the bill express that subject in its title.

§ 194. Form of title.

The provision that the subject of a bill must be expressed in its title does not require the title of a bill to be a complete and perfect index of the contents thereof.¹ It is sufficient if the title suggests the subject in such a way as to give reasonable information, to one who reads the title, of what the subject of the bill is.²

¹ *Whitney v. City of Pittsburg*, 147 Pa. St. 351, 30 Am. St. Rep. 740, 23 Atl. 395 [1892].

² *City Council of Montgomery v. Moore*, 140 Ala. 638, 37 So. 291 [1903]; *Anderson v. Grand Valley Irrigation District*, 35 Colo. 525, 85 Pac. 313 [1906]; *McChesney v. City of Chicago*, 159 Ill. 223, 42 N. E. 894 [1896]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894]; *Blake v. People, for use of Caldwell*, 109 Ill. 504 [1884]; *Potwin v. Johnson*, 108 Ill. 70 [1883]; *Guild, Jr., v. City of Chicago*, 82 Ill. 472 [1876]; *People ex rel. Miller v. Brislin*, 80 Ill. 423 [1875]; *Prescott v. City of Chicago*, 60 Ill. 121 [1871]; *Richman v. Supervisors of Muscatine County*, 77 Ia. 513, 14 Am. St. Rep. 308, 4 L. R. A. 445, 42 N. W. 422 [1889]; *Town of Parkland v. Gaines*, 88 Ky. 562, 11 S. W. 649 [1889]; *Excelsior Planting & Manufacturing Co. v. Green*, 39 La. Ann.

455, 1 So. 873 [1887]; *Butler v. Detroit*, 43 Mich. 552, 5 N. W. 1078; *Ek v. St. Paul Permanent Loan Co.*, 84 Minn. 245, 87 N. W. 844 [1901]; *Lien v. Board of County Commissioners of Norman County*, 80 Minn. 58, 82 N. W. 1094 [1900]; *State ex rel. Doyle v. Mayor and Common Council of the City of Newark*, 34 N. J. L. (5 Vr.) 236 [1870]; *In the Matter of the Petition of the Trustees of the Leake and Watts Orphan Home in the City of New York to Vacate an Assessment*, 92 N. Y. 116 [1883]; *In the matter of the Confirmation of the Report of the Commissioners of Assessment for Grading, Paving and Otherwise Improving Sackett, Douglas and De Graw Streets in the City of Brooklyn*, 74 N. Y. 95 [1878]; *In the matter of the Petition of Mayor to Vacate an Assessment*, 50 N. Y. 564 [1872]; *In the matter of the Petition of Astor to Vacate an Assess-*

§ 195. Illustrations of titles expressing subject matter.

The actual operation of these constitutional provisions may best be shown by some concrete illustrations. The courts allow a wide range of discretion to the legislature in selecting an appropriate title to the bill as long as the subject can reasonably be gathered from the title. Thus a statute entitled, "an act to authorize the city council of Montgomery to issue bonds for the purpose of paving, or otherwise improving the streets, or sidewalks, or either, of the city of Montgomery," is held to show the subject with sufficient certainty.¹ A statute entitled "An act authorizing the ascertainment, assessment, levy and collection of costs, damages and expenses of municipal improvements, including the grading, paving, macadamizing or otherwise improving of any street, lane or alley or parts thereof completed or now in process of completion and authorizing the completion of any such improvement," shows with sufficient certainty that it is intended to cure such defects as omission to secure the consent of property owners, or the inclusion of the cost of improvements not warranted by law.² A statute entitled, "an act to provide for the incorporation of cities and villages" sufficiently shows its subject in its title, even though it provides that such act shall apply to cities and towns already incorporated, as well as to towns to become incorporated; and though as to such cities and towns already incorporated, it may operate only as an amendment to such charters.³ A statute entitled, "an act to amend the charter of the town of Parkland, in Jefferson county," expresses its subject sufficiently in its title if the effect of the act is to extend the limits of such town; but if the act creates a road district it is invalid, as the title does not express such subject.⁴ A statute entitled, "a further supplement to the act en-

ment, 50 N. Y. 376 [1872]; In the matter of the Application of Cappan to Vacate Certain Assessments, 54 Barb. (N. Y.) 225 [1869]; People ex rel. Crowell v. Lawrence, 36 Barb. (N. Y.) 178 [1862]; In the matter of the Petition of Mead to Reduce an Assessment, 13 Hun (N. Y.) 349 [1878]; Whitney v. City of Pittsburgh, 147 Pa. St. 351, 30 Am. St. Rep. 740, 23 Atl. 395 [1892]; Bradley v. City of Pittsburgh, 130 Pa. St. 475, 18 Atl. 730 [1889]; Warner v.

Knox, 50 Wis. 429, 7 N. W. 572 [1880]; Massing v. Ames, 37 Wis. 645 [1875].

¹ City Council of Montgomery v. Moore, 140 Ala. 638, 37 So. 291 [1903].

² Whitney v. City of Pittsburgh, 147 Pa. St. 351, 30 Am. St. Rep. 740, 23 Atl. 395 [1892].

³ Guild, Jr., v. City of Chicago, 82 Ill. 472 [1876].

⁴ Town of Parkland v. Gaines, 88 Ky. 562, 11 S. W. 619 [1889].

titled, 'an act to revise and amend the charter of the city of Newark, approved March 11, 1857,' and containing provisions with reference to prior defective assessments and provisions for a new assessment for such improvement, sufficiently expresses its subject matter in its title.⁵ A statute entitled, "an act relative to contracts," and providing for the creation of a board of revision, is not invalid as failing to express its subject in its title.⁶ The title need not indicate the means by which the subject matter of the bill is to be carried into effect.⁷ Accordingly, provisions which are incidental to the subject of the bill or a means for carrying into effect such subject need not be expressed in the title. An act, whose title shows it concerns cities, towns and villages, and which contains provisions concerning the opening and repair of streets, expresses its purpose sufficiently in the title, as the opening and repair of streets is an incident of municipal government and operation.⁸ A statute entitled, "an act to provide for the organization and government of irrigation districts" which provides for the organization of irrigation districts, the construction of irrigation ditches, the appropriation of canals, by proceedings in eminent domain, the issuing of the bonds of the irrigation district, and the approval of the proceedings of the district by the court, sufficiently expresses its subject in its title.⁹ A statute entitled, "an act to establish a board of public works," and containing a provision that proposed public improvements shall be referred to such board expresses its subject in its title with sufficient certainty.¹⁰ A statute entitled, "an act to amend the charter of the city of St. Paul in relation to the duties and powers of the Board of Public Works of said city," containing provisions concerning the improvements over which such board has jurisdiction, which are connected with the incidental duty of the city treasurer to issue certificates on special assessment sales,

⁵ State ex rel. Doyle v. Mayor and Common Council of the City of Newark, 34 N. J. L. (5 Vr.) 236 [1870]; See for a similar case State, Walter, Pros. v. Town of Union in the County of Hudson, 33 N. J. L. (4 Vr.) 350 [1869].

⁶ In the matter of the Application of Tappan to Vacate Certain Assessments, 54 Barb. (N. Y.) 225 [1869].

⁷ Prescott v. City of Chicago, 60 Ill. 121 [1871].

⁸ Potwin v. Johnson, 108 Ill. 70 [1883].

⁹ Anderson v. Grand Valley Irrigation District, 35 Colo. 525, 85 Pac. 313 [1906].

¹⁰ Butler v. Detroit, 43 Mich. 552, 5 N. W. 1078.

sufficiently expresses its subject in its title.¹¹ A statute entitled, "an act to make provision for the government of the city of New York," which contains a provision for the appointment of certain official papers in which must be published such notices as are required to be published to the exclusion of other papers, has been held valid on the ground that such provision falls within the general subject of the government of the city.¹² A statute entitled, "an act to provide for laying out, opening, extending, widening, straightening, or closing up, in whole or in part, any street, square, lane, alley, place or court, within municipalities, and to condemn and acquire any and all land and property necessary or convenient for that purpose," and which contains provision authorizing the assessment of such land as is benefited by such proceeding, is not invalid. The subject of the act is sufficiently expressed in the title, as the assessment is regarded as merely a means to the end thus indicated.¹³ A statute entitled, "an act for the relief of James Ley and Son," which provides that the city shall levy a further assessment upon property originally assessed, and shall pay the proceeds of such assessment to James Ley and Son, the contractors by whom the original improvement was constructed as a payment over and above the contract price, has been held to show the subject in the title with sufficient certainty.¹⁴ A statute, the subject of which shows that it is upon the subject of collection of assessments, and which contains a provision concerning the costs of collection, has been held not to be invalid on the ground that the subject of the act is not expressed in the title.¹⁵ An act concerning special assessments need not show in its title that it contains a provision to the effect that deferred installments of assessments may bear interest.¹⁶ It will ordinarily be presumed that the legislature complied with the provisions of the constitution.¹⁷ A statute entitled, "an act to provide for the Eastern Boulevard in the city of New York, and in relation to certain alterations

¹¹ *Ek v. St. Paul Permanent Loan Co.*, 84 Minn., 245, 87 N. W. 844 [1901].

¹² In the matter of the Petition of *Astor to Vacate an Assessment*, 50 N. Y. 363 [1872].

¹³ *Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771 [1890].

¹⁴ *Brewster v. City of Syracuse*, 19 N. Y. 116 [1859].

¹⁵ *Bradley v. City of Pittsburgh*, 130 Pa. St. 475, 18 Atl. 730 [1889].

¹⁶ *McChesney v. City of Chicago*, 159 Ill. 223, 42 N. E. 894 [1896].

¹⁷ See § 79.

of the map or plan of said city, and certain local improvements," and containing a provision authorizing the department of public work to improve Tenth avenue, and construct a sewer therein, was held to express the subject sufficiently in the title, inasmuch as it would be assumed that there was a connection between the part of Tenth avenue specified in the act, and the Eastern Boulevard, in the absence of evidence showing that there was no such connection.¹⁸

§ 196. Illustrations of titles not expressing subject-matter.

On the other hand if the title does not suggest the subject of the bill in a fair and reasonable manner so much of the statute as is not expressed in the title most jurisdictions held to be invalid for failure to comply with these constitutional provisions.¹ If a statute contains a provision not expressed in the title, such provision is invalid; but the invalidity of this provision, if it can be separated from the rest of the act, does not invalidate the rest of the statute as a whole.² Specific examples best illustrate the scope of these general principles. A statute entitled "an act to amend sections three, nine and twenty-four, of an act entitled, 'an act to provide for the establishment of drainage districts,' " which provided for amending section five in addition to sections three, nine and twenty-four, is invalid, since the entire subject of the bill is not expressed in the title.³ A statute entitled, "an act to amend chapter 245 of the laws of 1875, entitled, 'an act to amend chapter 818 of the laws of 1868,' " entitled 'an act to incorporate the village of Port Chester and to amend chapter 227 of the laws of 1887,' " which statute at-

¹⁸ In the matter of the Petition of the Trustees of the Leake and Watts Orphan Home in the City of New York to Vacate an Assessment, 92 N. Y. 116 [1883].

¹ *Surget v. Chase*, 33 La. Ann. 833 [1881]; *Tingue v. Village of Port Chester*, 101 N. Y. 294, 4 N. E. 625 [1886]; *City of Watertown v. Fairbanks*, 65 N. Y. 588 [1875]; *Hopkins v. Mason*, 61 Barb. (N. Y.) 469 [1871]; *Turnquist v. Cass County Drain Commissioners*, 11 N. D. 514, 92 N. W. 852 [1902]; *Erickson v. Cass County*, 11 N. D.

494, 92 N. W. 841 [1902]; *Beckert v. City of Allegheny*, 85 Pa. St. 191 [1877]; *State of Washington on the Relation of Matson v. Superior Court for Skagit County*, 42 Wash. 491, 85 Pac. 264 [1906].

² In the matter of the Application of Van Antwerp to Vacate an Assessment, 56 N. Y. 261 [1874]; *Beckert v. City of Allegheny*, 85 Pa. St. 191 [1877].

³ *State of Washington on the Relation of Matson v. Superior Court for Skagit County*, 42 Wash. 491, 85 Pac. 264 [1906].

tempted to authorize re-assessments in cases of assessments set aside or vacated before the passage of such act, as well as after such passage, was held to be insufficient, since the title of such act did not show that it related to the municipality in question; namely, the village of Port Chester.⁴ A statute which purports to be an amendment to a charter, and contains a provision which attempts to confirm previously unauthorized assessments has been held to be invalid, on the ground that the title did not sufficiently express the subject of the statute.⁵ If the title of a statute shows that it concerns the improvement of certain streets, and the statute contains a certain provision for keeping certain streets in repair at the expense of the city, such provision is invalid, as being a subject not expressed in the title.⁶ A statute entitled, "an act to provide for the allowance and taxation of costs for additional attorneys' fees against the defendants in actions to enjoin drainage proceedings, or the levy and collection of taxes and assessments therefor," which contains a provision for the allowance of additional attorneys' fees against the plaintiffs in such an action, is held to be invalid as not expressing the subject of the act in the title, although the wording of the title was probably a misprint.⁷ A statute entitled, "an act relative to grading, paving, curbing, and otherwise improving Troy Road in the city of Allegheny," which provides for improving a portion of such road within the city limits, but for assessing the expense upon property paved within and without the city limits, was held invalid on the ground that the subject of the bill was not expressed in the title thereto.⁸

§ 197. View that such provision directory.

In some jurisdictions, it may be added, such provisions are regarded as merely directory and addressed to the conscience of the legislature. A violation of such provision does not, therefore, render the statute invalid for that reason, in the jurisdic-

⁴ *Tingue v. Village of Port Chester*, 101 N. Y. 294, 4 N. E. 625 [1886].

⁵ *City of Watertown v. Fairbanks*, 65 N. Y. 588 [1875], (not reported in full). This question was raised but not decided in *Hopkins v. Mason*, 61 Barb. (N. Y.) 469 [1871].

⁶ In the matter of the Application

of Van Antwerp to Vacate an Assessment, 56 N. Y. 261 [1874].

⁷ *Turnquist v. Cass County Drain Commissioners*, 11 N. D. 514, 92 N. W. 852 [1902]; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1892].

⁸ *Beckert v. City of Allegheny*, 85 Pa. St. 191 [1877].

tions where this view is entertained.¹ In most jurisdictions such provisions regarded as mandatory and failure to comply with them renders the statute invalid.²

§ 198. Statute may provide for means of accomplishing general purpose.

The clause requiring a bill to contain but one subject does not prevent the legislature from including in a bill both the general subject to be accomplished and the means provided for carrying such subject into effect.¹ A law, under such constitutional provision, may contain "several particular objects properly referable to and subdivisions of a single general object."² A statute entitled, "An act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others for agricultural, sanitary, and mining purposes, and to provide for the organization of drainage districts" is not invalid as embracing more than one subject. The subject of such statute is the protection of land against surplus water. The title of the statute goes into unnecessary detail in showing the means by which such end is to be reached, and the purposes and motives of the enactment; but this does not invalidate the statute.³ So the fact that such statute contains a provision for the construction of levees as incidental to the general scheme of protection against surplus water does not make the statute invalid as containing more than one subject.⁴ A statute entitled, "An act to amend sections 6, 7 and 9 of an act entitled 'An act in relation to the completion of public parks and the management thereof, approved June 16, 1871, and to add two (2) sections thereto,'" and containing provisions with relation to the acquisition of property for park purposes, and containing in one of the added

¹ Seeley v. Thomas, 31 O. S. 301 [1877]; State ex rel. Attorney-General v. Covington, 29 O. S. 102 [1876]; Pim v. Nicholson, 6 O. S. 176 [1856].

² See § 196.

³ Jones v. Town of Lake View, 151 Ill. 663, 38 N. E. 688 [1894]; Blake v. People for use of Caldwell, 109 Ill. 504 [1884]; Excelsior Planting & Manufacturing Company v. Green, 39 La. Ann. 455, 1 So. 873 [1887];

In re Report of Commissioners, etc., of Elizabeth, 49 N. J. L. (20 Vr.) 483, 10 Atl. 363 [1887]; Warner v. Knox, 50 Wis. 429, 7 N. W. 372 [1880].

² Excelsior Planting & Manufacturing Co. v. Green, 39 La. Ann. 455, 1 So. 873 [1887].

³ Blake v. People for use of Caldwell, 109 Ill. 504 [1884].

⁴ Blake v. People for use of Caldwell, 109 Ill. 504 [1884].

sections provisions with reference to driveways as incidents to parks, sufficiently expresses its subject in its title; as such section is not to be regarded as a new and independent subject, since it is fairly within the scope of the general purpose of the completion and management of public parks.⁵ This clause requiring a bill to contain but one subject does not, therefore, forbid the legislature to provide for an improvement and an assessment therefor in one statute. A statute which deals with taxes and assessments levied before it is passed and also with those which may be levied thereafter does not include more than one subject, since it deals primarily with taxes and assessments and includes these classes of such general subject, as well as the means specified in such act for enforcing and collecting such assessments.⁶ A statute which authorizes a council to order the construction of a certain sewer, and to charge the expense upon certain land, is not invalid as containing more than one subject.⁷ A statute which provides for the improvement of certain streets, and the levy of assessments to pay for the cost of such improvement, does not embrace more than one subject.⁸

§ 199. Combination of improvements in one general plan.

Furthermore two or more improvements which may reasonably be regarded as parts of a general plan may be embraced in one statute. A statute providing for the improvement and assessment of two or more streets, is not invalid as embracing more than one subject.¹ A statute entitled, "an act to widen portions of Sackett, Douglass and President streets, and otherwise alter the commissioners' map of the city of Brooklyn," is held not to be invalid, as embracing more than one subject.² A statute providing for levying re-assessments for the construction of two different roads, the assessment for which improvements had been levied under two different statutes, one a supplement of the other,

⁵ *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894].

⁶ *In re* Report of Commissioners, etc., of Elizabeth, 49 N. J. L. (20 Vr.) 488, 10 Atl. 363 [1887].

⁷ *Massing v. Ames*, 37 Wis. 645 [1875].

⁸ *Warner v. Knox*, 50 Wis. 429, 7 N. W. 372 [1880].

¹ In the matter of the Application of Van Antwerp to Vacate an Assessment, 56 N. Y. 261 [1874].

² In the matter of the Confirmation of the Report of the Commissioners of Assessment for Grading, Paving and Otherwise Improving Sackett, Douglas and De Graw Streets in the City of Brooklyn, 74 N. Y. 95 [1878].

but levied by the same commissioners and according to the same general method of assessment does not contain more than one subject.³ A statute which provides for the reassessment of certain defective assessments, to pay for certain pieces of Nicholson pavement previously laid down in such city without authority of law, and further authorizing the municipal authorities of such city to order the streets of such city or any portion of them to be paved with such material as they might select, and if such pavement selected was patented, either to buy the patent for the city, or to let the work to the lowest bidder, was held not to embrace more than one subject within the meaning of the constitutional provision in question.⁴

§ 200. Provision concerning form of tax laws.

The provision of the constitution of New York: "Every law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object;"¹ refers to state tax laws and has no application to local assessments for street improvements.² The constitution of Michigan provides, "every law which imposes, continues or revives a tax, shall distinctly state the tax, and the object to which it shall be applied, and it shall not be sufficient to refer to any other law to fix such tax or object."³ Under this provision, a statute which authorizes cities and villages to appropriate private property by eminent domain, and provides for ascertaining the amount of the damages, and the amount of special benefits conferred upon the property in the locality, and further provides for fixing the district which is deemed to be benefited by such improvement, and for determining the manner of such assessments, and then refers

³ State, Bergen County Savings Bank, Pros. v. Inhabitants of the Township of Union, in the County of Bergen, 44 N. J. L. (15 Vr.) 599 [1882].

⁴ Mills v. Charleton, 29 Wis. 400, 9 Am. Rep. 578 [1872]; (followed in Evans v. Sharp, 29 Wis. 564 [1872]). This point was queried, but not decided in Dean v. Charlton, 27 Wis. 522 [1871].

¹ Article III., § 24, Constitution of New York [1894]; Article III., § 20, Amended Constitution of New York [1846]; Article VII., § 13, Constitution of New York.

² Guest v. City of Brooklyn, 8 Hun. (N. Y.) 97 [1876]; In the matter of the Petition of Ford to Vacate an Assessment, 6 Lans. (N. Y.) 92 [1872].

³ Article XIV., § 14, Constitution of Michigan.

to an existing charter for the machinery of levying and collecting the assessment, and the form to be observed in such proceedings, is valid. The law states both the tax and the object, and the reference to the charter of the city merely concerns matters of detail.⁴

§ 201. Specific provisions securing right of trial by jury.

In many state constitutions are found provisions securing the right of trial by jury. Some of these provisions, which have been considered in cases involving the method of levying assessments, are as follows: "The right of trial by jury shall remain inviolate."¹ "The right of trial by jury shall be secured to all and remain inviolate, but in civil actions three-fourths of the jury may render a verdict."² "Trial by jury shall be as heretofore."³ "The right of trial by jury shall be secured to all and remain inviolate forever."⁴ "The right of trial by jury, except where it is otherwise provided in this constitution, shall remain inviolate. . . ."⁵ "The right of trial by jury as heretofore enjoyed shall remain inviolate."⁶ "The right of trial by

⁴ *Trowbridge v. City of Detroit*, 99 Mich. 443, 58 N. W. 368 [1894].

¹ Article I., § 12, Constitution of Alabama; Article II., § 7, Constitution of Arkansas; Article I., § 12, Constitution of Connecticut; Article I., § 20, Constitution of Indiana (as applied to civil cases); Article I., § 9, Constitution of Iowa; Article III., § 31, Constitution of Mississippi; Article I., § 6, Constitution of Nebraska; Article I., § 7, Constitution of New Jersey; Article I., § 15, Constitution of Rhode Island; Article I., § 11, Constitution of South Carolina; Article VI., § 6, Constitution of South Dakota; Article I., § 6, Constitution of Tennessee; Article I., § 15, Constitution of Texas; Article I., § 5, Constitution of Wisconsin.

A similar provision is found in Article II., § 23, Constitution of Colorado, with a provision that in civil cases a jury may consist of less than twelve men; in Article I., § 7, Constitution of Idaho, with a provision

that in civil actions three-fourths of the jury may render a verdict; in Article I., § 4, of the Constitution of Minnesota; Article I., § 21, Constitution of Washington; Article I., § 9, Constitution of Wyoming.

² Article I., § 7, Constitution of California.

³ Article I., § 4, Constitution of Delaware.

⁴ Article I., § 3, Constitution of Florida; Article I., § 3, Constitution of Nevada (with a provision for a three-fourths verdict unless the legislature requires unanimity by a statute passed by a two-thirds vote of all the members elected to each house of the legislature).

⁵ Article VI., § 18, Constitution of Georgia.

⁶ Article II., § 5, Constitution of Illinois; Article II., § 28, Constitution of Missouri (containing a further provision to the effect that a jury may consist of less than twelve men).

jury shall be inviolate.”⁷ “The ancient mode of trial by jury shall be held sacred and the right thereof remain inviolate, subject to such modifications as may be authorized by this constitution.”⁸ “In all civil suits and in all controversies concerning property, the parties shall have a right to trial by jury except in cases where it has heretofore been otherwise practiced.”⁹ “The inhabitants of Maryland are entitled to the common law of England and the trial by jury according to that law. . . .”¹⁰ “In all controversies concerning property and in all suits between two or more persons, except in cases in which it has heretofore been other ways used and practiced, the parties have a right to a trial by jury, and this method of procedure shall be held sacred unless in causes arising on the high seas and such as relate to mariners’ wages, the legislature shall hereafter find it necessary to alter it.”¹¹ “The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless demanded by one of the parties in such manner as may be prescribed by law.”¹² “The right of trial by jury shall be secured to all and remain inviolate. . . .”¹³ “The right of trial by jury in all cases in which it has been heretofore used shall remain inviolate forever. . . .”¹⁴ “In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people and ought to remain sacred and inviolate.”¹⁵ “In all cases the right of trial by jury shall remain inviolate.”¹⁶ “Trial by jury shall be as heretofore and the right thereof remain inviolate.”¹⁷ “. . . When any issue in fact, properly for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury which ought to

⁷ Article I., § 5, Constitution of Kansas; Article I., § 5, Constitution of Ohio.

⁸ § 7, Constitution of Kentucky [1891].

⁹ Article I., § 20, Constitution of Maine.

¹⁰ Article V., Declaration of Rights of Maryland.

¹¹ Article I., § 15, Constitution of Massachusetts. A similar provision is found in Part I., Article XX. of the Constitution of New Hampshire.

¹² Article VI., § 27, Constitution of Michigan.

¹³ Article III., § 23, Constitution of Montana, with a provision for a verdict of two-thirds of the jury; Article I., § 7, Constitution of North Dakota.

¹⁴ Article I., § 2, Constitution of New York.

¹⁵ Article I., § 13, Constitution of North Carolina.

¹⁶ Article I., § 17, Constitution of Oregon.

¹⁷ Article I., § 6, Constitution of Pennsylvania.

be held sacred.”¹⁸ “In controversies respecting property and in suits between man and man, trial by jury is preferable to any other and ought to be held sacred. . . .”¹⁹ “In suits at common law where the value in controversy exceeds twenty dollars, exclusive of interests and costs, the right of trial by jury if required by either party shall be preserved. . . .”²⁰

§ 202. Provisions not applicable to local assessments.

These provisions are held to be intended to secure and protect the right of trial by jury in cases where such right existed at common law. They are not intended, unless such affirmative intention is expressly stated, to extend the right of trial by jury to cases in which no such right existed at common law, as in cases of taxation. Accordingly an assessment statute is not made unconstitutional by these provisions because it makes no provision for having the question of benefits passed upon by a jury.¹

§ 203. Provisions applicable to eminent domain combined with assessment.

On the other hand it is not infrequently provided that the same commissioners or other assessing body, which is to act in determining the amount of the assessment shall also exact in determining the amount to be paid as compensation to the owners of property taken or injured by the improvement for which the assessment is levied. While no objection can be made to a stat-

¹⁸ Chapter I., Article XII, Constitution of Vermont.

¹⁹ Article I., § 11, Constitution of Virginia.

²⁰ Article III., § 14, Constitution of West Virginia.

¹ *Harris v. People ex rel. Knight*, 218 Ill. 439, 75 N. E. 1012 [1905]; *Stack v. People ex rel. Talbot*, 217 Ill. 220, 75 N. E. 347 [1905]; *Trig-ger v. Drainage District No. 1, etc.*, 193 Ill. 230, 61 N. E. 1114 [1901]; *Chicago & Alton Railroad Company v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077 [1894]; *Briggs v. Union Drainage District No. 1*, 140 Ill. 53, 29 N. E. 721 [1893]; *White v. People ex rel. City of Bloomington*, 94 Ill. 604 [1880]; *Rich v. City of Chi-*

cago, 59 Ill. 286 [1871]; *Baltimore and O. and C. Ry. Co. v. Ketring*, 122 Ind. 5, 23 N. E. 527; *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160 [1885]; (citing *Ross v. Davis*, 97 Ind. 79; *Indianapolis and Cumberland Gravel Road Co. v. Christian*, 93 Ind. 360; *Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 613); *In re Bradley*, 108 Ia. 476, 79 N. W. 280; *Howe v. City of Cambridge*, 114 Mass. 388 [1874]; *Mound City Land & Stock Co. v. Miller*, 170 Mo. 140, 94 Am. St. Rep. 727, 60 L. R. A. 190, 70 S. W. 721 [1902]; *Bishop v. Tripp*, 15 R. T. 466, 8 Atl. 692 [1887]; *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368,

ute which provides for conducting the assessment proceeding and the proceeding in eminent domain together,¹ yet there is generally a constitutional provision securing the right of trial by jury in eminent domain; and where this is the case, a statutory provision for submitting the determination of the question of damages and benefits to a body which is not a constitutional jury is unconstitutional as far as the assessment of damages is concerned.² Furthermore, where the amount of benefits and damages is to be stated as net result, all that is given for each tract being the difference between the gross amount of the damages and the gross amount of the benefits, it is evident that the assessing body cannot pass upon the amount of benefits, leaving a constitutional jury to pass upon the question of damages, and the entire statute is therefore invalid.³ The damages must be assessed by a jury in a condemnation suit before an assessment is made for special benefits.⁴

§ 204. Specific provisions for separation of governmental powers.

The state constitutions generally contain provisions for the separation of the three great governmental powers—the legislative, the executive and the judicial. In some constitutions this is effected by specific provisions,¹ which are substantially like

¹ See § 63 *et seq.*

² *Hutchins v. Vandalia Levee and Drainage District*, 217 Ill. 561, 75 N. E. 354 [1905]; *Stack v. People ex rel. Talbot*, 217 Ill. 220, 75 N. E. 347 [1905]; *Michigan Central Railroad Co. v. Spring Creek Drainage District*, 215 Ill. 501, 74 N. E. 696.

³ *Hull v. Sangamon River Drainage District*, 219 Ill. 454, 76 N. E. 701 [1906]; *Hutchins v. Vandalia Levee and Drainage District*, 217 Ill. 561, 75 N. E. 354 [1905].

"On the question of damages to lands not taken the jury would be bound to consider the effect of the improvement upon the land, both advantages and disadvantages, and for the purpose of reducing or balancing damages would necessarily take into account any special benefits. That is not assessing benefits for the land but is merely ascertaining

whether there is any damage or not." *Hull v. Sangamon River Drainage District*, 219 Ill. 454, 461, 76 N. E. 701 [1906]; (citing *Page v. Chicago, Milwaukee & St. Paul Railway Co.*, 70 Ill. 324).

⁴ *City of Joliet v. Spring Creek Drainage District*, 222 Ill. 441, 78 N. E. 836 [1906].

¹ Article III., §§ 1, 2, Constitution of Alabama; Article IV., § 1, Constitution of Arkansas; Article III., § 1, Constitution of California; Article III., Constitution of Colorado; Article II., Constitution of Connecticut; Article II., Constitution of Florida; Article I., § 11, Constitution of Georgia; Article III., § 96, Constitution of Indiana; Article III., § 1, Constitution of Iowa; § 27 Constitution of Kentucky; § 14, Constitution of Louisiana; Article 3, §§ 1, 2, Constitution of Maine; Article I., § 8,

the following provision from the constitution of Illinois: "The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter, expressly, directed or permitted."² In other constitutions the same result is accomplished by provisions conferring the separate kinds of governmental power upon the respective separate branches of government.

§ 205. General effect of such provisions.

Whether such provisions prevent the co-operation of these powers in matters of local assessment is a question which is occasionally presented to the courts for consideration. It is a special application of the broader question whether such provisions prevent the partial intermingling of these three branches of governmental power to make up the power of those officers often termed administrative officers. It is generally held that no such separation is demanded by these provisions. Indeed to insist on such separation of powers would be to render local government difficult if not impossible.¹ As far as the question of local assessments is concerned, these provisions do not prevent the legislature from providing for the co-operation of the legislative, executive and judicial powers in the levying and collection of assessments. Indeed, without such co-operation it is difficult to see how assessments could be levied and collected.

§ 206. Co-operation of courts in levy of assessment.

Statutory provisions which provide for the co-operation of the courts in the levy of local assessments are generally held not to

Constitution of Maryland; Article I., § 30, Constitution of Massachusetts; Article III., § 1. Constitution of Michigan; Article III., §§ 1, 2. Constitution of Mississippi; Article II., § 1 and Article III., Constitution of Missouri; Article IV., § 1. Constitution of Montana; Article III., § 1. Constitution of Nevada; Article III., § 1, Constitution of New Jersey; Article I., § 8. Constitution of North Carolina; Article III., § 1. Constitution of Oregon; Article IV. (in-

troducton). Constitution of Rhode Island; Article I., § 26. Constitution of South Carolina; Article II., Constitution of South Dakota; Article II., § 1. Constitution of Texas; Article II., § 6. Constitution of Vermont; Article I., § 7. and Article II., Constitution of Virginia; Article II., § 1. Constitution of Wyoming.

² Article III., Constitution of Illinois.

¹ See §§ 206, 207.

be invalidated by the constitutional provisions under discussion.¹ Thus a statute which provides that a drainage district can be formed only if the court on proper application shall find that the necessary precedent steps have been taken to form such district; that when the district is formed the commissioners thereof shall determine the amount necessary to be raised by special assessment to complete the proposed work; and that a jury under supervision of the court shall apportion the amount of such assessment among the different tracts of land benefited by such improvement, is not objectionable as an attempt to confer the power of taxation upon the judiciary.² A similar statute has been upheld on the ground that there is no delegation of legislative power, but that the duties thus imposed on the court are judicial in their nature.³ The validity of similar acts is recognized in other cases.⁴ So a provision for taking appeals in road assessment cases to the superior judge of the county, who is to file the transcript and docket the case, is not unconstitutional, as imposing a public and non-judicial employment upon a judge.⁵ The constitution of New York provided: "The judges of the Court of Appeals and the justices of the Supreme Court shall not hold any other office or public trust. . . ." ⁶ Under this provision a statute providing that the court shall appoint commissioners and confirm their reports, does not confer upon them another office or public trust, and is therefore valid.⁷ The power of the legislature to confer such powers and duties upon a court was questioned in an earlier case, on the theory that while acting under the statute, the judges were commissioners or quasi commissioners rather than a court.⁸ A statute granting power to the

¹ In the matter of Westlake Avenue, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

² Huston v. Clark, 112 Ill. 344 [1885].

³ State of Washington on the relation of Matson v. Superior Court for Skagit County, 42 Wash. 491, 85 Pac. 264 [1906].

⁴ Taylor v. Strayer, 167 Ind. 23, 78 N. E. 236 [1906].

⁵ Seanor v. Board of County Commissioners, 13 Wash. 48, 42 Pac. 552 [1895].

⁶ Article VI., § 10, Constitution of New York.

⁷ Striker v. Kelly, 2 Denio (N. Y.) 323 [Court of Errors, 1845]; (reversing on another point Striker v. Kelley, 7 Hill (N. Y.) 9 [1844]).

⁸ In the matter of the Petition of the Mayor, Aldermen and Commonalty of the City of New York in the matter of Enlarging and Extending Beekman Street in the City of New York, 20 John. (N. Y.) 269 [1819]. See also the dissenting opinion of Porter, J., in Striker v. Kelley, 2 Denio (N. Y.) 323 [1845], *supra*, in which he cites: In the matter of the Petition of the Mayor, Aldermen

court to set aside assessments for fraud and irregularity⁹ does not violate this provision. It does not confer any new jurisdiction, but merely extends to assessments the well established jurisdiction of the courts over frauds and legal irregularities.¹⁰ Under constitutional provisions to the effect that the legislature may vest in municipal authorities the power to make local improvements,¹¹ a statute providing that the city shall commence proceedings to levy local assessments; that the apportionment of assessments shall be made by commissioners appointed by the court; and that if objection to the assessment is made the court shall have power to correct irregularities therein, is valid, and is not objectionable as conferring upon the court the power to make assessments.¹² So a statute authorizing the court to determine in the first instance whether the proposed drainage scheme is practical and conducive to public welfare and whether it will increase the value of the lands which it is proposed to drain, is valid.¹³

§ 207. Action of administrative board as reviewing body.

On the other hand it has been claimed that statutes providing for a board, which is to hear complaints and decide questions of fact, in which the levy and apportionment of the assessment depends, are invalid as conferring judicial power, which by its nature should be conferred only upon a court. This claim, however, has failed in the cases in which it has been made and the courts have held such statutes valid,¹ on the ground that such

and Commonalty of the City of New York in the matter of Enlarging and Extending Beekman Street in the City of New York, 20 John. (N. Y.) 269 [1819]; *Stafford v. Mayor, Aldermen and Commonalty of the City of Albany*, 7 John. Sup. Ct. (N. Y.) 541 [1811]; *Matter of Third Street*, 6 Cowen (N. Y.) 571 [1827]; *Matter of Canal Street*, 11 Wend. (N. Y.) 154 [1834]; *Matter of Mount Morris Square*, 2 Hill (N. Y.) 14 [1842].

⁹ Act of April, 1858.

¹⁰ In the matter of the Petition of Beekman to Vacate Assessments, 19 How. (N. Y.) 518 [1860]; *Beek-*

man's Case, 11 Abb. Pr. (N. Y.) 164 [1860].

¹¹ Article VII., § 9, Constitution of Washington. See § 103 *et seq.*

¹² In the matter of Westlake Avenue, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

¹³ State of Washington on the relation of *Matson v. Superior Court for Skagit County*, 42 Wash. 491, 85 Pac. 264 [1906].

¹ *McGehee v. Mathis*, 21 Ark. 40 [1860]; (reversed on another point as *McGee v. Mathis*, 71 U. S. (4 Wall.) 143, 18 L. 314 [1866]); *Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771 [1890]; *Owners of*

board acts as a ministerial body and not as a judicial body.² So a statute which provides that the county surveyor is to keep the ditches constructed under the laws of the state in repair and certify the cost of such repair, including his own compensation to the county auditor, who is to draw his warrant in favor of such certificate upon the county treasurer, is not invalid as delegating judicial power to the surveyor.³ While judicial power cannot be conferred upon a non-judicial officer,⁴ the discretionary power here conferred is of a class that may be given to administrative, ministerial and executive officers.⁵ The constitution of California provides: "The legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town or municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal functions whatever."⁶ Under this section a statute providing for the appointment of commissioners who are to make a finding as to the amount necessary to meet the expense of the improvement, but who act under the direction of the municipality and whose acts are not binding or effective until they are approved and confirmed by the city council is not invalid as a delegation of municipal functions to such commissioners.⁷ The appointment of such commissioners is not a delegation of power to make or control a municipal improvement, since the commissioners are not, in legal effect, independent officials, but merely agents of the city for such purpose.⁸ So a statutory provision to the effect that the contractor shall collect the assessment is valid.⁹ In making such collection he acts as the agent of the municipality and not as an independent officer to whom munici-

Lands v. People ex rel. Stookey, 113 Ill. 296 [1886]; Heath v. McCrea, 20 Wash. 342 [1898]; Bellingham Bay Improvement Co. v. City of New Whatcom, 20 Wash. 53, 54 Pac. 774 [1898].

² McGehee v. Mathis, 21 Ark. 40 [1860]; Owners of Lands v. People ex rel. Stookey, 113 Ill. 296 [1886].

³ State ex rel. French v. Johnson, 105 Ind. 463, 5 N. E. 553 [1885].

⁴ Elmore v. Overton, 104 Ind. 548,

54 Am. Rep. 343, 4 N. E. 197.

⁵ State ex rel. French v. Johnson, 105 Ind. 463, 5 N. E. 553 [1885].

⁶ Article XI., § 13, Constitution of California.

⁷ Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771 [1890].

⁸ Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771 [1890].

⁹ Banaz v. Smith, 133 Cal. 102, 65 Pac. 309 [1901]; Sullivan v. Mier, 67 Cal. 264, 7 Pac. 691 [1885].

pal power has been delegated. A provision in an act of Congress to the effect that certain specified officers shall serve on the board of park commissioners for the District of Columbia, is valid, as it is merely an increase in the duties of existing officers, and not an attempt on the part of Congress to exercise the appointing power.¹⁰ The constitution of Illinois provides: "The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial; and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."¹¹ "The Governor shall nominate, and by and with the advice and consent of the Senate (a majority of all the members elected concurring by yeas and nays) appoint all officers whose offices are established by this constitution or which may be created by law and whose appointment or election is not otherwise provided for; and no such officer shall be appointed or elected by the General Assembly."¹² Under this section, a statute conferring additional powers and imposing additional duties upon existing officers already elected by the people is not unconstitutional as an appointment or election to office by the Legislature.¹³ Hence the county surveyor, county treasurer and sheriff may be constituted an appeal board to hear and decide all appeals from the drainage commissioners' orders confirming special assessments. Furthermore, such statute is not unconstitutional as conferring judicial powers upon a non-judicial body, since the power of passing on assessments in this manner is not regarded as judicial power.¹⁴ The statute may provide that the commissioners of highways of a town shall also be the drainage commissioners of a township.¹⁵ The Legislature may confer upon the township trustees a discretionary authority to determine when it is necessary to repair public drains.¹⁶

¹⁰ *Shoemaker v. United States*, 147 U. S. 282, 37 L. 170, 13 S. 361 [1893].

¹¹ Article III., Constitution of Illinois.

¹² Article V., § 10, Constitution of Illinois.

¹³ *Owners of Land v. People ex rel. Stookey*, 113 Ill. 296 [1886]; *Kil-*

gour v. Drainage Commissioners, 111 Ill. 342 [1885].

¹⁴ *Owners of Lands v. People ex rel. Stookey*, 113 Ill. 296 [1886].

¹⁵ *Kilgour v. Drainage Commissioners*, 111 Ill. 342 [1885].

¹⁶ *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600 [1887].

§ 208. Grant of taxing power to executive officer.

Under such provisions the power of levying taxes cannot be conferred upon an executive officer either directly or indirectly. A statute authorizing the tax assessor to determine whether certain work in the nature of removing from streams on the lands of the owner thereof, impediments to the flow thereof, has been done by such owner, and if he finds that it has not been done, to report such fact to the clerk, who is to extend a specific tax against such land, has, under these constitutional provisions, been held to be unconstitutional.¹

§ 209. Restriction on power to incur debts.

General provisions which forbid the pledging of public credit or the incurring of debts are usually so worded as not to apply to local assessments. If, under the law in force, the contractor by whom the improvement is constructed, is to look solely to the assessments for his compensation, and is to have no personal claim therefor against the public corporation which requires the improvement to be constructed, and which levies the assessment, such transaction creates no debt against such public corporation.¹ In such case the constitutional limitation as to the amount of indebtedness which such public corporation may contract does not apply.² The constitution of Louisiana provides: "The General Assembly shall have no power to contract or to authorize the contracting of any debt or liability on behalf of the state, or to issue bonds or other evidence of indebtedness thereof except for the purpose of repelling invasion, or as the suppression of insurrection."³ This provision restricts the power of the state and does not prevent the state from authorizing a levee district to incur debts.⁴ The further provision: "The funds, credit, property, or things of value of the state or of any political corporation thereof shall not be loaned, pledged or granted to or for any person or persons, association or corporation, public or private. . . ."⁵ does not prevent a levee district from issuing bonds for the con-

¹ Cleveland, C., C. & St. Louis Ry. Co. v. People ex rel., 212 Ill. 638, 72 N. E. 725.

² See Chapter XXVI.

³ Quill v. City of Indianapolis, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890]; Tuttle v. Polk & Hubbel, 92 Ia. 433, 60 N. W. 733 [1894].

⁴ Article XLIV., Constitution of Louisiana [1879].

⁵ Excelsior Planting & Manufacturing Company v. Green, 39 La. Ann. 455, 1 So. 873 [1887].

⁶ Article LVI., Constitution of Louisiana [1879].

struction of a levee, since such bonds are for the benefit of the district itself and not for the benefit of any other person or corporation.⁶ The provision of the constitution of California restricting indebtedness applies only to the public corporations which are specified therein, and does not prevent the legislature from authorizing other types of public corporations, such as irrigation districts,⁷ to incur indebtedness for public improvements for which assessments are to be levied, without the assent of two-thirds of the qualified voters of such district. Under the provision of the constitution of Arkansas, restricting the amount of indebtedness which may be incurred by a county, town or other municipality,⁸ it has been held that the words "county, town or other municipality," do not include an improvement district, which derives its powers from the Legislature, and in exercising them acts as agent of the property owners.⁹ The provision in the constitution of Kentucky,¹⁰ which provides that when a county or city "is authorized to contract an indebtedness it shall be required at the time time to provide for the collection of an annual tax sufficient to pay the interest," is not self-executing and requires legislation to make it operative.¹¹ The section limiting the amount of indebtedness which towns and cities may incur¹² is indeed self-executing and requires no legislation to make it operative,¹³ but by its terms it does not apply when the proposed indebtedness was authorized under laws in force prior to the adoption of such constitution.¹⁴ Accordingly, improvements authorized by such prior laws may be made and contracts entered into therefor after the adoption of such constitution, without reference to the amount of the existing indebtedness of the city or the amount of the debt to be created by such improvement; ¹⁵ at least until the Legislature provides by general

⁶ *Excelsior Planting & Manufacturing Company v. Green*, 39 La. Ann. 455, 1 So. 873 [1887].

⁷ In the matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675 [1891].

⁸ Article XVI., § 1. Constitution of Arkansas.

⁹ *Fitzgerald v. Walker*, 55 Ark. 148, 17 S. W. 702 [1891].

¹⁰ § 159, Constitution of Kentucky.

¹¹ *Holzhauser v. City of Newport*, 94 Ky. 396, 22 S. W. 752 [1893].

¹² § 158, Constitution of Kentucky.

¹³ *Holzhauser v. City of Newport*, 94 Ky. 396, 22 S. W. 752 [1893].

¹⁴ *City of Lexington on Appeal*, 96 Ky. 258, 28 S. W. 665 [1894]; *Holzhauser v. City of Newport*, 94 Ky. 396, 22 S. W. 752 [1893].

¹⁵ *City of Lexington on Appeal*, 96 Ky. 258, 28 S. W. 665 [1894]; *Holzhauser v. City of Newport*, 94 Ky. 396, 22 S. W. 752 [1893].

laws for the government of such cities.¹⁶ The constitution of Missouri provides: "No county, city, town, township, school district or other political corporation or subdivision of the state shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose."¹⁷ This provision does not prevent the Legislature from authorizing a general judgment against a city for its proportionate share of an assessment, based on the city's ownership of property abutting on the street for the improvement of which the assessment is levied.¹⁸

§ 210. Constitutional provisions for exemption from taxation.

In some of the state constitutions provisions are found exempting certain kinds of property from taxation. As considered in the law of local assessments these provisions are like the following: " . . . The property of the United States and of the state, counties, school districts and other municipal corporations, and such other property as the Legislature may by general laws provide, shall be exempt from taxation."¹ These provisions, as worded, generally refer to taxation in the more limited sense of the term, and do not include local assessments. The Legislature may, therefore, provide for levying local assessments against such land if it sees fit.² The greater number of constitutional provisions, however, merely permit the Legislature to exempt certain property, if it sees fit, and do not purport to make such exemption mandatory. The questions thus presented are chiefly statutory, and will be considered elsewhere.³ Furthermore, these provisions for exemption are exclusive and the Legislature cannot provide further

¹⁶ *City of Lexington on Appeal*, 96 Ky. 258, 28 S. W. 665 [1894].

¹⁷ Article X., § 12, Constitution of Missouri [1875].

¹⁸ *Barber Asphalt Paving Company v. City of St. Joseph*, 183 Mo. 451, 82 S. W. 64 [1904].

¹ Article VII., § 2, Constitution of Washington [1889]. See also the constitutional provisions quoted in § 146 *et seq.*

² *Hagar v. Gast*, 119 Ky. 502, 84

S. W. 556, 27 Ky. L. R. 129 [1905]; *Barber Asphalt Paving Co. v. City of St. Joseph*, 183 Mo. 451, 82 S. W. 64 [1904]; *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425, 74 S. W. 979 [1903]; *Winnona & St. P. R. Co. v. City of Watertown*, 1 S. D. 46, 44 N. W. 1072 [1890]; *In re Howard Avenue, North, in the City of Seattle*, 44 Wash. 62, 86 Pac. 1117 [1906].

³ See § 579 *et seq.*, § 618.

exemptions. The constitution of Illinois once provided: "The property of the state and counties, both real and personal, and such other property as the General Assembly may deem necessary for school, religious and charitable purposes, may be exempt from taxation."⁴ This provision was held to apply to general taxation only, and furthermore, to restrict the Legislature from granting any further exemptions. Accordingly it was held that the Legislature could not exempt a religious or charitable corporation from special assessments for local improvements.⁵ The constitution of Missouri provides: "The property, real and personal, of the state, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. . . ."⁶ Under this provision, a statute which authorizes a general judgment against a city for assessments levied against property owned by such city, for the improvement of abutting streets is valid.⁷

§ 211. Constitutional restrictions on amount of taxation—Specific provisions.

In some states are found constitutional provisions restricting and limiting the amount of the tax that may be levied. These provisions, as considered in the law of local assessments, are as follows: "No county, city, town, township, board of education or school district shall incur any indebtedness or liability in any manner or for any purpose exceeding, in any year, the income and revenue provided for such year. . . ."¹ "The tax rate of cities, towns, counties, taxing districts and other municipalities for other than school purposes, shall not, at any time, exceed the following rates upon the value of the taxable property therein. . . ."² "The state tax on property for all purposes whatever, including expenses of government, schools, levees and interest, shall not exceed in any one year six mills

⁴ Article IX., § 3, Constitution of Illinois [1848].

⁵ *City of Chicago v. Baptist Theological Union*, 115 Ill. 245, 2 N. E. 254 [1886].

⁶ Article X., § 6, Constitution of Missouri [1875].

⁷ *Barber Asphalt Paving Co. v. City of St. Joseph*, 183 Mo. 451, 82 S. W. 64 [1904].

¹ Article XI., § 18, Constitution of California, containing further certain exceptions to such provision such as authority to incur debt if consented to by two-thirds of the electors, or in case a sinking fund is provided sufficient to pay such debt in at least forty years.

² § 157, Constitution of Kentucky.

on the dollar of assessed valuation; . . . and no parish or municipal tax for all purposes whatsoever shall exceed ten mills on the dollar of valuation, provided that for the purpose of erecting and constructing public buildings, bridges and works of public improvement in parishes and municipalities, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the property taxpayers of such parish or municipality entitled to vote under the election laws of the state, and a majority of same voting at such election shall have voted therefor.”³ “No county, city, town, township, school district or other political corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose. . . .”⁴

§ 212. Application of such provisions to local assessments.

These provisions show by their phraseology that the sovereign authority that enacted them had in mind a taxation which could only be expressed and was necessarily stated in the form of a certain per centage of the valuation of the property taxed. Accordingly it is held that these provisions are limited in their application to general taxation, have no application to local assessments, and do not restrict the power of the Legislature to authorize the levy and collection of local assessments.¹

³ Article 209, Constitution of Louisiana [1879], Article 232 [1898].

⁴ Article X., § 12, Constitution of Missouri.

¹ Mayor and Aldermen of Birmingham v. Klein, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386 [1889]; In the Matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891]; Dyer v. City of Newport, — Ky. —, 80 S. W. 1127, 26 Ky. L. R. 204 [1904]; State ex rel. Hill v. Judges, 46 La. Ann. 1292, 16 So. 219 [1894]; George v. Young, 45 La. Ann. 1232, 14 So. 137 [1893]; Barber Asphalt

Paving Company v. Gogreve, 42 La. Ann. 251, 5 So. 848 [1889]; Barrow v. Helper, 34 La. Ann. 362 [1882]; Surget v. Chase, 33 La. Ann. 833 [1881]; Meier v. City of St. Louis, 180 Mo. 391, 79 S. W. 955; Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860 [1898]; Lamar Water & Electric Light Co. v. City of Lamar, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W. 756 [1895]; City of Clinton to use of Thornton v. Henry County, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893]; City of St. Joseph v. Owen, 110 Mo. 445, 19 S. W. 713 [1892]; Farrar v. City of St. Louis, 80 Mo. 379 [1883].

§ 213. Constitutional provisions for exemption from sale.

Specific provisions exempting certain kinds of property from forced sales, except for taxes due thereon, have been considered by the courts. Under the provision found in the constitution of Texas it was held, originally, that a local assessment was a tax within the meaning of the provision allowing forced sale of a homestead for taxes due thereon, and that according a homestead could be sold at forced sale to satisfy the lien of a local assessment.¹ Subsequently, however, this question was considered by the court, the original view abandoned, and the word "taxes" in such provision held not to include local assessments, with the result that a homestead was held to be exempt from forced sale for local assessments.² This change of judicial opinion was held not to amount to an impairment of the obligation of contracts entered into after the decision in *Lufkin v. City of Galveston*,³ and in reliance thereon, and prior to the decision in *Higgins v. Bordages*,⁴ and accordingly such contracts were controlled by the later decision as to the power to sell homesteads at forced sale to satisfy the lien of such assessments.⁵

§ 214. Referendum and emergency provisions.

The referendum and emergency provisions, which are found in some constitutions, have been considered as affecting local assessment. The constitution of Oregon provides: ". . . The second power is the referendum and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety) either by the petition signed by five per cent of the legal voters, or by the Legislative Assembly, as other bills are enacted. . . ." ¹ "No act shall take effect until ninety days from the end of the session, at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or the body of the law." ² The

¹ *Lufkin v. City of Galveston*, 58 Tex. 545 [1883]; construing Article XVI., § 50, Constitution of Texas.

² *Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770, 31 S. W. 52, 803 [1895]; (overruling *Lufkin v. City of Galveston*, 58 Tex. 545 [1883]); *Kettle v. City of Dallas*, 35 Tex. Civ. App. 632, 80 S. W. 874 [1904].

³ 58 Tex. 545 [1883].

⁴ 88 Tex. 458, 53 Am. St. Rep. 770, 31 S. W. 52, 803 [1895].

⁵ *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154 [1896].

¹ Article IV., § 1, Constitution of Oregon [as amended 1902].

² Article IV., § 28, Constitution of Oregon [1857].

decision of the Legislature that a given law is an emergency matter, is held to be conclusive and not susceptible of judicial review.³ Accordingly the declaration of the Legislature, that the charter of Portland is an emergency matter, causes it to go into effect at once, and as it may fairly be regarded as concerning the public peace, health and safety, prevents the application of the referendum clause.⁴

§ 215. Home rule provisions.

Certain constitutional provisions conferring upon cities the right to frame charters for themselves have been considered in connection with the law of local assessments.¹ The constitution of Missouri provides: "Any city having a population of more than one hundred thousand may frame a charter for its own government consistent with and subject to the constitution and laws of the state. . . ." ² A charter adopted by the vote of the people of a city having such population and consistent with the constitution and laws of the state has the force and effect of an act of the Legislature.³ Under this constitutional provision, a city within such specified class may frame a charter which provides that every special tax bill shall become a lien upon the lands assessed on the date of the receipt given to the Board of Public Works for such tax bill; that such lien shall continue for two years, unless suit shall be brought to collect and enforce the lien within that time; in which case, the lien shall continue until the determination of such suit; provided, that in case of commencing such suit the plaintiff shall file in the office of the city treasurer a statement showing the tax bill sued upon, and showing in what court the suit is brought, when it is brought, and against whom it is brought.⁴ The pro-

³ Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222 [1903]; (citing and following State ex rel. Lavin v. Bacon, 14 S. D. 284, 85 N. W. 225).

⁴ Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222 [1903].

¹ Turner v. Snyder, 101 Minn. 481, 112 N. W. 868 [1907]; Haag v. Ward, 186 Mo. 325, 85 S. W. 391 [1904].

² Article IX., § 16, Constitution of Missouri.

³ Meier v. City of St. Louis, 180 Mo. 391, 79 S. W. 955 [1903]; Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860 [1898]; Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600; State ex rel. Kansas City v. Field, 99 Mo. 352, 12 S. W. 802.

⁴ Haag v. Ward, 186 Mo. 325, 85 S. W. 391 [1904].

visions up to this point are valid, since they may be sustained on the ground that such notice must be given to *bona fide* purchasers to make such suit notice as against them. However, the charter proceeded to provide that in case of failure to file such notice, the land should be free from the lien of such assessment and the lien of any judgment rendered thereon, and should not be sold for such judgment. This provision was not restricted to cases where *bona fide* grantees had acquired interests in such realty, but applied to cases where the original owner retained his rights in such property. The general laws of the state contain no provision destroying the lien of an assessment in such cases, and such charter provision was accordingly held to be invalid.⁵ The constitution of Washington provides: ". . . Any city containing a population of twenty thousand inhabitants or more shall be permitted to frame a charter for its own government consistent with and subject to the constitution and laws of this state. . . ." ⁶ Under this constitutional provision a city cannot adopt an article in its charter to the effect that "no action shall be brought or maintained to test or question the validity of any assessment unless the plaintiff shall first pay into court the amount of the assessed tax."⁷ In the absence of a constitutional provision permitting cities to frame their own charters a statute giving such authority is invalid as being in violation of the clause in the constitution forbidding special legislation and requiring legislation to be uniform.⁸ In Minnesota a provision securing to cities the right to frame their governments was subsequently adopted into the constitution.⁹ Under such provisions the power of local assessment is held to be implied.¹⁰ The Legislature may provide that cities, incorporated under special charters when such charters were valid, may by vote of the electors, adopt the provisions of the general

⁵ *Haag v. Ward*, 186 Mo. 325, 85 S. W. 391 [1904].

⁶ Article XI, § 7, Constitution of Washington [1889].

⁷ *Wilson v. City of Seattle*, 2 Wash. 543, 27 Pac. 474 [1891].

⁸ *State of Minnesota ex rel. City of St. Paul v. District Court*, 72 Minn. 226, 71 Am. St. Rep. 480, 75 N. W. 224 [1898]; *State ex rel. Childs v. Copeland*, 66 Minn. 315, 61 Am. St.

Rep. 410, 34 L. R. A. 777, 69 N. W. 27 [1896].

⁹ *State ex rel. Ryan v. District Court of Ramsey County*, 87 Minn. 146, 91 N. W. 300 [1902].

¹⁰ *State ex rel. Ryan v. District Court of Ramsey County*, 87 Minn. 146, 91 N. W. 300 [1902]; See also *Turner v. Snyder*, 101 Minn. 481, 112 N. W. 868 [1907].

law incorporating cities, passed after the clause requiring uniformity of legislation was adopted into the constitution.¹¹

§ 216. Provisions concerning method of amending constitution.

Questions concerning the validity of constitutional amendments are occasionally prescribed in the law of assessments. Apart from the law of assessments, and as a general question, the courts have power to decide whether a given amendment has been adopted in the method prescribed by the constitution,¹ except in cases where the constitution itself has provided for some special tribunal whose decision on this question is to be final.² A limited exception to this general principle is found in cases in which the question is as to the validity of the very constitution under which the court derives its authority; a question which, it is held, such court cannot pass upon.³

The constitution of California provides: " . . . If two-thirds of all members elected to each of the two houses shall vote in favor thereof, such proposed amendment, or amendments, shall be entered in the journals with the yeas and nays taken thereon. . . . " ⁴ Under this provision a proposed amendment concerning local assessment was passed by the requisite majority in the Legislature, was not spread in full upon the journal of the Legislature but was referred to by title and number; and was voted for by the requisite majority. Upon the question whether such failure to enter the amendment at length upon the journal invalidated the amendment the court at first divided, a majority of the court in one case holding that such omission

¹¹ *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615 [1887]; See §§ 176, 177 and 178.

¹ *Collier v. Frierson*, 24 Ala. 100; *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221; *Koehler v. Hill*, 60 Ia. 543, 14 N. W. 738, 15 N. W. 609; *Secombe v. Kittleson*, 29 Minn. 555, 12 N. W. 519; *State v. Young*, 29 Minn. 474, 9 N. W. 737; *State ex rel. McClurg v. Powell*, 77 Miss. 543, 48 L. R. A. 652, 27 So. 927; *Edwards v. Lesueur*, 132 Mo. 410, 31 L. R. A. 815, 33 S. W. 1130; *State ex rel. Woods v. Tooker*, 15 Mont. 8, 25 L. R. A. 560, 37 Pac. 840; *State ex rel.*

v. Wurts, 63 N. J. L. (34 Vr.) 289, 45 L. R. A. 251, 43 Atl. 744; *State ex rel. v. Rogers*, 56 N. J. L. (27 Vr.) 480, 23 L. R. A. 354, 28 Atl. 726, 29 Atl. 173; *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N. W. 785 [1882].

² *Worman v. Hagan*, 78 Md. 152, 21 L. R. A. 716, 27 Atl. 616; *Miles v. Bradford*, 22 Md. 170, 85 Am. Dec. 643; *Dennett, Petitioner*, 32 Me. 508, 54 Am. Dec. 602.

³ *Luther v. Borden*, 48 U. S. (7 How.) 1, 12 L. 581.

⁴ Article XVIII., § 1, Constitution of California [1879].

invalidated the amendment,⁵ and in another that it did not.⁶ It was finally held that such omission did not invalidate such amendment.⁷ The constitution of Oregon provides: "While an amendment, or amendments, which shall have been agreed upon by one legislative assembly shall be awaiting the action of a legislative assembly, or of the electors, no additional amendment or amendments shall be proposed. . . ."⁸ In construing this provision it was held that a second amendment could not be introduced while a former one was "awaiting the action of a legislative assembly," even if they referred to different provisions of the constitution. It was further held in construing this provision that the Legislature, which was to pass a second time upon the proposed constitutional amendment before it was submitted to popular vote, was the Legislature chosen next after the Legislature which had passed such amendment; that if such Legislature next chosen did not act on such amendment it was no longer "awaiting the action of a legislative assembly," and that new amendments might be introduced.⁹

§ 217. Provisions concerning form of amending statute.

Provisions with reference to the form of an amending statute have been considered in some cases involving assessments. The constitution of Pennsylvania provides: "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."¹ Under this section it has been held that a statute,² which provides, "in exercising the power aforesaid, all proceedings for the ascertaining of damages and the assessment of

⁵ *Oakland Paving Company v. Hilton*, 69 Cal. 479, 11 Pac. 3 [1886].

⁶ *Thomason v. Ruggles*, 69 Cal. 465, 11 Pac. 20 [1886].

⁷ *Oakland Paving Co. v. Tompkins*, 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801; (followed in *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615 [1887]). In other jurisdictions the opposite result has been reached: *State ex rel. v. Tusly*, 19 Nev. 391, 3 Am. St. Rep. 895, 12 Pac. 835; An amendment copied on the journal

in different phraseology from that which was submitted to the people and voted on by them has been held to be invalid. *Koehler v. Hill*, 60 Ia. 543, 14 N. W. 738, 15 N. W. 609.

⁸ Article XVII., § 2, Constitution of Oregon.

⁹ *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222 [1903].

¹ Article III., § 6, Constitution of Pennsylvania [1874].

² Act of May, 1895, § 2, P. L. 105.

benefits incident thereto shall be as now provided by law in reference to payment of cases, damages and expenses of public improvements within municipal corporations" is valid.³ The constitution of Illinois provides: ". . . No law shall be revised or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act."⁴ Under this provision it was held that a statute entitled "an act in regard to the completion of public parks and the management thereof," which contains a subject-matter fairly corresponding to such title, would not be regarded as intended primarily to amend the acts concerning Lincoln Park in the city of Chicago, since the court could not assume that there were no other uncompleted parks within the state; and accordingly such statute was held to be valid, even as applying as a general law to Lincoln Park, although it did not set forth at length the prior statutes concerning Lincoln Park, which were in effect amended by such act.⁵ Under a similar provision, an amendatory statute which repeats the title of the amended statute correctly with the exception of one word, the word "execute" being inserted in place of the correct word "exercise," but the meaning being substantially the same, has been upheld.⁶

§ 218. Constitutional provisions regulating jurisdiction.

A group of constitutional provisions which regulate the jurisdiction of certain courts have been operative in the law of local assessments. The constitution of Louisiana provides: "The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases when the matter in dispute or the fund to be distributed, whatever may be the amount therein claimed, shall exceed one thousand dollars, exclusive of interest, to suits for divorce and separation from bed and board, and to all cases in which the constitutionality of any tax, toll or import whatever, . . . shall be in contestation, whatever may be the amount thereof, and in such cases the appeal on the law and the fact shall be directly

³ *In re Greenfield Avenue*, Appeal of the City of Pittsburg, 191 Pa. St. 290, 43 Atl. 225 [1899].

⁴ Article IV., § 13, Constitution of Illinois [1870].

⁵ *Hundley & Rees v. Commissioners of Lincoln Park*, 67 Ill. 559 [1873].

⁶ *Ray v. City of Jeffersonville*, 90 Ind. 567 [1883].

from the court in which the case originated to the Supreme Court. . . . ”¹ Whether, within the meaning of this clause an assessment is a tax so that the Supreme Court has jurisdiction of a case involving an assessment, irrespective of the amount thereof, is a question upon which the court has rendered decisions apparently conflicting. Levee assessments were once held not to be taxes within the meaning of this provision.² Subsequently the court held that though such charges for the construction of levees were based upon the theory of benefits and were properly speaking assessments, yet, as they were generally termed taxes, they would be regarded as taxes with reference to the jurisdiction of the Supreme Court.³ At the same time other kinds of assessments,⁴ such as those for curbing and gutting⁵ and paving,⁶ have been held not to be taxes within the meaning of this constitutional provision; and hence, not within the jurisdiction of the Supreme Court, unless of the amount specified. The constitution of Illinois provides: “. . . County Courts . . . shall have original jurisdiction . . . in proceedings for the collection of taxes and assessments. . . . ”⁷ This provision does not confer exclusive jurisdiction upon the County Court, but such jurisdiction may also be conferred upon the Circuit Court.⁸ The constitution of Illinois also provides: “The Supreme Court . . . shall have original jurisdiction in cases relating to the revenue. . . . ”⁹ This provision does not confer exclusive jurisdiction upon the Supreme Court.¹⁰ These questions are considered elsewhere with reference to procedure in assessment cases, and in connection with statutory provisions.¹¹

¹ Article 81, Constitution of Louisiana.

² *Police Jury v. Mitchell*, 37 La. Ann. 44; *Board of Levee Commissioners v. Lorio Bros.*, 33 La. Ann. 276 [1881].

³ *State ex rel. Hill v. Judges*, 46 La. Ann. 1292, 16 So. 219 [1894]: In the opinion in this case the court points out that for other purposes, such as with reference to the constitutional provisions requiring uniformity of taxation and those restricting the amount of taxation, an assessment is not a tax.

⁴ *Fayssoux v. Denis*, 48 La. Ann. 850, 19 So. 760 [1896]; *Rooney v. Brown*, 21 La. Ann. 51 [1869].

⁵ *Rooney v. Brown*, 21 La. Ann. 51 [1869].

⁶ *Fayssoux v. Denis*, 48 La. Ann. 850, 19 So. 760 [1896].

⁷ Article VI., § 18, Constitution of Illinois [1870].

⁸ *Hundley & Rees v. Commissioners of Lincoln Park*, 67 Ill. 559 [1873].

⁹ Article VI., § 2, Constitution of Illinois [1870].

¹⁰ *Hundley & Rees v. Commissioners of Lincoln Park*, 67 Ill. 559 [1873].

¹¹ See §§ 911, 1369 *et seq.*

§ 219. Law dependent for effect on future action.

As in the case of other laws, there is no constitutional objection to the passage of an assessment act which is not to take effect until the happening of some future events.¹ Such statute is not a delegation of the legislative power, if the happening of such future facts depends upon the will of third persons.² Thus an assessment statute may require the presenting of a petition,³ and the official finding of certain facts⁴ in order that it may take effect. A statute for the organization of a drainage district may require that a petition therefor is to be presented to the County Court and the necessary facts found to be true before the corporation comes into existence.⁵ A city ordinance may provide that it shall not take effect until certain suits, then pending, shall have been dismissed.⁶ So a law to take effect upon acceptance thereof by the municipality is valid.⁷ So by statute park commissioners may become corporate authorities upon the vote of the people within such park district. Subsequently the legislature may modify the powers and duties of such park commissioners without submitting such supplementary and amendatory act to popular vote.⁸

§ 220. Provisions securing redress for injury to property.

The constitution of Wisconsin provides: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."¹ Similar provisions are found in many jurisdictions. Among them are the following: "All courts shall be open; and every man for injury done to him in

¹ *Guild, Jr. v. City of Chicago*, 82 Ill. 472 [1876].

² *Blake v. People for use of Caldwell*, 109 Ill. 504 [1884]; *Mayor and City Council of Baltimore v. Clunet*, 23 Md. 449 [1865].

³ *Blake v. People, for use of Caldwell*, 109 Ill. 504 [1884].

⁴ *Blake v. People, for use of Caldwell*, 109 Ill. 504 [1884].

⁵ *Blake v. People, for use of Caldwell*, 109 Ill. 504 [1884].

⁶ *Mayor and City Council of Baltimore v. Clunet*, 23 Md. 449 [1865].

⁷ *Guild, Jr., v. City of Chicago*, 82 Ill. 472 [1876]; *Borgman v. City of Antigo*, 120 Wis. 296, 97 N. W. 936 [1904]; *Adams v. City of Beloit*, 105 Wis. 363, 47 L. R. A. 441, 81 N. W. 869 [1900].

⁸ *Andrews v. People ex rel. Rumsey*, 83 Ill. 529 [1876].

¹ Article I., § 9, Constitution of Wisconsin [1848].

his person property or reputation shall have due course of law. Justice shall be administered freely and without purchase; completely and without denial; speedily and without delay.”² “No court shall be secret, but justice shall be administered openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in person, property or reputation.”³ “All courts shall be open and every person for an injury done him in his land, goods, person or reputation shall have remedy by due course of law; and justice administered without denial or delay.”⁴ “Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries and wrongs which he may receive in his person, property or character; he ought to obtain right and justice freely and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws.”⁵ These provisions do not invalidate a statute providing for a re-assessment of benefits and damages arising out of a street improvement, the original assessment being invalid.⁶ Under such constitutional provision a statute which provides that as a condition precedent to the right to bring an action to set aside an illegal assessment or special tax, the owner of the property so assessed must first pay such tax is unconstitutional, as amounting to a denial of justice.⁷

§ 221. Other constitutional provisions.

The constitution of California at one time contained a provision, “No public work or improvement of any description whatsoever shall be done or made in any city in, upon or about the streets thereof or otherwise, the cost and expense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment in proportion to benefits on the property to be affected or benefited shall be levied, collected

² Article I., § 12, Constitution of Indiana.

³ Article I., § 10, Constitution of Oregon [in effect 1859].

⁴ Article I., § 16, Constitution of Ohio [1851].

⁵ Chapter I., Article 4, Constitu-

tion of Vermont [1793].

⁶ *Haubner v. City of Milwaukee*, 124 Wis. 153, 101 N. W. 930 [1905]; (rehearing denied 102 N. W. 578 [1905]).

⁷ *Weller v. City of St. Paul*, 5 Minn. 70, 5 Gilf. 95 [1861].

and paid into the city treasury before such work or improvement shall be commenced or any contract for letting or doing the same authorized or performed. . . . ”¹ Such provision was held to be self-executing, to require no legislation to enforce it, and to render invalid a statute enacted prior to the adoption of such constitutional provision,² and inconsistent therewith.³ This section of the constitution was subsequently amended by re-enacting it with the omission of the sentence quoted.⁴ The constitution of California provides: “A mortgage, deed of trust, contract or other obligation by which a debt is secured, shall for the purposes of assessment and taxation be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi public corporations, in case of debt so secured, the value of the property affected by such mortgage, deed of trust, contract or obligation less the value of such security shall be assessed and taxed to the owner of the property and the value of such security shall be assessed and taxed to the owner affected thereby is situate. . . . ”⁵ A special assessment for benefits is not a tax within the meaning of this provision.⁶ Accordingly a statute which provides for levying an assessment upon the property in an assessment district without deducting from the value of such property the amount of any mortgages which might affect such property is valid.⁷ Under a constitutional provision requiring an appropriation by law for paying money out of the county treasury,⁸ it has been held that a statute which provides that the county surveyor shall keep the ditches in repair and shall certify the cost thereof, including his own per diem compensation to the county auditor, who shall then draw his warrant in favor of the holder of each certificate upon the county treasurer, who shall pay it, the county treasury to be reimbursed subsequently by assessments against the realty benefited by such repairs, is constitutional, since such statute setting

¹ Article XI., § 19 Constitution of California [1879].

² Act of April 1st, 1872.

³ McDonald v. Patterson, 54 Cal. 245 [1880].

⁴ Oakland Paving Co. v. Tompkins, 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801; (followed in Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615

[1887]); Amendment approved Feb. 14, 1883, and ratified Nov. 4, 1884.

⁵ Article XIII., § 4, Constitution of California.

⁶ Tregea v. Owens, 94 Cal. 317, 29 Pac. 643 [1892].

⁷ Tregea v. Owens, 94 Cal. 317, 29 Pac. 643 [1892].

⁸ Article X., § 3, Constitution of Indiana.

aside as much of the county's revenues as is necessary to pay the cost of such repairs "is in legal effect an appropriation by law of so much of the county revenues of the several counties as is necessary to keep the ditches of the state in repair."⁹

⁹ State ex rel. French v. Johnson,
105 Ind. 463, 468, 5 N. E. 553
[1885].

CHAPTER VI.

NECESSITY OF STATUTORY AUTHORITY FOR ASSESSMENT.

§ 222. Assessment not inherent power.

A municipal corporation has no inherent power to levy local assessments for special benefits accruing to property by reason of a public improvement.¹ No such power is conferred upon a municipal corporation by any rule of the common law.²

§ 223. Power to assess for benefits must be conferred by written law.

The power of levying special assessments to pay for the cost of constructing public improvements which confer some special local benefit not being an inherent power, and not existing at common law, it follows therefore that a municipal corporation does not possess such power unless it is conferred upon it by some express provision of the written law. The constitutions of the different states do not usually contain provisions conferring such power, though the power of levying local assessments has been construed to exist under a home-rule provision by implication.¹ Accordingly in most states such power can exist only

¹ "The power to levy them (i. e. local assessments) is not inherent in any public corporation, but must be directly conferred by statute." *City of Greensboro v. McAdoo*, 112 N. C. 359, 362, 17 S. E. 178 [1893].

² *City of Henderson v. Lambert*, 77 Ky. (14 Bush.) 24 [1878]; "But the obligation of lot-owners to pay for improving streets does not rest alone on the ground that they are benefited by such improvements and therefore ought in natural justice to pay for them. That they are benefited furnishes the foundation for legislative power to require them to pay but does not raise an implied assump-

sit. There is no common-law liability resting upon lot-owners to pay for the improvement of an adjacent street. Whatever liability they are subject to is created by statute and all such statutes must be construed most strictly against those asserting claims under them." *City of Henderson v. Lambert*, 77 Ky. (14 Bush.) 24, 30, 31 [1878]. See §§ 15, 17, 230 *et seq.*

¹ *State ex rel. Ryan v. District Court of Ramsey County*, 67 Minn. 146, 91 N. W. 300. For special constitutional provisions concerning the power of assessment, see § 103 *et seq.*

if conferred upon municipal corporations by statute.² "It is from the state only that a municipality has power to levy an

² *Watkins v. Griffith*, 59 Ark. 344, 27 S. W. 234 [1894]; *City Street Improvement Co. v. Babcock*, 139 Cal. 690, 73 Pac. 666 [1903]; *San Diego Investment Co. v. Shaw*, 129 Cal. 273, 61 Pac. 1082 [1900]; *Ede v. Cuneo*, 126 Cal. 167, 58 Pac. 538 [1899]; *Kelso v. Cole*, 121 Cal. 121, 53 Pac. 353 [1898]; *Durrell v. Dooner*, 119 Cal. 411, 51 Pac. 628 [1897]; *Schwiesau v. Mahon*, 110 Cal. 543, 42 Pac. 1065 [1895]; *Shipman v. Forbes*, 97 Cal. 572, 32 Pac. 599 [1893]; *Reclamation District No. 3 v. Kennedy*, 58 Cal. 124 [1881]; *Hagar v. Board of Supervisors of Yolo County*, 51 Cal. 474, [1876]; *City of Stockton v. Whitmore*, 50 Cal. 554 [1875]; *Hewes v. Reis*, 40 Cal. 255 [1870]; *Chambers v. Satterlee*, 40 Cal. 497 [1871]; *Nicholson Pavement Co. v. Painter*, 35 Cal. 699 [1868]; *Dougherty v. Hitchcock*, 35 Cal. 51 [1868]; *Himmelmänn v. Danos*, 35 Cal. 441 [1868]; *Smith v. Cofran*, 34 Cal. 310 [1867]; *Haskell v. Bartlett*, 34 Cal. 281 [1867]; *Mayo v. Ah Loy*, 32 Cal. 477, 91 Am. Dec. 595 [1867]; *Taylor v. Conner*, 31 Cal. 481 [1866]; *Creighton v. Manson*, 27 Cal. 614 [1865]; *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825 [1887]; *Fair Haven & Westville Railroad Co. v. City of New Haven*, 77 Conn. 494, 59 Atl. 737 [1905]; *Angus v. City of Hartford*, 74 Conn. 27, 49 Atl. 192 [1901]; *Harris v. City of Ansonia*, 73 Conn. 359, 47 Atl. 672 [1900]; *Keifer v. City of Bridgeport*, 68 Conn. 401, 36 Atl. 801 [1896]; *Gilpin v. City of Ansonia*, 68 Conn. 72, 35 Atl. 777 [1896]; *Sargent & Co. v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. 1028 [1895]; *Croft v. City of Danbury*, 65 Conn. 294, 32 Atl. 365; *McLauren v. City of Grand Forks*, 6 Dak. 397, 43 N. W. 710 [1889]; *District of Columbia v. Weaver*, 6 App. D. C. 482 [1895]; *Allman v. District*

of Columbia, 3 App. D. C. 8 [1894]; *Johnson v. District of Columbia*, 6 Mackey (D. C.) 21 [1887]; *Alexander v. Dennison*, 2 McArthur (D. C.) 562 [1876]; *Halliday v. City of Atlanta*, 96 Ga. 377, 23 S. E. 406 [1895]; *City of Chicago v. Blair*, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829 [1894]; *City of Chicago v. Law*, 144 Ill. 569, 33 N. E. 855 [1893]; *Wright v. City of Chicago*, 20 Ill. 252 [1858]; *Dunkle v. Herron*, 115 Ind. 470, 18 N. E. 12 [1888]; *Churchman v. City of Indianapolis*, 110 Ind. 259, 11 N. E. 301 [1886]; *Phillips v. Lewis*, 109 Ind. 62, 9 N. E. 395 [1886]; *Case v. Johnson*, 91 Ind. 477 [1883]; *Merrill v. Abbott*, 62 Ind. 549 [1878]; *Maberry v. City of Jeffersonville*, 38 Ind. 198 [1871]; *Wilson v. Poole*, 33 Ind. 443 [1870]; *Palmer v. Stumph*, 29 Ind. 329 [1868]; *City of Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989 [1904]; *Town of Clay City v. Bryson*, 30 Ind. App. 490, 66 N. E. 498 [1903]; *People ex rel. Hanberg v. Peyton*, 214 Ill. 376, 73 N. E. 768 [1905]; *Gray v. Town of Cicero*, 177 Ill. 459, 53 N. E. 91 [1899]; *Lingle v. City of Chicago*, 172 Ill. 170, 50 N. E. 192 [1898]; *Robeson v. People ex rel. Curry*, 161 Ill. 176, 43 N. E. 619 [1896]; *McChesney v. People ex rel. Kern*, 148 Ill. 221, 35 N. E. 739 [1894]; *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; *City of Chicago v. Law*, 144 Ill. 569, 33 N. E. 855 [1893]; *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172 [1893]; *Badger v. Inlet Drainage District*, 141 Ill. 540, 31 N. E. 170 [1893]; *City of Carlyle v. County of Clinton*, 140 Ill. 512, 30 N. E. 782 [1893]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]; *Louisville & Nashville Railroad Co. v. City of East St. Louis*, 134 Ill. 656, 25 N. E. 962 [1891]; *Ganen v.*

assessment on property for street work. In the absence of a delegation of such power, its efforts in that direction would be

Moredock and Ivy Landing Drainage District No. 1, 131 Ill. 446, 23 N. E. 633 [1890]; *People ex rel. Huck v. Pierce*, 90 Ill. 85 [1878]; *Guild, Jr. v. City of Chicago*, 82 Ill. 472 [1876]; *Taylor v. People*, Reed, 66 Ill. 322 [1872]; *Workmen v. City of Chicago*, 61 Ill. 463 [1871]; *Skinner v. City of Chicago*, 42 Ill. 52 [1866]; *Scammon v. City of Chicago*, 40 Ill. 146 [1866]; *Lill v. The City of Chicago*, 29 Ill. 31 [1862]; *Fort Chartres & Ivy Landing Drainage & Levee District No. 5 v. Smalkand*, 70 Ill. App. 449 [1897]; *Independent School District of Burlington v. City of Burlington*, 60 Ia. 500, 15 N. W. 295 [1883]; *Ankeny v. Hennigsen*, 54 Ia. 29, 6 N. W. 65 [1880]; *Wardens & Vestry of Christ's Church v. City of Burlington*, 39 Ia. 224 [1874]; *Merriam v. Moody's Executors*, 25 Ia. 163 [1868]; *Worthington v. City of Covington*, 82 Ky. 265 [1884]; *City of Henderson v. Lambert*, 77 Ky. (14 Bush. 24 [1878]; *Murray v. Tucker*, 73 Ky. (10 Bush.) 241 [1874]; *Caldwell v. Rupert*, 73 Ky. (10 Bush.) 179 [1873]; *Broadway Baptist Church v. McAtee*, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871]; *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304 [1885]; *Sleeper v. Bullen*, 6 Kan. 300 [1870]; *Martin v. City of Oskaloosa*, 126 Ia. 680, 102 N. W. 529 [1905]; (opinion in this case reported in 99 N. W. 557, [1904] withdrawn); *Barber Asphalt Paving Co. v. Watt*, 51 La. Ann. 1345, 26 So. 70 [1899]; *Surget v. Chase*, 33 La. Ann. 833 [1881]; *Sirgi v. Matthews*, 24 La. Ann. 613 [1872]; *Second Municipality of New Orleans v. McDonogh*, 9 Rob. (La.) 408 [1845]; *Henderson v. Mayor and City Council of Baltimore use of Eschbach*, 8 Md. 352 [1855]; *Mayor, etc., of Baltimore v. Moore*, 6 H. & J. (Md.) 375 [1825]; *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 228 [1890]; *State v.*

Foster, 94 Minn. 412, 103 N. W. 14 [1905]; *McComb v. Bell*, 2 Minn. 295 [1858]; *City of St. Louis v. Koeh*, 169 Mo. 587, 70 S. W. 143 [1902]; *West v. Porter*, 89 Mo. App. 150 [1901]; *City of St. Joseph to the use of the Saxton National Bank v. Landis*, 54 Mo. App. 315 [1893]; *Fruin-Bambrick Construction Co. v. Geist*, 37 Mo. App. 509 [1889]; *Trephagen v. City of South Omaha*, 69 Neb. 577; 96 N. W. 248 [1903]; *Farmers' Loan & Trust Co. v. Hastings*, 2 Neb. Unoff. 337; 96 N. W. 104 [1902]; *City of South Omaha v. Tighe*, 67 Neb. 572, 93 N. W. 946 [1903]; *Morse v. City of Omaha*, 67 Neb. 426, 93 N. W. 734 [1903]; *Harmon v. City of Omaha*, 53 Neb. 164, 73 N. W. 671 [1897]; *Bellevue Improvement Co. v. Village of Bellevue*, 39 Neb. 876, 58 N. W. 446 [1894]; *Farmers' Loan & Trust Co. v. Hastings*, 2 Neb. Unoff. 337, 96 N. W. 104 [1902]; *Mayor of East Orange v. Hussey*, 72 N. J. L. (43 Vr.) 71, 59 Atl. 1060 [1905]; *State, Harris, Pros. v. Mayor, Aldermen, etc., of Jersey City*, 38 N. J. L. (9 Vr.) 85 [1875]; *Nehasane Park Association v. Lloyd*, 167 N. Y. 431, 60 N. E. 741 [1901]; *Stebbins v. Kay*, 123 N. Y. 31, 25 N. E. 207 [1890]; *In the Matter of the Petition of Pennie to Vacate an Assessment*, 108 N. Y. 364, 15 N. E. 611 [1888]; *Merritt v. Village of Port Chester*, 71 N. Y. 309, 27 Am. Rep. 47 [1877]; *In the Matter of the Petition of the Second Avenue Methodist Episcopal Church, to Vacate an Assessment*, 66 N. Y. 395 [1876]; *Newell v. Wheeler*, 48 N. Y. 486 [1872]; *Felthousen v. City of Amsterdam*, 69 Hun. 505, 23 N. Y. Supp. 424 [1893]; *In the Matter of the Petition of Van Buren, to Vacate an Assessment*, 17 Hun. 527 [1879]; *Matter of Eager*, 10 Abb. Pr. N. S. 229 [1871]; *Matter of Douglass*, 9 Abb. Pr. N. S. 84 [1870];

futile.”³ Hence, if the state confers a certain power of levying local assessments upon cities having a population over a certain amount, that power cannot be exercised by a city having a

People ex rel. Kerber v. City of Utica, 7 Abb. N. C. 414 [1879]; Lathrop v. City of Buffalo, 3 Abb. Ct. App. 30 [1861]; Hopkins v. Mason, 61 Barb. 469 [1871]; Brenn v. City of Troy, 60 Barb. 417 [1871]; People ex rel. Johnson v. City of Brooklyn, 23 Barb. 180 [1856]; Hopkins v. Mason, 42 How. (N. Y.) 115 [1871]; Pettigrew v. Mayor, etc., of the City of New York, 17 How. (N. Y.) 492 [1859]; Hersie v. City of Buffalo, 1 Sheldon (N. Y.) 445 [1874]; City of Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178 [1893]; Bradshaw v. Board of Commissioners of Guilford County, 92 N. C. 278 [1885]; Village of Pleasant Hill v. Commissioners, 71 O. S. 133, 72 N. E. 896 [1904]; Smith v. City of Toledo, 24 O. S. 126 [1873]; Culbertson v. City of Cincinnati, 16 Ohio 574 [1847]; Brewer v. Incorporated Village of Bowling Green, Ohio, 7 Ohio C. C. 489 [1893]; Allen v. City of Portland, 35 Or. 420, 58 Pac. 509 [1899]; Smith v. Minto, 30 Or. 351, 48 Pac. 166 [1897]; Ladd v. Spencer, 23 Or. 193, 31 Pac. 474 [1892]; Northern Pacific Lumbering & Manufacturing Co. v. East Portland, 14 Or. 3, 12 Pac. 4 [1886]; Hawthorne v. City of East Portland, 13 Or. 271, 10 Pac. 342 [1886]; Philadelphia to use of Nestor v. Spring Garden Farmers' Market Company, 161 Pa. St. 522, 29 Atl. 286 [1894]; Morewood Avenue, Ferguson's Appeal, 159 Pa. St. 39, 28 Atl. 130 [1893]; Widening of Burnish Street, Pottsville Borough, 140 Pa. St. 531, 21 Atl. 500 [1891]; Borough of Greensburg v. Laird, 138 Pa. St. 533, 21 Atl. 96 [1890]; City of Meadville v. Dickson, 129 Pa. St. 1, 18 Atl. 513 [1889]; City of Philadelphia v. Richards, 124 Pa. St. 303, 16 Atl. 802 [1889]; Western Pennsylvania Railway Co.

v. City of Allegheny, 92 Pa. St. 100 [1879]; Borough of Mauch Chunk v. Shortz, 61 Pa. St. 399 [1869]; Cruikshanks v. City Council, 1 McCord (S. C.) 360 [1821]; Horiston v. City Council of Charleston, 1 McCord (S. C.) 345 [1821]; Mason v. City of Sioux Falls, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770 [1892]; Whyte v. Mayor and Aldermen of Nashville, 32 Tenn. (2 Swan.) 364 [1852]; Breath v. City of Galveston, 92 Tex. 454, 49 S. W. 575 [1899]; Storrie v. Houston City Street Railway Co., 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898]; Connor v. City of Paris, 87 Tex. 32, 27 S. W. 88 [1894]; Flewellin v. Proetz, 80 Tex. 191, 15 S. W. 1043 [1891]; Wood v. City of Galveston, 76 Tex. 126, 13 S. W. 227 [1890]; Frosh v. City of Galveston, 73 Tex. 401, 11 S. W. 402 [1889]; Allen v. City of Galveston, 51 Tex. 302 [1879]; Ardrey v. City of Dallas, 13 Tex. Civ. App. 442, 35 S. W. 726 [1896]; City of Dallas v. Ellison, 10 Tex. Civ. App. 28, 30 S. W. 1128 [1895]; Violet v. City Council of Alexandria, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896]; McCrowell v. City of Bristol, 89 Va. 652, 20 L. R. A. 653, 16 S. E. 867 [1893]; Green v. Ward, 82 Va. 324 [1886]; Blanchard v. City of Barre, 77 Vt. 420, 60 Atl. 970 [1905]; City of New Whatcom v. Bellingham Bay Improvement Co., 9 Wash. 639, 38 Pac. 163 [1894]; City of Spokane Falls v. Browne, 3 Wash. 84, 27 Pac. 1077 [1891]; Oshkosh City Railway Co. v. Winnebago County, 89 Wis. 435, 61 N. W. 1107 [1895]; Dean v. Borchsenius, 30 Wis. 236 [1872]; Kneeland v. City of Milwaukee, 18 Wis. 411 [1864];
³ Thomason v. Ruggles, 69 Cal 465, 472, 11 Pac. 20 [1886].

smaller population.⁴ Where certain power to levy assessments is given by statute to reclamation districts formed under the municipal code or re-organized thereunder, such power cannot be exercised by a reclamation district which is not so formed or re-organized.⁵

§ 224. Consent of voters not sufficient.

In the absence of specific constitutional provision, the consent of the voters or property owners of a district cannot confer upon the public authorities the power to levy a local assessment.¹ The power of such public officers to levy local assessments can be conferred only by act of the legislature. If all the property owners assent to the making of the improvement, and the levy of a local assessment therefor, they may be bound on principles of estoppel.² The assent of any number less than all, however, cannot bind those who do not assent.³ In some states constitutional provisions are found which expressly authorize the voters of certain cities to frame their own charters. Where such provisions exist, a grant of power by the voters, acting in compliance with such constitutional provision, has of course the same effect and validity as an act of the legislature.⁴

§ 225. Consent of voters necessary by specific provision.

The consent of the voters of a public corporation may be made by statute or by constitutional provision, sufficient and necessary to enable the public corporation to adopt new powers.¹ The legislature may provide that certain provisions regulating city government shall not go into effect unless the voters of such city adopt such provisions by vote at an election at which such question is submitted to them.² If a constitutional provision authorizes assessments only if based upon the consent of a majority in value of property owners,³ a statute which author-

⁴ *State v. Moss*, 44 Wash. 91, 86 Pac. 1129 [1906].

⁵ *Reclamation District No. 3 v. Kennedy*, 58 Cal. 124 [1881].

¹ *Anderson v. Hill*, 54 Mich. 477, 20 N. W. 549 [1884]; *Hixson v. Bur-*
son, 54 O. S. 470, 43 N. E. 1000.

² See Chapter XIX.

³ *Anderson v. Hill*, 54 Mich. 477, 20 N. W. 549 [1884].

⁴ *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; See § 215.

¹ See § 780 *et seq.*

² *State of Minnesota ex rel. Merrick v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885]; *Alcorn v. Hamer*, 38 Miss. 652 [1860].

³ See § 103.

izes an assessment without any provision for securing the consent of property owners is invalid.⁴ A provision requiring the assent of the voters of the district to certain forms of taxation applies only to general taxes and not to assessments for benefits.⁵

§ 226. What is statute.

A statute can exist only if enacted by the legislature in accordance with the mandatory provisions of the state constitution.¹ The official acts of those charged with the duty of determining specific facts necessary to its enactment cannot ordinarily be impeached. Where an act is found among the public laws, bearing the approval of the Governor, the Supreme Court, sitting as a court of errors, will presume that such act was constitutionally passed, if the record discloses no proof to the contrary. The journals of the legislature will not be examined in the Supreme Court for the first time, to impeach the validity of such act, or to determine whether or not it was passed in compliance with constitutional requirements.² Words in a printed statute which were not in the law as approved by the Governor have no proper place in such statute and are not a part thereof.³ If words are in a statute as passed by the legislature and as approved by the Governor they are a part of such statute even if they are contained in brackets.⁴

§ 227. Change of statute.

In the absence of some specific constitutional provision, the legislature may modify the powers and organization of a city¹ or of an assessment district² so as to affect its power of levying local assessments without obtaining the consent of the voters of such district to such modification. Even if the consent of a majority of the electors is necessary to determine that cities and towns theretofore organized shall organize under general

⁴ *Craig v. Board of Improvement of Russellville Waterworks Improvement District*, 84 Ark. 390, 105 S. W. 867 [1907].

⁵ *Shuford v. Commissioners of Gaston County*, 86 N. C. 552 [1882].

¹ See §§ 79, 192 *et seq.*

² *Bedard v. Hall*, 44 Ill. 91 [1867].

³ *Drain Commissioners v. Baxter*,

57 Mich. 127; *sub nomine* *Robertson v. Baxter*, 23 N. W. 711 [1885].

⁴ *Murphy v. Dobben*, 137 Mich. 565, 100 N. W. 891 [1904].

¹ *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615 [1887]; *Brientwall v. Philadelphia*, 103 Pa. St. 156 [1883].

² *People ex rel. Miller v. Brislin*, 80 Ill. 423 [1875].

laws, instead of their special charters, the legislature may pass a general law affecting the charter of the city and county of San Francisco, without obtaining the consent of such cities and counties.³ Even where the original statute for a park district was accepted by a popular vote by the inhabitants of such district,⁴ and possibly might have been unconstitutional but for provision for such acceptance as a condition precedent to its taking effect,⁵ the legislature may by statute modify the powers of such park without any new vote of the inhabitants thereof.⁶ Such district, when once formed, is subject to general legislation in the same way that any other municipal corporation is subject. If a statute which controls the method of levying an assessment is changed after contract is let and the work is begun such repeal does not prevent the city from compelling the property owner to reimburse it for expenses incurred and obligations entered into by said city under its contract for such improvement.⁷ A different rule applies where no work has been done and no contract has been entered into before the change of statute. In such case the rights of the city are measured solely by the new statute.⁸ A change of statute made by a repealing act which contains a saving clause as to existing assessments leaves such assessments governed by the prior statute.⁹ A change of statute will ordinarily be construed, if practicable, as having a prospective operation only, and as applying solely to subsequent improvements.¹⁰ Thus a statute which provides, "Whenever . . . common council . . . shall desire to construct sewers," was construed to apply only to sewers constructed after the passage of such statute.¹¹

§ 228. General principles of statutory construction.

The construction of a statute is a matter for the court. "Legislative construction of past legislation has no judicial force

³ *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615 [1887].

⁴ *Peope ex rel. Wilson v. Salomon*, 51 Ill. 37.

⁵ See § 176 *et seq.*

⁶ *People ex rel. Miller v. Brislin*, 83 Ill. 423 [1875].

⁷ *City of Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26 [1894].

⁸ *Wilson v. City of Seattle*, 2 Wash.

543, 27 Pac. 474 [1891].

⁹ *Board of Councilmen of Frankfort v. Mason & Foard Co.*, 100 Ky. 48, 37 S. W. 290 [1896]; *State, Brittin, Pros. v. Blake*, 36 N. J. L. (7 Vr.) 442 [1872].

¹⁰ *Pennsylvania Co. v. Cole*, 132 Fed. 668 [1904].

¹¹ *Pennsylvania Co. v. Cole*, 132 Fed. 668 [1904].

except for the future,"¹ though it may be considered as an aid in extracting the intention of the legislature from doubtful language.² Intelligent and rational action on the part of the legislature is always to be presumed.³ The public necessities on which the power of assessment is based must be considered in determining the meaning of the statute.⁴ A statute is, if possible, to be construed as one harmonious whole, every part thereof having effect in carrying out the general intention of the legislature.⁵ If two sections of a statute relate to the same subject matter, they are to be construed together in order to ascertain from both the intention of the legislature,⁶ and to accomplish this purpose and enforce the general intent of the legislature, particular provisions will, if necessary, be construed as having a meaning other than that which they literally bear.⁷ Statutes *in pari materia* are to be considered together, as though they were one statute.⁸ Accordingly, of two constructions, one of which will cause inconsistencies between parts of statutes *in pari materia*, and the other of which will reconcile the statutes and prevent inconsistencies, the latter will prevail.⁹ Repeals by implication are not favored.¹⁰ Hence, if by one construction two statutes passed at different times may be construed together so as to give full force and effect to each, and by another construction they are inconsistent so that the later statute will operate as an implied repeal of the prior statute, the former construction will be preferred.¹¹ Thus a special charter allow-

¹ Drain Commissioners v. Baxter, 57 Mich. 127; *sub nomine* Robertson v. Baxter, 23 N. W. 711 [1885].

² Drain Commissioners v. Baxter, 57 Mich. 127, *sub nomine* Robertson v. Baxter, 23 N. W. 711 [1885].

³ Taylor v. Palmer, 31 Cal. 240 [1866]; Verdin v. City of St. Louis, 131 Mo. 26, 36 S. W. 52, 33 S. W. 480 [1895].

⁴ Shaler v. McAleese. — N. J. Eq. —, 68 Atl. 416 [1907].

⁵ Appeal of North Beach & Mission R. R. Co., in the Matter of Widening Kearney Street, 32 Cal. 499 [1867]; People ex rel. Keeney v. City of Chicago, 152 Ill. 546, 38 N. E. 744 [1894].

⁶ Taylor v. Palmer, 31 Cal. 240 [1866].

⁷ People ex rel. Keeney v. City of Chicago, 152 Ill. 546, 38 N. E. 744 [1894].

⁸ Lake Shore & Michigan Southern Railway Co. v. City of Chicago, 148 Ill. 509, 37 N. E. 88 [1894].

⁹ Clarke v. Mead, 102 Cal. 516, 36 Pac. 862 [1894]; Lake Shore & Michigan Southern Railway Co. v. City of Chicago, 148 Ill. 509, 37 N. E. 88 [1894].

¹⁰ Rich v. City of Chicago, 152 Ill. 18, 38 N. W. 255 [1894]; Copeland v. Mayor and Aldermen of Springfield, 166 Mass. 498, 44 N. E. 605 [1896].

¹¹ Rich v. City of Chicago, 152 Ill. 18, 38 N. E. 255 [1894].

ing the city of Springfield to construct sidewalks and assess the entire cost thereof upon the owners of abutting property is not repealed by implication by a subsequent statute allowing all cities to construct sidewalks and assess not more than one-half of the cost thereof upon the abutting property owners.¹² The theory that the different sections of the same statute or the different statutes upon the same subject are, if possible, to be construed together, so as to harmonize them, and to give effect to each part is merely a *prima facie* theory of legislative intent, and yields to the affirmative indication of the opposite intention, if manifest on the face of the statute. If the legislature has evidently intended to create different rules for two or more particular cases arising under the same general subject, such statutes will not to this extent be regarded as being *in pari materia*.¹³ Thus, if a legislature has provided two different methods of procedure in assessing benefits and damages, the one in the ordinary case of eminent domain, and the other when land is taken by cities or villages for municipal purposes, the courts should not regard such statutes as being *in pari materia* as to the matters upon which the legislature evidently intended to prescribe distinct rules.¹⁴ A revising statute which covers the subject matter of prior statutes and is inconsistent therewith is regarded as repealing such statutes by implication.¹⁵ Hence, the consolidation act, which was intended to revise and consolidate all statutes concerning the government of New York City, impliedly repeals a provision requiring the expense of certain improvements to be divided between the city and the property owners and substitutes therefor a general provision permitting an as-

¹² *Copeland v. Mayor and Aldermen of Springfield*, 166 Mass. 498, 44 N. E. 605 [1896].

¹³ *Lake Shore & Michigan Southern Railway Co. v. City of Chicago*, 148 Ill. 509, 37 N. E. 88 [1894].

¹⁴ *Lake Shore & Michigan Southern Railway Co. v. City of Chicago*, 148 Ill. 509, 37 N. E. 88 [1894].

¹⁵ In the *Matter of the Petition of the New York Institution for Instruction of Deaf and Dumb, to Vacate Assessments*, 121 N. Y. 234, 24 N. E. 378 [1890]: "Where a revising statute covers the whole subject-

matter of antecedent statutes, and such plainly appears to have been the legislative intent, it is to be deemed to contain the entire law on the subject, and it virtually repeals the former enactment, although there is no express provision to that effect, and although provisions of the former acts are omitted in the revising statute." In the *Matter of the Petition of the New York Institution for Instruction of the Deaf and Dumb, to Vacate Assessments*, 121 N. Y. 234, 24 N. E. Rep. 378 [1890].

assessment of the entire expense upon the property owners, though such consolidation act contains no express provision repealing such prior clause.¹⁶ If the later statute covers the same subject matter as an earlier statute and is clearly inconsistent therewith, it operates as a repeal of the earlier statute by implication.¹⁷ The intention of the legislature is to be deduced primarily from the language which it has seen fit to employ. In determining the intention of the legislature as expressed in the statute, the primary question is, "not what the statute should be, but what it is."¹⁸ The general intention of the legislature as deduced from the entire statute should prevail over the letter of the law.¹⁹ The literal wording of a statute must always yield to the legislative intent, where the latter is clearly apparent from the statute taken as a whole.²⁰ A statute which specifically directs a particular course of action, impliedly prohibits a course of action which differs materially from that prescribed.²¹ In case of doubt the title of a statute may be resorted to as tending to aid in determining the intention of the legislature.²² The title is, however, of but slight importance and can never be used to enlarge or control unequivocal language employed in the body of the act.²³ In some states by express constitutional provision the title of a statute must show the subject matter thereof.²⁴ The preamble is no part of the law, but it can be used for the purpose of identifying the subject matter of the law and explaining the motives and intention of the legislature.²⁵ Provisions in the charter of a city which prescribe the matter of instituting and conducting proceedings for constructing an improvement whereby an assessment is to be levied upon property owners, do not limit or restrict the power of the city to make such improvement if it is to be paid for by general taxation.²⁶

¹⁶ In the Matter of the Petition of the New York Institution for Instruction of Deaf and Dumb, to Vacate Assessments, 121 N. Y. 234, 24 N. E. 378 [1890].

¹⁷ Doremus v. People ex rel. Kochersperger, 173 Ill. 63, 50 N. E. 686 [1898].

¹⁸ Kelly v. The City of Cleveland, 34 O. S. 468 [1878].

¹⁹ Verdin v. City of St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52 [1895].

²⁰ Verdin v. City of St. Louis, 131

Mo. 26, 30 S. W. 480, 36 S. W. 52 [1895].

²¹ City of New Haven v. Whitney, 36 Conn. 373 [1870].

²² Hagar v. Board of Supervisors of Yolo County, 47 Cal. 222 [1874].

²³ Hagar v. Board of Supervisors of Yolo County, 47 Cal. 222 [1874].

²⁴ See § 192 *et seq.*

²⁵ Commonwealth to use of Allegheny City v. Marshall, 69 Pa. St. 328 [1871].

²⁶ Allen v. City of Janesville, 35 Wis. 403 [1874].

§ 229. Statutes conferring power construed strictly.

Furthermore, assessment proceedings are proceedings *in invitum*,¹ and have for their ultimate object the taking of property from the individual owner without his consent. As is the case in all proceedings of a similar character, such as taxation, the statutes conferring the power to impose local assessments must be construed strictly.² The intention of the legislature to

¹City Street Improvement Co. v. Babcock, 139 Cal. 690, 73 Pac. 666 [1903]; Sargent & Company v. Tuttle, 67 Conn. 162, 32 L. R. A. 822; 34 Atl. 1028 [1895]; Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 94 Am. St. Rep. 727, 60 L. R. A. 190, 70 S. W. 721 [1902]; Guinotte v. Egelhoff, 64 Mo. App. 356 [1895]; Rose v. Trestrail, 62 Mo. App. 352 [1895]; Hutchinson v. City of Omaha, 52 Neb. 345, 72 N. W. 218 [1897].

²Crofut v. City of Danbury, 65 Conn. 294, 32 Atl. 365 [1894]; City of New Haven v. Whitney, 36 Conn. 373 [1870]; People ex rel. Raymond v. Field, 197 Ill. 568, 64 N. E. 544 [1902]; Lake Shore & Michigan Southern Railway Co. v. City of Chicago, 148 Ill. 509, 37 N. E. 88 [1894]; Wright v. City of Chicago, 20 Ill. 252 [1858]; Town of Greendale v. Suit, 163 Ind. 282, 71 N. E. 658 [1904]; Niklaus v. Conkling, 118 Ind. 289, 20 N. E. 797 [1888]; Churchman v. City of Indianapolis, 110 Ind. 259, 11 N. E. 301 [1886]; Overshiner v. Jones, 66 Ind. 452 [1879]; Busenbark v. Clements, 22 Ind. App. 557, 53 N. E. 665 [1899]; Ankeny v. Hennigsen, 54 Ia. 29, 6 N. W. 65 [1880]; Merriam v. Moody's Executors, 25 Ia. 163 [1868]; Murray v. Tucker, 73 Ky. (10 Bush.) 240 [1874]; Whitney v. Common Council of the Village of Hudson, 69 Mich. 189, 37 N. W. 184 [1888]; In the Matter of the Appeal of Powers, 29 Mich. 504 [1874]; City of Sedalia to use of Sedalia National Bank v. Donohue, 190 Mo. 407, 89 S. W. 386 [1905]; Rose v. Trestrail, 62 Mo. App. 352 [1895]; Hutchinson

v. City of Omaha, 52 Neb. 345, 72 N. W. 218 [1897]; Bergen County Savings Bank v. Township of Union, 44 N. J. L. (15 Vr.) 599 [1882]; State, Peckham, Pros. v. Mayor and Common Council of the City of Newark, 43 N. J. L. (14 Vr.) 576 [1881]; Campion v. City of Elizabeth, 41 N. J. L. (12 Vr.) 355 [1879]; State, Terhune, Pros. v. City of Passaic, 41 N. J. L. (12 Vr.) 90 [1879]; State, Wilkinson, Pros. v. Inhabitants of the City of Trenton, 36 N. J. L. (7 Vr.) 499 [1873]; Carron v. Martin, 26 N. J. L. (2 Dutch.) 594, 69 Am. Dec. 584 [1857]; State, Townsend, Pros. v. Mayor and Common Council of Jersey City, 26 N. J. L. (2 Dutch.) 444 [1857]; State, Tims, Pros. v. Mayor and Common Council of Newark, 25 N. J. L. (1 Dutch.) 399 [1856]; In the Matter of the Petition of Van Buren, 55 How. (N. Y.) 513 [1878]. "It is unnecessary to cite authorities on these points. The A. B. C. of the laws of municipal corporations, that the power to levy special assessments is to be construed strictly, that the mode prescribed is the measure of power and that material requirements must be complied with before there is any liability is all that need be quoted. Spokane Falls v. Browne, 3 Wash. 34, 27 Pac. 1077 [1891]. An assessment made contrary to these principles is void and an injunction lies to restrain its collection." Buckley v. City of Tacoma, 9 Wash. 253, 267, 37 Pac. 441 [1894]; (quoted in Kline v. City of Tacoma, 11 Wash. 193, 195, 39 Pac. 453 [1895]).

confer upon public corporations the power of levying local assessments must appear affirmatively. In case of fair and reasonable doubt as to the existence of such power, the presumption in construing the statute must be against its existence.³ If, however, the entire statute, taken as a whole, shows that the legislature intended to confer the power of levying local assessments, full effect must be given to such intention. A grant of power to assess damages and special benefits is held to confer the power of levying a special assessment.⁴ A grant of power is not to be limited so as to thwart the intention of the legislature.⁵ Thus, power to fix the time for commencing work, which is to be prosecuted to completion with reasonable diligence, and power "to extend the time so fixed from time to time," includes power to extend the time of completion.⁶ Provisions inserted for the benefit of the property owner are to be so construed as to accomplish such purpose.⁷

§ 230. Construction of statutes authorizing assessments for performance of legal duty.

The power of a public corporation to compel owners of land to perform legal duties owing to the public with reference to their land and in default thereof to perform such duty itself and to charge the land-owner with the expense thereof, is one which, if it exists at all, is construed in a much more liberal manner than the power of levying assessments on the theory of benefits.¹ Since this is a true case of exercise of the police power, a general grant of power to compel performance of a legal duty carries with it the power to enforce such performance by appropriate and suitable means.² Thus a general grant of power to compel

³ "If there is reasonable doubt as to the existence of any such power (i. e. the power to levy local assessments for special benefits) the presumption is that it does not exist." *Fair Haven & Westville Railroad Co. v. City of New Haven*, 77 Conn. 494, 497, 59 Atl. 737 [1905].

⁴ *City of Asheville v. Wachovia Loan & Trust Co.*, 143 N. C. 360, 55 S. E. 800 [1906].

⁵ *Oakland Paving Co. v. Barstow*, 79 Cal. 45, 21 Pac. 514 [1889].

⁶ *Oakland Paving Co. v. Barstow*, 79 Cal. 45, 21 Pac. 514 [1889].

⁷ *The People ex rel. v. City of Chicago*, 152 Ill. 546, 38 N. E. 744.

¹ *Mayor and Board of Trustees of the Town of New Iberia v. Fontelieu*, 108 La. 460, 32 So. 369 [1901]. See also *James v. Pine Bluff*, 49 Ark. 199, 4 S. W. 760 [1887]; *Nugent v. City of Jackson*, 72 Miss. 1040, 18 So. 493 [1895].

² *Mayor and Board of Trustees of the Town of New Iberia v. Fontelieu*, 108 La. 460, 32 So. 369 [1901].

owners of urban property to construct sidewalks in front of their lands and to keep them free from obstruction and in repair carries with it a grant of such powers as are necessary to carry into effect the power specifically given.³ In this respect it differs from a grant of power to assess for benefits, since power to construct a given improvement which may be paid for by general taxation does not carry with it an implied power to levy a local assessment to pay for the cost thereof.

§ 231. Power to construct improvement does not confer power to assess.

A grant to a municipal corporation of power to construct a given form of public improvement does not of itself confer power to pay for such improvement by levying special assessments therefor.¹ While a grant of power carries with it, without specific mention thereof, all powers incidental to the main power granted, and reasonably adapted to carry such power into effect, the power of special assessment cannot be regarded as incidental to the power of constructing public improvements, since such improvements may be constructed and paid for out of funds raised by general taxation. Thus a grant of power "to grade, macadamize and pave the sidewalks and to lay out, change and open new streets," does not confer the power of levying a local assessment to pay for such improvement.² A grant of power to a city to "regulate and improve all streets, alleys and sidewalks"

* Mayor and Board of Trustees of the Town of New Iberia v. Fontelieu, 108 La. 460, 32 So. 369 [1901].

¹ Wilcoxon v. City of San Luis Obispo, 101 Cal. 508, 35 Pac. 988 [1894]; City of Chicago v. Law, 144 Ill. 569, 33 N. E. 855 [1893]; City of Fairfield v. Ratcliff, 20 Ia. 396 [1866]; Mayor, Recorder and Aldermen of the City of Annapolis v. Harwood, 32 Md. 471, 3 Am. Rep. 151 [1870]; State v. Smith, 99 Minn. 59, 108 N. W. 822 [1906]; Oster v. City of Jefferson, 57 Mo. App. 485 [1894]; Goodrich v. City of Omaha, 10 Neb. 98, 4 N. W. 424 [1880]; State. Hoetzel, Pros. v. Inhabitants of East Orange, 50 N. J. L. (21 Vr.) 354, 12 Atl. 911 [1888]; City of Watertown v. Fairbanks, 65

N. Y. 588 [1875]; City of Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178 [1893]; City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; Mt. Pleasant Borough v. Baltimore & Ohio Railroad Co., 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052 [1890]; Borough of Mauch Chunk v. Shortz, 61 Pa. St. 399 [1869]; Dietz v. City of Neenah, 91 Wis. 422, 65 N. W. 500, 64 N. W. 299 [1895]; Cain v. City of Elkins, 57 W. Va. 9, 49 S. E. 898 [1905].

² City of Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178 [1893]; City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892].

does not confer power to levy special assessments on lots for the construction of a sidewalk.³ So power to assess a part of the cost of an improvement upon the owners of the property benefited does not confer power to levy an assessment for other parts of such cost.⁴

§ 232. Power to levy general tax does not confer power to assess.

A grant of power to levy a general tax for the purpose of constructing a given form of public improvement does not confer power to levy a local assessment for the purpose of meeting the expenses of such improvement.¹ In the absence of some statutory provision expressly granting the power to levy local assessments to pay the cost of such improvements, it will be presumed to be the intention of the legislature that the cost of such improvement is to be paid for by general taxation exclusively. If the context, however, shows that the term "tax" was used in its broad sense, including local assessment as well as general taxation, a grant of power to tax will confer power to assess.² Thus under a statute authorizing a city to raise money for paving streets or making sidewalks by a tax on real and personal property, "as may seem proper," it has been held that the city may require the property owners to pay one-third of the cost of the improvement in front of their respective lots.³

§ 233. Power to levy assessment does not confer power of general taxation.

Conversely, it may be here noted that the mere grant of power to levy a local assessment for a given kind of public improvement

³ *City of Fairfield v. Ratcliff*, 20 Ia. 396.

⁴ *Reed v. City of Toledo*, 18 Ohio 161 [1849].

¹ *Wilcoxon v. City of San Luis Obispo*, 101 Cal. 508, 35 Pac. 988 [1894]; *City Council of Augusta v. Murphy*, 79 Ga. 101, 3 S. E. 326 [1887]; *Independent School District of Burlington v. City of Burlington*, 60 Ia. 500, 15 N. W. 295 [1883]; *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304 [1885]; *Mayor, Recorder and Aldermen of the City of Annapolis v. Harwood*, 32 Md. 471, 3 Am.

Rep. 151 [1870]; *State v. Smith*, 99 Minn. 59, 108 N. W. 822 [1906]; *City of Watertown v. Fairbanks*, 65 N. Y. 588 [1875]; *City of Asheville v. Wachovia Loan & Trust Co.*, 143 N. C. 360, 55 S. E. 800 [1906].

² *Oakey v. Mayor*, 1 La. 1 [1830].

³ *Oakey v. Mayor*, 1 La. 1 [1830]. In this case, however, another statute gave the power of compelling the "completion, . . . maintenance and repair of side pavements at the cost of the proprietors of houses, lands or neighboring lots."

does not confer the power to levy a general tax therefor, since such grant is evidently the determination by the legislature to exercise its power of choosing between general taxation and local assessment in favor of local assessment. Under such a grant of power the city can exercise only the power of taxation which the legislature has conferred upon it.¹

§ 234. Statutes conferring power to be followed strictly.

The statutes conferring such power must be followed strictly by the public corporation which is seeking to levy such local assessment; and if these statutes are not thus strictly followed the assessment is invalid.¹ A statute authorizing an assessment

¹ *Oster v. City of Jefferson*, 57 Mo. App. 485 [1894]; *Rhineland v. Mayor, etc., of New York*, 24 How. (N. Y.) 304 [1862]; *Breen v. City of Troy*, 60 Barb. (N. Y.) 417 [1871]; In the matter of the Application of Tappan to Vacate Certain Assessments, 54 Barb. (N. Y.) 225 [1869]; In the Matter of Tappan, to Vacate Certain Assessments, 36 How. (N. Y.) 390 [1869].

¹ *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 46 L. 773, 22 S. 531 [1902]; *Watkins v. Griffith*, 59 Ark. 344, 27 S. W. 234 [1894]; *City Street Improvement Co. v. Babcock*, 139 Cal. 690, 73 Pac. 666 [1903]; *San Diego Investment Co. v. Shaw*, 129 Cal. 273, 61 Pac. 1082 [1900]; *Ede v. Cuneo*, 126 Cal. 167, 58 Pac. 538 [1899]; *Kelso v. Cole*, 121 Cal. 121, 53 Pac. 353 [1898]; *Durrell v. Dooner*, 119 Cal. 411, 51 Pac. 628 [1897]; *Schwiesau v. Mahon*, 110 Cal. 543, 42 Pac. 1065 [1895]; *Shipman v. Forbes*, 97 Cal. 572, 32 Pac. 599 [1893]; *Reclamation District No. 3 v. Kennedy*, 58 Cal. 124 [1881]; *Hagar v. Board of Supervisors of Yolo County*, 51 Cal. 474 [1876]; *City of Stockton v. Whitmore*, 50 Cal. 554 [1875]; *Hewes v. Reis*, 40 Cal. 255 [1870]; *Chambers v. Satterlee*, 40 Cal. 497 [1871]; *Nicholson Pavement Co. v. Painter*, 35 Cal. 699 [1868]; *Dougherty v. Hitchcock*, 35 Cal. 512 [1868]; *Himmelmann v.*

Danos, 35 Cal. 441 [1868]; *Smith v. Cofran*, 34 Cal. 310 [1867]; *Haskell v. Bartlett*, 34 Cal. 281 [1867]; *Mayo v. Ah Loy*, 32 Cal. 477, 91 Am. Dec. 595 [1867]; *Taylor v. Conner*, 31 Cal. 481 [1866]; *Smith v. Davis*, 30 Cal. 537 [1866]; *Creighton v. Manson*, 27 Cal. 614 [1865]; *Blanchard v. Beideman*, 18 Cal. 261 [1861]; *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825 [1887]; *Fair Haven & Westville Railroad Co. v. City of New Haven*, 77 Conn. 494, 59 Atl. 737 [1905]; *Angus v. City of Hartford*, 74 Conn. 27, 49 Atl. 192 [1901]; *Harris v. City of Ansonia*, 73 Conn. 359, 47 Atl. 672 [1900]; *Sargent & Company v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822, 823, 34 Atl. 1028 [1895]; *Croft v. Danbury*, 65 Conn. 294, 32 Atl. 365; *Hillhouse v. City of New Haven*, 62 Conn. 344, 26 Atl. 293 [1892]; *District of Columbia v. Burgdorf*, 6 App. D. C. 465 [1895]; *District of Columbia v. Weaver*, 6 App. D. C. 482 [1895]; *Allman v. District of Columbia*, 3 App. D. C. 8 [1894]; *Johnson v. District of Columbia*, 6 Mackey (D. C.) 21 [1887]; *McLauren v. City of Grand Forks*, 6 Dakota 397, 43 N. W. 710; *Holliday v. City of Atlanta*, 96 Ga. 377, 23 S. E. 406 [1895]; *People ex rel. Hanberg v. Peyton*, 214 Ill. 376, 73 N. E. 768 [1905]; *Gray v. Town of Cicero*, 177 Ill. 459, 53 N. E. 91 [1899]; *Lingle v. City of Chicago*,

for an improvement if upon notice the property owners do not themselves construct such improvement, does not empower a

172 Ill. 170, 50 N. E. 192 [1898]; (West Chicago Park Commissioners v. Baldwin, 162 Ill. 87, 44 N. E. 404, followed); Robeson v. People ex rel. Curry, 161 Ill. 176, 43 N. E. 619 [1896]; McChesney v. People ex rel. Kern, 148 Ill. 221, 35 N. E. 739 [1894]; Davis v. City of Litchfield, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; Morrison v. City of Chicago, 142 Ill. 660, 32 N. E. 172 [1893]; City of Carlyle v. The County of Clinton, 140 Ill. 512, 30 N. E. 782 [1893]; Louisville & Nashville Railroad Company v. City of East St. Louis, 134 Ill. 656, 25 N. E. 962 [1891]; People ex rel. Pollard v. Swigert, 130 Ill. 608, 22 N. E. 787 [1890]; Thorn v. West Chicago Park Commissioners, 130 Ill. 594, 22 N. E. 520 [1890]; Taylor v. People ex rel. Reed, 66 Ill. 322 [1872]; Workman v. City of Chicago, 61 Ill. 463 [1871]; Skinner v. City of Chicago, 42 Ill. 52 [1866]; Seammon v. City of Chicago, 40 Ill. 146 [1866]; City of Chicago v. Wright, 32 Ill. 192 [1863]; Lill v. The City of Chicago, 29 Ill. 31 [1862]; Fort Chartres & Ivy Landing Drainage & Levee District No. 5 v. Smalkand, 70 Ill. App. 449 [1897]; Shaw v. State for use, 97 Ind. 23; Case v. Johnson, 91 Ind. 477 [1883]; Moberry v. City of Jeffersonville, 38 Ind. 198 [1871]; City of Bluffton v. Miller, 33 Ind. App. 521, 70 N. E. 989 [1904]; Sleeper v. Bullen, 6 Kan. 300 [1870]; Worthington v. City of Covington, 82 Ky. 265 [1884]; Murray v. Tucker, 73 Ky. (10 Bush.) 241 [1874]; Caldwell v. Rupert, 73 Ky. (10 Bush.) 179 [1873]; Broadway Baptist Church v. McAttee, 71 Ky. (8 Bush.) 508, 8 Amer. Rep. 480 [1871]; City of Henderson v. Lambert, 77 Ky. (14 W. P. Bush) 24 [1878]; Barber Asphalt Paving Co. v. Watt, 51 La. Ann. 1345, 26 So. 70

[1899]; Sirgi v. Matthews, 24 La. Ann. 613 [1872]; Second Municipality of New Orleans v. McDonogh, 9 Robinson (La.) 408 [1845]; Pierce v. County Commissioners of Franklin County, 63 Me. 252 [1872]; Mayor and City Council of Baltimore v. Porter, 18 Md. 284, 79 Am. Dec. 686 [1861]; Henderson v. Mayor and City Council of Baltimore, use of Eschbach, 8 Md. 352 [1855]; Mayor, etc., of Baltimore v. Moore, 6 H. & J. (Md.) 375 [1825]; City of Manistee v. Herley, 79 Mich. 238, 44 N. W. 603 [1890]; McComb v. Bell, 2 Minn. 295 [1858]; Collier Estate v. Western Paving & Supply Company, 180 Mo. 362, 79 S. W. 947 [1904]; City of St. Louis v. Koch, 169 Mo. 587, 70 S. W. 143 [1902]; City of Nevada to use of Gilfillan v. Eddy, et al., 123 Mo. 546, 27 S. W. 471 [1894]; Town of Trenton v. Coyle, 107 Mo. 193, 17 S. W. 643 [1891]; Cole v. Skrainka, 105 Mo. 303, 16 S. W. 491 [1891]; Barton v. Kansas City, 110 Mo. App. 31, 83 S. W. 1093 [1904]; West v. Porter, 89 Mo. App. 150 [1901]; Rose v. Trestail, 62 Mo. App. 352 [1895]; City of St. Joseph, to use of the Saxton National Bank v. Landis, 54 Mo. App. 315 [1893]; Fruin-Bambrick Construction Co. v. Geist, 37 Mo. App. 509 [1889]; Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734 [1903]; Harmon v. City of Omaha, 53 Neb. 164, 73 N. W. 671 [1897]; Farmers' Loan & Trust Co. v. Hastings, 2 Neb. Unoff. 337, 96 N. W. 104 [1902]; Nehasane Park Association v. Lloyd, 167 N. Y. 431, 60 N. E. 741 [1901]; Stebbins v. Kay, 123 N. Y. 31, 25 N. E. 207 [1890]; In the Matter of the Petition of Pennie to Vacate an Assessment, 108 N. Y. 364, 15 N. E. 611 [1888]; Merritt v. Village of Port Chester, 71 N. Y. 309, 27 Am. Rep. 47 [1877]; In the Matter of the Petition of the Second

public corporation to levy an assessment for such improvement if the property owners have not been given an opportunity to

Avenue Methodist Episcopal Church, to Vacate an Assessment, 66 N. Y. 395 [1876]; Newell v. Wheeler, 48 N. Y. 486 [1872]; Felthousen v. City of Amsterdam, 69 Hun. 505, 23 N. Y. Supp. 424 [1893]; In the Matter of the Petition of Van Buren to Vacate an Assessment, 17 Hun. 527 [1879]; Matter of Eager, 10 Abb. Pr. N. S. 229 [1871]; Matter of Douglass, 9 Abb. Pr. N. S. 84 [1870]; People ex rel. Kerber v. City of Utica, 7 Abb. N. C. 414 [1879]; Lathrop v. City of Buffalo, 3 Abb. Ct. App. 30 [1861]; Hopkins v. Mason, 61 Barb. 469 [1871]; Brenn v. City of Troy, 60 Barb. 417 [1871]; People ex rel. Johnson v. City of Brooklyn, 23 Barb. 180 [1856]; Hopkins v. Mason, 42 Howard, 115 [1871]; Brady v. Mayor, etc., of the City of New York, 18 Howard, 343 [1859]; Pettigrew v. Mayor, etc., of the City of New York, 17 Howard, 492 [1859]; Hersie v. City of Buffalo, 1 Sheldon. 445 [1874]; City of Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178 [1893]; Bradshaw v. Board of Commissioners of Guilford County, 92 N. C. 278 [1885]; Village of Pleasant Hill v. Commissioners, 71 O. S. 133, 72 N. E. 896; Smith v. City of Toledo, 24 O. S. 126 [1873]; Culbertson v. City of Cincinnati, 16 Ohio 574 [1847]; City of Cincinnati v. Coombs, 16 Ohio 181 [1847]; Allen v. City of Portland, 35 Ore. 420, 58 Pac. 509 [1899]; Smith v. Minto, 30 Ore. 351, 48 Pac. 166 [1897]; Ladd v. Speneer, 23 Ore. 193, 31 Pac. 474 [1892]; North Pacific Lumbering & Manufacturing Co. v. East Portland, 14 Ore. 3, 12 Pac. 4 [1886]; Hawthorne v. City of East Portland, 13 Ore. 271, 10 Pac. 342 [1886]; Morewood Ave., Ferguson's Appeal, 159 Pa. St. 39, 28 Atl. 130 [1893]; Widening of Burnish St., Pottsville Borough, 140 Pa. St. 531, 21 Atl. 500 [1891]; Borough of Greensburg

v. Laird, 138 Pa. St. 533, 21 Atl. 96 [1890]; City of Meadville v. Dickson, 129 Pa. St. 1, 18 Atl. 513 [1889]; City of Philadelphia v. Richards, 124 Pa. St. 303, 16 Atl. 802 [1889]; Western Pennsylvania Railway Co. v. City of Allegheny, 92 Pa. St. 100 [1879]; Borough of Manch Chunk v. Shortz, 61 Pa. St. 399 [1869]; Fell v. Philadelphia, to the use of Cunningham, 81 Pa. St. (31 P. F. Smith) 58 [1876]; City v. Lea, 5 Phila 77; Reilly v. City of Philadelphia, 60 Pa. St. (10 P. F. Smith) 467 [1869]; Pittsburg v. Walter, 69 Pa. St. (19 P. F. Smith) 365 [1871]; Mason v. City of Sioux Falls, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770 [1892]; Whyte v. Mayor and Aldermen of Nashville, 32 Tenn. (2 Swan.) 364 [1852]; Breath v. City of Galveston, 92 Tex. 454, 49 S. W. 575 [1899]; Storrie v. Houston Street Railway Co., 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898]; Connor v. City of Paris, 87 Tex. 32, 27 S. W. 88 [1894]; Flewellin v. Proetz, 80 Texas 191, 15 S. W. 1043 [1891]; Wood v. City of Galveston, 76 Tex. 126, 13 S. W. 227 [1890]; Frosh v. City of Galveston, 73 Tex. 401, 11 S. W. 402 [1889]; Allen v. City of Galveston, 51 Tex. 302 [1879]; Ardrey v. City of Dallas, 13 Tex. Civ. App. 442, 35 S. W. 726 [1896]; City of Dallas v. Ellison, 10 Tex. Civ. App. 28, 30 S. W. 1128 [1895]; Violet v. City Council of Alexandria, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896]; McCrowell v. City of Bristol, 89 Va. 652, 20 L. R. A. 653, 16 S. E. 867 [1893]; Green v. Ward, 82 Va. 324 [1886]; City of New Whatcom v. Bellingham Bay Improvement Co., 9 Wash. 639, 38 Pac. 163 [1894]; City of Spokane Falls v. Browne, 3 Wash. 84, 27 Pac. 1077 [1891]; Oshkosh City Railroad Company v. Winnebago County, 89 Wis. 435, 61 N. W. 1107 [1895];

construct it.² A statute empowering a city to construct a sewer and levy an assessment therefor if it has not already commenced a general system of sewerage by the levy and expenditure of a tax therefor, does not authorize such city to levy an assessment for the construction of a sewer in case the city had, prior to the passage of such act, commenced a general system of sewerage by the levy and expenditure of a tax therefor.³ A statute conferred power to levy a local assessment for a certain kind of improvement, without reference to benefits. This statute was held to be unconstitutional. Another statute conferred the power of levying an assessment for the same kind of improvement in a different manner and according to benefits. The city attempted to assess under the unconstitutional statute. It was held that the assessment could not be sustained under either statute, since one was unconstitutional and the city had not attempted to follow the provisions of the other.⁴ The rules set forth in the preceding sections are very broad and general—so much so that they afford but little real help in determining the rights of the parties in actual cases when presented for consideration. Examples of the application of these broad principles to particular forms of deviation from the rules laid down by statute are found elsewhere. These rules of statutory construction are applicable where there is no specific statute prescribing the rule of construction applicable thereto. In some jurisdictions, however, statutes have been passed which provide for a more liberal construction of such statutes than that which the common law rules permit. Some of these statutes provide specifically what effect shall be given to a departure from the statutory procedure in imposing assessments. Such statutory provisions of course supersede the common law rules of statutory construction herein set forth.

Dean v. Borchsenius, 30 Wis. 236 [1872]; *Kneeland v. City of Milwaukee*, 18 Wis. 411 [1864]; "The exercise of the power must strictly pursue the statutory authority." *Lill v. City of Chicago*, 29 Ill. 31, 37.

²*State v. Foster*, 94 Minn. 412, 103 N. W. 14 [1905]; *City of Westport to use of Hoelzel v. Smith*, 68 Mo. App. 63 [1896]. See § 52 *et seq.*

³*Independent School District of*

Burlington v. City of Burlington, 60 Ia. 500, 15 N. W. 295 [1883].

⁴*Harwood v. Street Commissioners of the City of Boston*, 183 Mass. 348, 67 N. E. 362 [1903]: (under the first statute an assessment could be levied for a street improvement including the cost of a sewer built thereunder. Under the second statute the assessment was to be for the cost of the street, not including the cost of the sewer.)

§ 235. Discretionary power as to assessment or taxation possessed by the legislature.

The legislature, if not restrained by some specific constitutional provision, has the power to provide that public improvements of kinds for which local assessments may be levied may be constructed either at the expense of the taxpayers of the public corporation by general taxation or at the expense of the owners of property benefited thereby, by special assessment, as the legislature may in its discretion determine.¹ Even after the improvement has been begun on the assessment plan, the legislature may require the city to pay the cost of such improvement by general taxation.² Whether after the improvement has been begun on the plan of payment by general taxation the legislature may then require such improvement to be paid for by local assessment, is a question which is discussed elsewhere.³

§ 236. Discretionary power as to assessment or taxation given to public corporation.

It is well settled that it is within the power of the legislature to authorize a public corporation to construct a public improvement to be paid for either by general taxation or by local assessments based on special benefits, as such corporation may, in its discretion, determine.¹ The question of which method is the

¹ *Chambers v. Satterlee*, 40 Cal. 497 [1871]; *Burnett v. Mayor and Common Council of the City of Sacramento*, 12 Cal. 76, 73 Am. Dec. 518 [1859]; *O'Neill v. City of Hoboken*, 72 N. J. L. (43 Vr.) 67, 60 Atl. 50 [1905]; *O'Neill v. City of Hoboken*, 73 N. J. L. (44 Vr.) 189, 63 Atl. 986 [1906].

² *O'Neill v. City of Hoboken*, 72 N. J. L. (43 Vr.) 67, 60 Atl. 50 [1905].

³ See § 169.

¹ *Burnett v. Mayor and Common Council of the City of Sacramento*, 12 Cal. 76, 73 Am. Dec. 518 [1859]; *Murphy v. Mayor and Council of the City of Wilmington*, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345 [1880]; *City of Chicago v. Blair*, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829 [1894]; *Kuehner v. City of Freeport*, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372;

People ex rel. Thatcher v. Village of Hyde Park, 117 Ill. 462, 6 N. E. 33 [1887]; *Faleh v. People ex rel. Johnson*, 99 Ill. 137 [1881]; *Ricketts v. Village of Hyde Park*, 85 Ill. 110 [1877]; *Fagan v. City of Chicago*, 84 Ill. 227 [1876]; *People ex rel. Miller v. Sherman*, 83 Ill. 165 [1876]; *Sefton v. Board of Commissioners of Howard County*, 160 Ind. 357, 66 N. E. 891 [1903]; *Shelby v. City of Burlington*, 125 Ia. 343, 101 N. W. 101 [1904]; *Morton v. Sullivan*. — Ky. —, 96 S. W. 807 [1906]; *Blanchet v. Municipality No. 2*, 13 La. 322 [1839]; *City of Greenville v. Harvie*, 79 Miss. 754, 31 So. 425 [1901]; *Maybin v. City of Biloxi*, 77 Miss. 673, 28 So. 566 [1900]; *City of Kansas City to the use of Atkins v. Richards*, 34 Mo. Ann. 521 [1889]; *Wilson v. City of Auburn*, 27 Neb.

fairer and more just in the particular case is one of policy if the legal power to exercise both is given, and it is a question which can be determined more accurately by the city than by the state. The exercise of such discretion cannot, according to the great weight of authority, be controlled by the courts.² Even if the city has in the past paid for improvements of a certain kind by general taxation, this fact will not prevent it from levying special assessments for future improvements of the same kind.³ A contrary view has been expressed in Kentucky. Under similar statutes it has been held that the city has not the arbitrary and unlimited choice of paying for improvements, but that in such cases the city is bound to levy local assessments as a means of paying for public improvements except in cases in which local assessment would so exceed the benefits conferred as to amount in effect to a confiscation of the property assessed; and that in such case the city is bound to pay for the improvement by general taxation.⁴ While this view differs from that held by the weight of authority the difference exists in the construction placed by the Kentucky court upon such statutes, and in the legislative intent which that court deduces from the language employed by the legislature. The city is held, it is true, to have a very limited amount of discretion; but there is no attempt on the part of the court to exercise discretion conferred upon a city.

§ 237. Power to tax does not abrogate power to assess.

Since it is within the power of the legislature to confer upon a public corporation both the power to levy a general tax and the power to levy a local assessment, with discretion to determine in which method it will pay for the improvement in question,

435. 43 N. W. 257 [1889]; *In re Dugro*, 50 N. Y. 513 [1872]; *Astor v. Mayor, Aldermen and Commonalty of the City of New York*, 37 N. Y. Sup. Ct. 539 [1874]; *Beers v. Dallas City*, 16 Or. 334, 13 Pac. 835; *In re Beechwood Avenue*, Appeal of O'Mara, 194 Pa. St. 86, 45 Atl. 127 [1899]; *Borough of Greensburg v. Young*, 53 Pa. St. 280 [1866]; *McCullough v. Village of Campbellsport*, 123 Wis. 334, 101 N. W. 709 [1904].

² *People ex rel. Thatcher v. Village*

of Hyde Park, 117 Ill. 462, 6 N. E. 33 [1887]; *Falch v. People ex rel. Johnson*, 99 Ill. 137 [1881]; *Shelby v. City of Burlington*, 125 Ia. 343, 101 N. W. 101 [1904]; *Blanchet v. Municipality No. 2*, 13 La. 322 [1839]; *Astor v. Mayor, Aldermen and Commonalty of the City of New York*, 37 N. Y. Sup. Ct. 539 [1874].

³ *McChesney v. City of Chicago*, 152 Ill. 543, 38 N. E. 767 [1894].

⁴ *City of Covington v. Worthington*, 88 Ky. 206, 11 S. W. 1038, 10 S. W. 790 [1889].

a grant of power by the legislature to a public corporation authorizing it to levy a general tax to pay for a certain kind of public improvement does not abrogate another grant of power authorizing such corporation to levy special assessments to defray the expense of such improvements.¹ So a grant to a public corporation of authority to borrow money to pay for improvements of a certain class does not prevent such corporation from levying special assessments, if legislative authority therefor exists and using the proceeds of such assessments to reimburse the city for the debt which has thus been contracted.² Thus the statute authorized what was known as a "revolving fund" to be created as follows. The city was to issue bonds, and thus raise a fund, out of which the expense of constructing certain improvements was to be paid and into which the amount derived from local assessments levied on the property benefited by such improvements respectively was to be paid. It was held that a statute of this sort was within the power of the legislature, both as to improvements already made³ and as to improvements to be made thereafter.⁴ Accordingly the mayor of such city could be compelled by mandamus to sign such bonds.⁵ A limited grant of power to levy a general tax for the expense of a public improvement does not abrogate a pre-existing grant of power to levy a local assessment therefor.⁶ On the same principle a provision in a state constitution, affirmatively granting the power of general taxation for a given form of improvement does not restrict or destroy the power of local assessment. A provision concerning a levee district: ". . . It may levy a tax not to exceed five mills on the taxable property situated within the alluvial portions of said districts subject to overflow,"⁷ does not limit the power of local assessment.⁸ The intention of the framers

¹ *People ex rel. Miller v. Sherman*, 83 Ill. 165 [1876]; *Sefton v. Board of Commissioners of Howard County*, 160 Ind. 357, 66 N. E. 891 [1903]; *Gilmore v. City of Utica*, 131 N. Y. 26, 29 N. E. 841 [1892]; *Borough of Greensburg v. Young*, 53 Pa. St. 280 [1866].

² *In re Beechwood Avenue, Appeal of O'Mara*, 194 Pa. St. 86, 45 Atl. 127 [1899].

³ *Alexander v. City of Duluth*, 77 Minn. 445, 80 N. W. 623.

⁴ *State ex rel. Minnesota Loan & Trust Co. v. Ames*, 87 Minn. 23, 91 N. W. 18 [1902].

⁵ *State ex rel. Minnesota Loan & Trust Co. v. Ames*, 87 Minn. 23, 91 N. W. 18 [1902].

⁶ *Gilmore v. City of Utica*, 131 N. Y. 26, 29 N. E. 841 [1892].

⁷ Article 214, Constitution of Louisiana.

⁸ *Excelsior Planting & Manufacturing Co. v. Green*, 39 La. Ann. 455, 1 So. 873 [1887].

of the constitution in drafting this article was to grant a new and additional power and one which, but for such express grant, would have been forbidden by other articles of the constitution. The legislature did not intend thereby to destroy the power of local assessment which was already given.⁹

§ 238. Power to assess does not abrogate power to tax.

If the power of general taxation is given in a clear and unequivocal manner, the subsequent grant of the power of levying local assessments does not abrogate the power of levying general taxes,¹ since the evident intention of the legislature in cases of this kind is that the public corporation shall have the choice between these two methods of paying for a public improvement. Accordingly if the city constructs an improvement without taking the steps necessary in case of levying a local assessment, it may nevertheless be liable for the cost of such improvement and may pay therefor by general taxation.² If, however, the intention of the legislature is to deprive the municipality of the power of levying a general tax for certain improvements, and to restrict it to the levy of local assessments as the sole means of paying for such improvements, full effect must be given to such intention.³

§ 239. Discretionary power to combine assessment and general taxation.

The legislature, if not restrained by some specific constitutional provision, is not bound to choose between the alternatives

⁹ *Excelsior Planting & Manufacturing Co. v. Green*, 39 La. Ann. 455, 1 So. 873 [1887].

¹ *Bradley v. Village of West Duluth*, 45 Minn. 4, 47 N. W. 166 [1890]; *Pine Tree Lumber Co. v. City of Fargo*, 12 N. D. 360, 96 N. W. 357 [1903]; *Stephens v. City of Spokane*, 11 Wash. 41, 39 Pac. 266 [1895]; *Soule v. City of Seattle*, 6 Wash. 315, 33 Pac. 384, 1080 [1893]; *McCullough v. Village of Campbellsport*, 123 Wis. 334, 101 N. W. 709 [1904]; *Allen v. City of Janesville*, 35 Wis. 403 [1874].

² *Bradley v. Village of West Du-*

luth. 45 Minn. 4, 47 N. W. 166 [1890]; *Pine Tree Lumber Co. v. City of Fargo*, 12 N. D. 360, 96 N. W. 357 [1903]; *State ex rel. The City of Columbus v. Strader*, 25 O. S. 527 [1874]; *Stephens v. City of Spokane*, 11 Wash. 41, 39 Pac. 266 [1895]; *Soule v. City of Seattle*, 6 Wash. 315 33 Pac. 384, 1080 [1893].

³ See *Rounds v. Mumford*, 2 R. I. 154 [1852] where the power to levy local assessments for the construction of sidewalks existed, but it was doubted, though not decided, whether the power to levy local taxes for such purpose existed.

providing for payment of the cost of an improvement solely by general taxation and of providing for such payment solely by local assessment. It may, in its discretion, provide that the improvement in question shall be paid for in part by local assessment and in part by general taxation.¹ Statutes are not infrequent in which the legislature provides that a certain fixed portion of the cost shall be borne by the property owners and the rest of the cost shall be borne by the city. Such provisions are upheld except in jurisdictions in which the assessment of the cost of an improvement or of a fixed portion thereof upon the owners of property benefited by such improvement, without a preliminary inquiry as to the existence and amount of the benefits conferred upon such property owners by the amount of such benefits, and without a specific restriction of the amount of assessment to the amount of such benefits, is unconstitutional.² Even in the latter case, however, the objection is not to the use of general taxation and local assessment together, but to the imposition of a local assessment in excess of benefits. Statutes which provide that the land benefited by the improvement shall be assessed up to the extent of the special benefit conferred by the improvement and that the rest of the cost of such improvement shall be paid by the public corporation out of funds raised by general taxation are held valid.³

¹ *Brown v. Drain*, 112 Fed. 582 [1901]; *People ex rel. Miller v. Sherman*, 83 Ill. 165 [1876]; *St. John v. City of East St. Louis*, 50 Ill. 92 [1869]; *State ex rel. Horrall v. Thompson*, 109 Ind. 533, 10 N. E. 305 [1886]; *Zumbro v. Parnin*, 141 Ind. 430, 40 N. E. 1085 [1895]; *City of Terre Haute v. Blake*, 9 Ind. App. 403, 36 N. E. 932 [1893]; *Richardson v. Morgan*, 16 La. Ann. 429 [1862]; *Hurford v. City of Omaha*, 4 Neb. 336 [1876]; *State, Youngster. Pros. v. Mayor and Aldermen of Paterson*,

40 N. J. L. (11 Vr.) 244 [1878]; *Smith v. Mayor and Common Council of the City of Newark*, 32 N. J. Eq. (5 Stew.) 1 [1880]; *In the Matter of the Application of Church for the Appointment of Commissioners. etc.*, 92 N. Y. 1 [1883]; *Town of Muskegon v. Drainage Commissioners*, 78 Wis. 40, 47 N. W. 11 [1890].

² See § 114. *et seq.*; § 709.

³ *State, Youngster. Pros. v. Mayor and Aldermen of Paterson*, 40 N. J. L. (11 Vr.) 244 [1878].

CHAPTER VII.

BY WHAT AUTHORITY ASSESSMENTS MAY BE LEVIED.

§ 240. Questions involved in discussion of power to levy assessment.

The question of the power of various public bodies to levy local assessments is one which is not infrequently presented for judicial consideration. It involves certain fundamental theories of the organization, and powers of our state governments, and of the legislative branches thereof. Upon these principles, fundamental and elementary as they may appear to be, there is a marked lack of harmony among the different courts. The chief of the general fundamental questions involved in this subject, are the following: (1) The legislature is a body of delegated power, having those powers conferred upon it by the people of the state, speaking through the constitution of such state. Has the legislature the power to create inferior public corporations, and to delegate to them the governmental powers, including the power of taxation, and the power of special assessment, which have been conferred upon the legislature by the people of the state? (2) If the legislature has the power of creating inferior public corporations for the purposes of local self-government, is the legislature bound to confer upon such public corporations matters which involve local self-government, including local taxation and special assessment, or may the legislature exercise such powers itself by direct legislative act? (3) If the legislature has power to create inferior public corporations for purposes of local self-government, is it bound to admit the people within the territorial jurisdiction of such inferior corporation to the control of such corporation; or, on the other hand, has the legislature power to create an inferior public corporation without the will of the persons who are subject to its jurisdiction, and without giving them any opportunity to choose its officers, or otherwise to control its public action?

§ 241. Power of legislature to levy assessment.

The power of local assessment is sometimes exercised directly by the legislature itself, without the intervention of any inter-

mediate public corporation. In the absence of any specific constitutional provision, it is generally assumed by the courts, and often held specifically, that the legislature has power to levy local assessments directly.¹ In the absence of specific constitutional provision, it seems to be assumed that the legislature may fix such elements of an assessment as leave to the local public corporation merely the perfunctory duty of carrying into execution the mandates of the legislature.² So the legislature may fix the amount of an assessment for sewer purposes at a certain amount per front foot,³ or it may determine the amount to be raised for a given improvement and the district to be taxed therefor.⁴ The power of the legislature to confirm a contract, which has been attacked on the ground of fraud, by enacting a special confirmatory statute and providing for an assessment to pay the cost of such improvement has been questioned by the

¹ Matter of City of New York, 190 N. Y. 350, *sub nomine*; *In re Water Front in City of New York*, 83 N. E. 299 [1907]; (modifying judgment, 105 N. Y. S. 750, 120 App. Div. 849); *In the Matter of the Application of Van Antwerp to Vacate an Assessment*, 56 N. Y. 261 [1874]; *City of Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892].

² *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]).

³ *People of the State of New York ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662 [1902].

⁴ *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]); *King v. Portland*, 38 Or. 402, 52 L. R. A. 812, 63 Pac. 2 [1900]; "The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which

might justly have been imposed upon adjacent property benefited by the change. By the act of 1881 the legislature imposes the unpaid portion of the cost and expenses upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final." *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]; (affirmed as *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (quoted in *Parsons v. District of Columbia*, 170 U. S. 45, 53, 54, 52 L. 943, 18 S. 521 [1898])).

lower courts of New York,⁵ but on the other hand has been recognized by such courts.⁶ A statute appropriating a certain sum for repaving and repairing streets has been held to be valid;⁷ and where in obedience to such law the council passes an ordinance appropriating such sum to such purpose, the work is regarded as being done by authority of the legislature and not by authority of the council.⁸

§ 242. Specific provisions restricting power of legislature to levy assessments.

Specific constitutional provisions, however, which are in force in some states, secure local self-government, and prevent the legislature from levying taxes or local assessments directly. The constitution of California provides: "The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporation, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes; but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes."¹ Under this provision the legislature has no power to levy a local assessment directly within an incorporated city.² Thus under a special act concerning a swamp land reclamation district, by which the trustees were required to make up a sworn statement of the cost of the reclamation work "based upon the books and vouchers thereof," and the amount so reported was to be assessed upon the lands, it was held that this was in effect a levy by the legislature of an assessment upon the lands of the

⁵ In the Matter of Regulating and Grading Eightieth Street between Fifth Avenue and the East River, 31 How. (N. Y.) 99 [1865].

⁶ In the Matter of the Petition of the President, Managers and Company of the Delaware & Hudson Canal Co. to Vacate an Assessment, 60 Hun. (N. Y.) 204, 14 N. Y. Supp. 585 [1891].

⁷ Brady v. Mayor of the City of New York, 35 How. (N. Y.) 81 [1868].

⁸ Brady v. Mayor of the City of New York, 35 How. (N. Y.) 81 [1868].

¹ Constitution of California, Article XI., § 12.

² Schumacker v. Toberman, 56 Cal. 508 [1880]; People v. Houston, 54 Cal. 536 [1880]; Brady v. King, 53 Cal. 44 [1878]; People of the State of California v. Lynch, 51 Cal. 15, 21 Am. Rep. 677 [1875]; "Nor can the legislature, by a direct act, make an assessment within an incorporated city." Schumacker v. Toberman, 56 Cal. 508, 511 [1880]; (citing Taylor v. Palmer, 31 Cal. 240, [1866]; People of the State of California v. Lynch, 51 Cal. 15 [1875]).

district, and that the act was accordingly unconstitutional.³ The legislature may, however, authorize the board of supervisors of a county to levy an assessment to pay bonds of irrigation districts if the directors of such irrigation districts neglect to levy such assessments.⁴ Under a provision in the constitution forbidding a "special act for the assessment or collection of taxes,"⁵ an act authorizing the improvement of certain streets in the third ward of the city of Milwaukee and the levy of a special tax in such ward therefor has been held valid as an amendment to the city charter and not an act for assessment of taxes.⁶ Under an earlier provision of the constitution of Illinois,⁷ it was held that local assessments could not be imposed on a locality without the consent of the property owners affected.⁸

§ 243. Power of Congress to levy assessment.

A corresponding question has been considered in cases in which the Congress of the United States has provided for local assessments in the District of Columbia, and it has been held that Congress has complete jurisdiction over the District of Columbia,¹ and that this power includes the right to provide for the levy and collection of local assessments.² It is also competent

³ *People v. Houston*, 54 Cal. 536 [1880].

⁴ *Nevada National Bank v. Board of Supervisors of Kern County*, 5 Cal. App. 638, 91 Pac. 122 [1907].

⁵ Article IV., § 31, Subdivision 6, Amendments to the Constitution of Wisconsin.

⁶ *Warner v. Knox*, 50 Wis. 429, 7 N. W. 372 [1880].

⁷ "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body improving the same." Article IX., § 5, Constitution of Illinois [1848].

⁸ *Udike v. Wright*, 81 Ill. 49 [1876].

¹ *Wight v. Davidson*, 181 U. S. 371, 45 L. 900, 21 S. 616 [1901]; (revers-

ing *Davidson v. Wight*, 16 App. D. C. 371 [1900]); *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898]; *Bauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; *Shoemaker v. United States*, 147 U. S. 282, 37 L. 170, 13 S. 361 [1893]; *Gibbons v. District of Columbia*, 116 U. S. 404, 6 S. 427; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. 1098 [1878]; *Willard v. Presbury*, 81 U. S. (14 Wall) 676 20 L. 719 [1869].

² *Wight v. Davidson*, 181 U. S. 371, 45 L. 900, 21 S. 616 [1901]; (reversing *Davidson v. Wight*, 16 App. D. C. 371 [1900]); *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898]; *Wilson v. Lambert*, 168 U. S. 611, 42 L. 599, 18 S. 217 [1897]; (reversing *Craighill v. Van Riswick*, 8 App. D. C. 185 [1896]); *Bauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966

for Congress to provide that an assessment of a certain amount shall be levied upon property abutting on improvements of a certain character and that its action thus taken is conclusive of the question of benefits to abutting property.³ An example of the exercise of power of this sort is found in a statute providing for an assessment of one dollar and twenty-five cents per lineal front foot on all land abutting upon a street, road or alley in which a water main should be laid. Such a statute was held to be within the power of Congress.⁴

§ 244. Legislative delegation of power to levy local assessment.

Much more frequently than the attempt of the legislature to levy local assessments directly or by its own act, are its attempts to delegate to public corporations of various kinds the power to levy local assessments. This attempt has been attacked as unconstitutional, on the theory that the power of the legislature is itself merely a delegated power, and that the creation of such inferior public corporations, with power to tax and levy local assessments, is a delegation of power which itself is delegated. From the standpoint of abstract logic, it might seem difficult to answer objections of this sort. Here, as in other cases, the effect of the written constitution is greatly modified by the pre-existing practice in force when the constitution was adopted. At the time of the adoption of written constitutions in the United States, public corporations existed everywhere for the purposes of local self-government, and the existence of such corporations is often recognized indirectly by the written constitutions. It has always been felt that the written constitutions were not intended to subvert the existing form of government in this country, except where specific provisions are manifestly inconsistent with prior practices. Indeed, it has been felt that written constitutions were intended to preserve and perpetuate local self-government, rather than to subvert and destroy it. The whole spirit of the written constitutions assumes the existence of local self-government. Accordingly it is held that in the

[1897]; *Shoemaker v. United States*, 147 U. S. 282, 37 L. 170, 13 S. 361 [1893]; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. 1098 [1878]; *Willard v. Presbury*, 81 U. S. (14 Wall) 676, 20 L. 719 [1869].

³ *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898].

⁴ *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898].

absence of specific constitutional provisions the legislatures have the power to delegate to inferior public corporations powers of local self-government, including the power to levy assessments.¹

¹ French v. Barber Asphalt Paving Co., 181 U. S. 324, 45 L. 879, 21 S. 625 [1901]; (affirming Barber Asphalt Paving Co. v. French, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]); Bauman v. Ross, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; (reversing District of Columbia v. Arnes, 8 App. D. C. 393 [1896]; Bauman v. Ross, 9 App. D. C. 260 [1896]; Abbott v. Ross, 9 App. D. C. 289 [1896]); Crane v. Siloam Springs, 67 Ark. 30, 55 S. W. 955 [1899]; City Street Improvement Co. v. Babeock, 139 Cal. 690, 73 Pac. 666 [1903]; Capron v. Hitchcock, 98 Cal. 427, 33 Pac. 431 [1893]; Ede v. Cogswell, 79 Cal. 278, 71 Pac. Rep. 767 [1889]; Lent v. Tillson, 72 Cal. 404, 14 Pac. 71 [1887]; Reclamation District No. 108 v. Hagar, 66 Cal. 54, 4 Pac. Rep. 945 [1884]; Reclamation District No. 3 v. Goldman, 61 Cal. 205 [1882]; People of the State of California v. Lynch, 51 Cal. 15, 21 Am. Rep. 677 [1875]; Wolff v. City of Denver, 20 Colo. App. 135, 77 Pac. 364 [1904]; Fair Haven & Westville Railroad Company v. City of New Haven, 75 Conn. 442, 53 Atl. 690 [1903]; Angus v. City of Hartford, 74 Conn. 27, 49 Atl. 192 [1901]; Todd v. Macfarland, 20 App. D. C. 176 [1902]; District of Columbia v. Wormley, 15 App. D. C. 58 [1899]; Allman v. District of Columbia, 3 App. D. C. 8 [1894]; Madderom v. City of Chicago, 194 Ill. 572, 62 N. E. 846 [1902]; Andrews v. People ex rel. Koehersperger, 173 Ill. 123, 50 N. E. 335 [1898]; People ex rel. Gleason v. Yancey, 167 Ill. 255, 47 N. E. 521 [1897]; Delamater v. City of Chicago, 158 Ill. 575, 42 N. E. 444 [1895]; Tucker v. People ex rel. Wall, 156 Ill. 108, 40 N. E. 451 [1895]; Rich v. City of Chicago, 152 Ill. 18, 38 N. E. 255 [1894];

Steele v. Village of River Forest, 141 Ill. 302, 30 N. E. 1034 [1893]; Cochran v. Village of Park Ridge, 138 Ill. 295, 27 N. E. 939 [1893]; Murphy v. City of Peoria, 119 Ill. 509, 9 N. E. 895 [1888]; Village of Hyde Park v. Spencer, 118 Ill. 446, 8 N. E. 846 [1888]; Kedzie v. West Chicago Park Commissioners, 114 Ill. 280, 2 N. E. 182 [1886]; Skinner v. City of Chicago, 42 Ill. 52 [1866]; City of Chicago v. Wright, 32 Ill. 192 [1863]; Broadway Baptist Church v. McAttee, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871]; Surget v. Chase, 33 La. Ann. 833 [1881]; O'Leary v. Sloo, 7 La. Ann. 25 [1852]; Mayor and City Council of Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43 [1894]; Mayor and City Council of Baltimore v. Johns Hopkins Hospital, 56 Md. 1 [1880]; Dashiell v. Mayor and City Council of Baltimore, use of Hax, 45 Md. 615 [1876]; Mayor and City Council of Baltimore v. Clunet, 23 Md. 449 [1865]; Workman v. City of Worcester, 118 Mass. 168 [1875]; Butler v. City of Worcester, 112 Mass. 541 [1873]; Godbold v. City of Chelsea, 111 Mass. 294 [1873]; Prince v. City of Boston, 111 Mass. 226; [1872]; Whiting v. Mayor and Aldermen of the City of Boston, 106 Mass. 89 [1870]; Jones v. Board of Aldermen of the City of Boston, 104 Mass. 461 [1870]; Chandler v. Heisler, — Mich. —, 116 N. W. 626 [1908]; Kellogg v. Village of Janesville, 34 Minn. 132, 24 N. W. 359 [1885]; State of Minnesota ex rel. Burger v. District Court of Ramsey County, 33 Minn. 295; 23 N. W. 222 [1885]; Wilzinski v. City of Greenville, 85 Miss. 393, 37 So. 807 [1905]; Heman v. Allen, 156 Mo. 534, 57 S. W. 559 [1900]; City of Springfield to use of Central National Bank v. Weaver, 137 Mo. 650, 57 S. W.

§ 245. Specific corporations to which power of levying local assessment may be given—Existing municipal corporations.

It being assumed that the legislature may confer upon inferior public corporations the power to levy local assessments, the question of its power to authorize specific existing corporations to levy local assessments presents few difficulties. From this general principle it follows that statutes which confer upon cities the power of levying local assessments, are valid.¹ Thus

509, 39 S. W. 276 [1896]; Eyerman v. Blaksley, 78 Mo. 145 [1883]; Smith v. Tobener, 32 Mo. App. 601 [1888]; City of St. Louis v. Stoddard, 15 Mo. App. 173 [1884]; Farrington v. City of Mt. Vernon, 166 N. Y. 233, 59 N. E. 826 [1901]; McLaughlin v. Miller, 124 N. Y. 510, 26 N. E. 1104 [1891]; In the matter of the Petition of the New York Institution for the Instruction of the Deaf and Dumb to Vacate an Assessment, 121 N. Y. 134, 24 N. E. 378 [1890]; In the matter of the Application of Tappan to Vacate Certain Assessments, 54 Barb. 225 [1869]; Gilbert v. Havemeyer, 4 N. Y. Sup. Ct. Rep. 506 [1849]; City of Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178 [1893]; City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841 [1902]; Jones v. Holzapfel, 11 Okla. 405, 68 Pac. 511 [1902]; Beers v. Dalles City, 16 Or. 334, 18 Pac. 835 [1888]; Frederick Street, Hanover Borough's Appeal, 150 Pa. St. 202, 24 Atl. 669 [1892]; Hand v. Fellows, 148 Pa. St. 456, 23 Atl. 1126 [1892]; City of Reading v. Savage, 124 Pa. St. 328, 16 Atl. 788 [1889]; Rounds v. Mumford, 2 R. I. 154 [1852]; Taylor v. Boyd, 63 Tex. 533 [1885]; Sands v. City of Richmond, 31 Grattan, 571, 31 Am. Rep. 742 [1879]; Norfolk City v. Ellis, 26 Grattan, 224 [1875]; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432 [1898];

State of Washington on the Relation of Hernan v. City of Ballard, 16 Wash. 418, 47 Pac. 970 [1897]; City of Ballard v. West Coast Improvement Co., 15 Wash. 572, 46 Pac. 1055 [1896]; Town of Medical Lake v. Smith, 7 Wash. 195, 34 Pac. 835 [1893]; McNair v. Ostrander, 1 Wash. 110, 23 Pac. 414 [1890]; City of Seattle v. Yesler, 1 Wash. Terr. 577 [1878]; Boyd v. City of Milwaukee, 92 Wis. 456, 66 N. W. 603 [1896]; Johnson v. City of Milwaukee, 88 Wis. 383, 60 N. W. 270 [1894].

¹ French v. Barber Asphalt Paving Co., 181 U. S. 324, 45 L. 879, 21 S. 625 [1901]; (affirming Barber Asphalt Paving Co. v. French, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]); Crane v. Siloam Springs, 67 Ark. 30, 55 S. W. 955 [1899]; Ahern v. Board of Improvement District No. 3 of Texarkana, 69 Ark. 68, 61 S. W. 575 [1901]; Rector v. Board of Improvement, 50 Ark. 116, 6 S. W. 519 [1887]; Watkins v. Griffith, 59 Ark. 344, 27 S. W. 234 [1894]; Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057 [1896]; Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615 [1887]; People of the State of California v. Lynch, 51 Cal. 15, 21 Am. Rep. 677 [1875]; City of Denver v. Campbell, 33 Colo. 162, 80 Pac. 142 [1905]; City of Denver v. Londoner, 33 Colo. 104, 80 Pac. 117 [1904]; Wolff v. City of Denver, 20 Colo. App. 135, 77 Pac. 364 [1904]; Bassett v. City of New Haven, 76

Congress can confer upon the city of Washington and the Dis-

Conn. 70, 55 Atl. 579 [1903]; Bartram v. City of Bridgeport, 55 Conn. 122, 10 Atl. 470 [1887]; Gregory v. City of Bridgeport, 52 Conn. 40 [1884]; Fair Haven & Westville Railroad Company v. City of New Haven, 75 Conn. 442, 53 Atl. 960 [1903]; The Norwich Savings Society v. City of Hartford, 48 Conn. 570 [1881]; Nichols v. City of Bridgeport, 23 Conn. 189, 60 Am. Dec. 636 [1854]; Murphy v. Mayor and Council of the City of Wilmington, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345 [1880]; Bacon v. Mayor and Aldermen of Savannah, 91 Ga. 500, 17 S. E. 749 [1893]; City of Chicago v. Brede, 218 Ill. 528, 75 N. E. 1044 [1905]; Jones v. Town of Lake View, 151 Ill. 663, 38 N. E. 688 [1894]; Lightner v. City of Peoria, 150 Ill. 80; 37 N. E. 69 [1894]; Davis v. City of Litchfield, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; Linck v. City of Lichtfield, 141 Ill. 469, 31 N. E. 123 [1893]; Huston v. Clark, 112 Ill. 344 [1885]; Potwin v. Johnson, 108 Ill. 70 [1883]; Faleh v. People ex rel. Johnson, 99 Ill. 137 [1881]; People ex rel. Miller v. Sherman, 83 Ill. 165 [1876]; Greeley v. People of the State of Illinois, 60 Ill. 19 [1871]; Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Oglesby, 165 Ind. 542, 76 N. E. 165 [1905]; Cason v. City of Lebanon, 153 Ind. 567; 55 N. E. 768 [1899]; Barber Asphalt Paving Co. v. Edgerton, 125 Ind. 455; 25 N. E. 436 [1890]; Leeds v. City of Richmond, 102 Ind. 372, 1 N. E. 711 [1885]; Bradley v. McAtee, 70 Ky. (7 Bush.) 667, 3 Am. Rep. 309 [1870]; City of Louisville v. Hyatt, 2 B. Monroe (Ky.) 177, 36 Am. Dec. 594 [1841]; City of Lexington v. McQuillan's Heirs, 9 Dana (Ky.) 513, 35 Am. Dec. 159 [1840]; Excelsior Planting & Manufacturing Co. v. Green, 39 La. Ann. 455, 1 So. 873 [1887]; Surget v. Chase, 33 La.

Ann. 833 [1881]; Mayor and City Counsel of Baltimore v. Johns Hopkins Hospital, 56 Md. 1 [1880]; Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564, 52 N. W. 1028 [1892]; Hoyt v. City of East Saginaw, 19 Mich. 39, 2 Am. Rep. 76 [1869]; Burns v. City of Duluth, 96 Minn. 104, 104 N. W. 714 [1905]; State of Minnesota ex rel. Merriek, v. District Court of Hennepin County, 33 Minn. 235, 22 N. W. 625 [1885]; City of Sedalia to use of Sedalia National Bank v. Donohue, 190 Mo. 407, 89 S. W. 386 [1905]; Barber Asphalt Paving Co. v. French, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]; Heman v. Allen, 156 Mo. 534, 57 S. W. 559 [1900]; City of St. Joseph v. Anthony, 30 Mo. 537 [1860]; City of Excelsior Springs to use of McCormick v. Ettenson, 120 Mo. App. 215, 96 S. W. 701 [1906]; City of Excelsior Springs to use of McCormick v. Mississippi Valley Trust Co., — Mo. App. —, 96 S. W. 707 [1906]; Medland v. Linton, 60 Neb. 249, 82 N. W. 866 [1900]; Durrell v. City of Woodbury, 74 N. J. L. (45 Vr.) 206, 65 Atl. 198 [1906]; In the Matter of City of New York, 190 N. Y. 350, *sub nomine*; In re Water Front in City of New York, 83 N. E. 299 [1907]; (modifying judgment 105 N. Y. S. 750, 120 App. Div. 849); McLaughlin v. Miller, 124 N. Y. 510, 26 N. E. 1104 [1891]; In the matter of the Application of Church for the Appointment of Commissioners, etc., 92 N. Y. 1 [1883]; City of Asheville v. Wachovia Loan & Trust Co., 143 N. C. 360, 55 S. E. 800 [1906]; City of Raleigh v. Peace, 110 N. C. 32; 17 L. R. A. 330; 14 S. E. 521 [1892]; Portland Lumbering & Manufacturing Co. v. City of East Portland, 18 Or. 21, 6 L. R. A. 290, 22 Pac. 536 [1889]; Charleston v. Werner, 38 S. C. 488, 37 Am. St. Rep. 776; 17 S. E. 33 [1892]; Nash-

trict of Columbia the power to levy local assessments.² In like manner the power of the legislature to confer the power of local assessment upon other public corporations, or quasi-corporations such as counties,³ or townships,⁴ is everywhere recognized. If a public corporation has been annexed to a larger one,⁵ or has been dissolved and has become a part of an incorporated township,⁶ the officials of the corporation into which it is thus merged are the ones who have authority to levy assessments within the territory of such former corporations. The assessment is to be made according to the charter of the resulting city if this differs from the law applicable to the original corporation.⁷ If a municipality is annexed, under statutory proceedings, by a larger municipality after an assessment is levied, but before the construction of the improvement for which said assessment is levied, the city into which said municipality is merged may discontinue the assessment proceeding and abandon the improvement.⁸ An ordinance enacted by a public corporation while organized as a town, remains its ordinance after it is organized as an incorporated village.⁹ A drainage district is held to change to one organized under the levee act, by virtue of a popular vote for such change, when the record of the certificate of the county clerk, showing that a majority of the votes cast at such election were for a change of organization, is filed.¹⁰

ville v. Berry, 2 Shan. Cas. (Tenn.) 561; Taylor v. Boyd, 63 Tex. 533; Lovenberg v. City of Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024 [1897]; Hemen v. City of Ballard, 40 Wash. 81, 82 Pac. 277 [1905]; City of Seattle v. Yesler, 1 Wash. Terr. 577 [1878]; State ex rel. Burbank v. City of Superior, 81 Wis. 649, 51 N. W. 1014 [1892].

²Mattingly v. District of Columbia, 97 U. S. 687, 24 L. 1098 [1878]. Willard v. Presbury, 81 U. S. (14 Wall.) 676, 20 L. 719 [1869].

³Dowlan v. Sibley County, 36 Minn. 430, 31 N. W. 517; Darst v. Griffin, 31 Neb. 668, 48 N. W. 819 [1891]; State of Nebraska ex rel. Abbott v. Board of County Commissioners of Dodge County, 8 Neb. 124, 30 Am. Rep. 819 [1879]; Seanor v.

Board of County Commissioners, 13 Wash. 48, 42 Pac. 552 [1895].

⁴Sessions v. Crunkilton, 20 O. S. 349; Reeves v. Treasurer of Wood County, 8 O. S. 333 [1858]; Anderson v. Lower Merion Township, 217 Pa. St. 369; 66 Atl. 1115 [1907].

⁵Gilpin v. City of Ansonia, 68 Conn. 72, 35 Atl. 777; City of Chicago v. Weber, 94 Ill. App. 561; Barber Asphalt Paving Co. v. Field. — Mo. App. —, 111 S. W. 907 [1908].

⁶Adams v. County of Piscataquis, 87 Me. 503, 33 Atl. 12.

⁷Gilpin v. City of Ansonia, 68 Conn. 72, 35 Atl. 777.

⁸City of Chicago v. Weber, 94 Ill. App. 561 [1900].

⁹Neff v. Bates, 25 O. S. 169.

¹⁰Drainage District No. 3 v. The People ex rel. Baron, 147 Ill. 404; 35 N. E. 238.

§ 246. *De facto* municipal corporations.

If the public corporation, which has constructed an improvement and levied an assessment therefor, is assuming to act under legal authority, and is at least a corporation *de facto*, the legality of its incorporation cannot be questioned in a proceeding to enforce the assessment.¹ While a city may levy a re-assessment after re-incorporating, for an improvement constructed under the defective incorporation,² the mere act of re-incorporating does not make prior assessments valid.³ The legislature may legalize the re-incorporation of towns and cities which up to that time had been illegally incorporated and may make the contracts of such towns and cities legally binding.⁴

§ 247. Assessment districts.

Somewhat different from the foregoing questions, is the question of the power of the legislature to create a public corporation, or quasi corporation, for the primary purpose of levying local assessments. The exercise of this power usually takes the form of the creation of an assessment district, consisting of the property which it is assumed will be benefited by the proposed improvement, and the conferring upon some board, public body, and the like, the power to levy local assessments in such district. The power of the legislature to create an assessment district consisting of the land which is benefited by the improvement, is very generally recognized in the absence of some specific constitutional restriction.¹ The question of the finality of the legis-

¹Swamp Land District v. Silver, 98 Cal. 51, 32 Pac. 866 [1895]; Mulikin v. City of Bloomington, 72 Ind. 161; Redden v. Town of Covington, 29 Ind. 118; Willard v. Albertson, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403 [1899]; City of St. Louis v. Stoddard, 15 Mo. App. 173; *contra*, Medical Lake v. Smith, 7 Wash. 195, 34 Pac. 835. See also City of Ballard v. West Coast Improvement Co., 15 Wash. 572, 46 Pac. 1055.

²State ex rel. Heman v. Ballard, 16 Wash. 418, 47 Pac. Rep. 970.

³Medical Lake v. Smith, 7 Wash. 195, 34 Pac. 835.

⁴Abernathy v. Town of Medical Lake, 9 Wash. 112, 37 Pac. 306 [1894].

¹Minnesota & M. Land Improvement Co. v. City of Billings, 111 Fed. 972, 50 C. C. A. 70 [1901]; Jonesboro, Lake City & Eastern R. Co. v. Board of Directors of St. Francis Levee District, 80 Ark. 316, 97 S. W. 281 [1906]; Crane v. Siloam Springs, 67 Ark. 30, 55 S. W. 955 [1899]; City of Little Rock v. Board of Improvements, etc., 42 Ark. 152 [1883]; Carson v. St. Francis Levee District, 59 Ark. 513, 27 S. W. 590 [1894]; Davis v. Gaines, 48 Ark. 370, 3 S. W. 184; Hensley v. Recla-

lative act in determining that the property within such district is benefited, is considered elsewhere.² On the other hand it has been said the legislature cannot authorize a city to make "a private property of small extent assume the name of an assessment district."³ The existence of an assessment district may be shown by subsequent legislation which recognizes such existence.⁴ Mere failure to exercise its powers does not terminate its existence⁵ in the absence of legislation depriving it of its powers or of the judgment of a court of competent jurisdiction. An assessment district, such as a drainage or reclamation district, must be organized in substantial compliance with the statutory provisions on the subject. Under the provisions of some statutes an assessment district, such as for example, a drainage district, is organized by presenting a petition, signed as required by law, to the proper court, and by the action of the court in

mation District No. 556, 121 Cal. 96, 53 Pac. 401; Swamp Land District v. Silver, 98 Cal. 51, 32 Pac. 866 [1895]; Reclamation District No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779 [1892]; Lent v. Tillson, 72 Cal. 404, 14 Pac. 71 [1887]; Reclamation District No. 108 v. Hagar, 66 Cal. 54, 4 Pac. 945 [1884]; Rogne v. People ex rel. Goedtnr, 224 Ill. 449, 79 N. E. 662 [1906]; Carr v. People ex rel. Goedtnr, 224 Ill. 160, 79 N. E. 648 [1906]; Smith v. People ex rel. Detrick, 140 Ill. 355, 29 N. E. 676 [1893]; Springer v. Watters, 139 Ill. 419, 28 N. E. 761 [1893]; Wilson v. Board of Trustees of the Sanitary District of Chicago, 133 Ill. 443; 27 N. E. 203 [1891]; People ex rel. Miller v. Scott, 132 Ill. 427, 23 N. E. 1119; Kilgour v. Drainage Commissioners, 111 Ill. 342; Blake v. People for use of Caldwell, 109 Ill. 504 [1884]; Dunham v. People ex rel. McCrea, 96 Ill. 331 [1880]; People ex rel. Miller v. Brislin, 80 Ill. 423 [1875]; Adams v. City of Shelbyville, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; Board of Commissioners of County of Monroe v. Harrell, 147 Ind. 500, 46 N. E. 124 [1896]; City of Kansas

City v. Gibson, 66 Kan. 501, 72 Pac. 222 [1903]; Warren v. City of Grand Haven, 30 Mich. 24 [1874]; Meier v. City of St. Louis, 180 Mo. 391, 79 S. W. 955 [1903]; Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 94 Am. St. Rep. 727, 60 L. R. A. 190, 70 S. W. 721 [1902]; City of St. Louis v. Ranken, 96 Mo. 497, 9 S. W. 910 [1888]; Hilliard v. City of Asheville, 118 N. C. 845, 24 S. E. 738 [1896]; Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332 [1896].

² See § 552 *et seq.*

³ City of Detroit v. Daly, 68 Mich. 503, 509, 37 N. W. 11 [1888]. (citing Clay v. City of Grand Rapids, 60 Mich. 451, 27 N. W. 596 [1886]. This, however, was a case of appropriating a part of a tract of land and assessing one-half of the expense back on the residue not taken; a proceeding which in some jurisdictions has been held to be objectionable without regard to the area of the district. See §§ 308, 702.

⁴ Swamp Land District v. Silver, 98 Cal. 51, 32 Pac. 866 [1895]. Reclamation District No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779 [1892].

⁵ Swamp Land District v. Silver, 98 Cal. 51, 32 Pac. 866 [1895].

finding that a proper petition has been presented and that the improvement petitioned for is necessary.⁶ The fact that the petition is referred to the drainage commissioners within a shorter time than that specified by statute, is held not to invalidate the proceedings.⁷ If an organized public corporation, such as a city or village, determines that a specified portion of the lands within its limits needs drainage, and sets such lands apart as a district to be drained, this amounts to an organization of a drainage district, and no preliminary petition is necessary.⁸ If the authorities of a city or village have power to lay off assessment districts, their determination that a particular portion of lands within the limits of such village or city needs draining amounts to a virtual organization of such land as a drainage district and dispenses with the necessity of a petition by the owners of land in such districts.⁹ Provision is made for a hearing of a quasi judicial character before a court of competent jurisdiction for the purpose of passing upon the necessity of the public improvement which it is sought to make and for determining what land will be benefited thereby and the boundaries of the assessment district.¹⁰ If a drainage district be by popular vote re-organized under a different statute, a change of organization is effected from the time that the record of the certificate of the proper officer is filed showing that a majority of the votes cast at such election were for such re-organization.¹¹ The swamp land clerk may sign a notice for a meeting to re-organize a reclamation district.¹² If a drainage district is wholly within a county, report should be made to the board of supervisors of such county.¹³ Under some statutes, a drainage association is provided for which must be organized by preparing and filing articles of association

⁶ Commissioners of Mason & Taz-
enill Special Drainage District v.
Griffin, 134 Ill. 330, 25 N. E. 995
[1891]; Blake v. The People for use
of Caldwell, 109 Ill. 504 [1884];
McBride v. State for use of Clandy,
130 Ind. 325, 30 N. E. 699 [1891].

⁷ McBride v. State for use of
Clandy, 130 Ind. 325, 30 N. E. 699
[1891].

⁸ Village of Hyde Park v. Spencer,
118 Ill. 446, 8 N. E. 346 [1888].

⁹ Village of Hyde Park v. Spencer,
118 Ill. 446, 8 N. E. 346 [1888].

¹⁰ Gauen v. Moredock & Ivy Land-
ing Drainage District No. 1, 131 Ill.
446, 23 N. E. 633 [1890].

¹¹ Drainage District No. 3 v. Peo-
ple ex rel. Baron, 147 Ill. 404, 35
N. E. 238 [1894].

¹² Reclamation District No. 3 v.
Goldman, 65 Cal. 635, 4 Pac. 676
[1884].

¹³ Swamp Land District No. 150 v.
Silver, 98 Cal. 51, 32 Pac. 866
[1893].

showing the land to be drained and the nature of the improvement.¹⁴ If the articles of association do not show with sufficient certainty the nature of the improvement,¹⁵ or the land to be affected thereby,¹⁶ such articles are insufficient to form a drainage association under such statutes. A slight variance between the corporate name and the name in which the assessment is levied is immaterial.¹⁷ Thus, if the name in the articles of association is "The Arctic Ditchers" and the assessment of benefits is in the name of "The Arctic Ditchers' Association," such variance is not fatal to the assessment on appeal.¹⁸ If the land to be drained was described with sufficient accuracy it was not necessary to describe the precise method of draining.¹⁹ A draining association under the early Indiana statute had no corporate existence and no power to make a valid assessment until its articles of association had been recorded.²⁰ If the owners of certain lands voluntarily connect the system for the drainage of such lands with the system already constructed by an existing drainage district, they are regarded as in legal effect annexing themselves with such drainage district.²¹ A drainage district cannot be so laid out as to include lands which cannot possibly be drained by the system available for draining the rest of the lands in such district.²² Under statutes which provide therefor, a drainage district may be so laid out as to cross township or county lines.²³

¹⁴ *Smith v. Duck Pond Ditching Association*, 54 Ind. 235 [1876]; *Chase v. Arctic Ditchers*, 43 Ind. 74 [1873]; *West v. Bullskin Prairie Ditching Company*, 32 Ind. 138 [1869].

¹⁵ *Smith v. Duck Pond Ditching Association*, 54 Ind. 235 [1876]; *West v. Bullskin Prairie Ditching Company*, 32 Ind. 138 [1869].

¹⁶ *Smith v. Duck Pond Ditching Association*, 54 Ind. 235 [1876].

¹⁷ *Chase v. Arctic Ditchers*, 43 Ind. 74 [1873].

¹⁸ *Chase v. Arctic Ditchers*, 43 Ind. 74 [1873].

¹⁹ *Seyberger v. Calumet Draining Company*, 33 Ind. 330 [1870].

²⁰ *Eel River Draining Association v. Carriger*, 30 Ind. 213 [1868].

²¹ *People ex rel. etc., v. Drainage Commissioners, District No. 1 of Town of Young America*, 143 Ill. 417, 32 N. E. 688 [1893]; *Streuter v. Willow Creek Drainage District*, 72 Ill. App. 561 [1897].

²² *Klinger v. The People ex rel. Conkle*, 130 Ill. 509, 22 N. E. 600 [1890].

²³ *Scott v. The People ex rel. Lewis*, 120 Ill. 129, 11 N. E. 408 [1889]; *Commissioners of Highways of the Town of Colfax v. Commissioners, East Lake Fork Special Drainage District*, 127 Ill. 581, 21 N. E. 206 [1890].

§ 248. Assessment district, including parts of other political corporations.

In laying off such assessment district, the legislature is, in the absence of specific constitutional restriction, not bound to pay any attention to the boundaries of pre-existing political subdivisions of the state.¹ In this respect the power of local assessment differs from the power of general taxation. An assessment apportioned according to benefits may be levied upon a district laid out without regard to the boundaries of existing political districts, while the power of levying general taxation can be conferred only upon existing political districts.² The assessment district thus created may include the entire area of a city.³ It may, and more often does, include a part of the area of a city consisting of that part of the city which will be specially benefited by the proposed improvement.⁴ A statute which provides for local assessments upon real property in any natural division of a city benefited thereby prevents the authorities from going

¹ Reclamation District No. 108 v. Hagar, 66 Cal. 54, 4 Pac. 945 [1884]; Kedzie v. West Chicago Park Commissioners, 114 Ill. 280, 2 N. E. 182, 6 N. E. 48 [1886]; Board of Commissioners of County of Monroe v. Harrell, 147 Ind. 500, 46 N. E. 124 [1896]; Aleorn v. Hamer, 38 Miss. 652 [1860]; State, Freeholders of Hudson v. Road Commissioners, 42 N. J. L. (13 Vr.) 608 [1880]; Makemson v. Kauffman, 35 O. S. 444; Commissioners of Putnam County v. Young, 36 O. S. 288 [1880]; "There being no constitutional prohibition the legislature may create a district for that special purpose or they may tax a class of lands or persons benefited to be designated by the public agents appointed for that purpose without reference to town, county or district lines." People ex rel. Griffin v. Mayor, etc., of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; (quoted Matter of Sackett Street, 4 Hun. 92, 93 [1875]).

² State, Lydecker, Pros. v. Drainage and Water Commissioners of the

Township of Englewood, 41 N. J. L. (12 Vr.) 154 [1879].

³ Minnesota and M. Land Improvement Co. v. City of Billings, 111 Fed. 972, 50 C. C. A. 70 [1901]; Crane v. Siloam Springs, 67 Ark. 30, 55 S. W. 955 [1899]; Grimmell v. City of Des Moines, 57 Ia. 144, 10 N. W. 330 [1881].

⁴ Crescent Hotel Co. v. Bradley, 81 Ark. 286, 98 S. W. 971 [1906]; Springer v. Walters, 139 Ill. 419, 28 N. E. 761 [1893]; Village of Hyde Park v. Spencer, 118 Ill. 446, 8 N. E. 846 [1888]; Adams v. City of Shelbyville, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; City of Kansas City v. Gibson, 66 Kan. 501, 72 Pac. 222 [1903]; Voight v. City of Detroit, 123 Mich. 547, 82 N. W. 253 [1900]; (affirmed 184 U. S. 115, 22 S. 337 [1902]); Warren v. City of Grand Haven, 30 Mich. 24 [1874]; Meier v. City of St. Louis, 180 Mo. 391, 79 S. W. 955 [1903]; St. Louis v. Ranken, 96 Mo. 497, 9 S. W. 910 [1888]; Hilliard v. City of Asheville, 118 N. C. 845, 24 S. E. 738 [1896].

out of a natural division of the city for the purpose of laying out an assessment district.⁵ Certain improvements will confer benefits alike upon land within cities and land without. In such cases the legislature has power to lay off assessment districts, including city and county alike. A road district,⁶ or a drainage district may be so created as to include both city and county.⁷ Certain forms of improvement may confer benefits upon two or more cities or towns. In such cases the legislature has power to lay off an assessment district containing two or more cities or towns.⁸ A drainage district may be formed including two or more townships.⁹ A reclamation district may be authorized which runs across county lines.¹⁰ A road district may be created less in area than the pre-existing political subdivision in which it is located.¹¹ One drainage district may be created within the limits of another drainage district.¹² However, the same tract of land cannot be so placed in two assessment districts that it can be assessed twice for the same improvement.¹³

§ 249. Assessment districts formed on petition of property owners.

Assuming the power of the legislature to create a special assessment district for the purpose of levying local assessments, the difficult and important question still remains of the power of the legislature to confer authority to levy such assessments upon

⁵ *City of Ottawa v. Macy*, 20 Ill. 413 [1858].

⁶ *Makemson v. Kauffman*, 35 O. S. 444; *Commissioners of Putnam County v. Young*, 36 O. S. 288 [1880].

⁷ *Wilson v. Board of Trustees of the Sanitary District of Chicago*, 133 Ill. 443, 27 N. E. 203 [1891]; *Town of Muskegon v. Drainage Commissioners*, 78 Wis. 40, 47 N. W. 11 [1890]; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 917 [1889]; *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545 [1887].

⁸ *Dunham v. People ex rel. McCrea*, 96 Ill. 331 [1880]; *People ex rel. Miller v. Brislin*, 80 Ill. 423 [1875]; *Hundley and Rees v. Commissioners of Lincoln Park*, 67 Ill. 559 [1873].

⁹ *Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District*, 127 Ill. 581, 21 N. E. 206 [1890].

¹⁰ *Reclamation District No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945 [1884].

¹¹ *State Board of Chosen Freeholders of the County of Hudson, Pros. v. Inferior Court of Common Pleas of the County of Hudson*, 42 N. J. L. (13 Vr.) 608 [1880]; See to the same effect in taxation as distinguished from assessment, *Bowles v. State of Ohio*, 37 O. S. 35 [1881].

¹² *People ex rel. Miller v. Scott*, 132 Ill. 427, 23 N. E. 1119 [1891].

¹³ *Abascal v. Bouny*, 37 La. Ann. 538.

various public boards or governmental bodies. In many cases the statute providing for the organization of an assessment district requires that it should be organized upon the petition of a certain part of the property owners therein. Such a provision is generally held to give sufficient safeguard to the rights of the property owners upon whose property such assessment is to be levied, and therefore to be a constitutional exercise of legislative power.¹ The fact that upon the recommendation of the improvement district the city council is bound to levy an assessment and that if it refuses to do so it may be compelled by mandamus proceedings to levy such assessment,² and that the board is regarded in making such improvement as the agent of the property owners and not the agent of the public corporation³ does not prevent such statute from being constitutional. No difficulty is found where the assessment district is formed only if a majority of the electors within its limits vote for its formation.⁴

§ 250. Power of assessment exercised by officers elected by district.

The power of levying local assessments is usually conferred upon officers elected by the voters of the assessment district of the po-

¹ Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; (reversing Bradley v. Fallbrook Irrigation District, 68 Fed. 948 [1895]); Board of Improvement District No. 60 v. Cotter, 71 Ark. 556, 76 S. W. 552 [1903]; Stiewel v. Fencing District No. 6 of Johnson County, 71 Ark. 17, 70 S. W. 308; (affirmed on re-hearing, 71 S. W. 247 [1902]); Ahern v. Board of Improvement District No. 3, of Texarkana, 69 Ark. 68, 61 S. W. 575 [1901]; Fitzgerald v. Walker, 55 Ark. 148, 17 S. W. 702 [1891]; City of Little Rock v. Board of Improvements, etc., 42 Ark. 152 [1883]; Reclamation District No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779 [1892]; In the Matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891]; People ex rel., etc., v. Drainage Com-

missioners, District No. 1 of Town of Young America, 143 Ill. 417, 32 N. E. 688 [1893]; Badger v. Inlet Drainage District, 141 Ill. 540, 31 N. E. 170 [1893]; Commissioners of Mason and Tazewell Special Drainage District v. Griffin, 134 Ill. 330, 25 N. E. 995 [1891]; Owners of Lands v. People ex rel. Stookey, 113 Ill. 296 [1886]; Huston v. Clark, 112 Ill. 344 [1885]; State ex rel. Ashby v. Three States Lumber Co., 193 Mo. 430, 95 S. W. 333 [1906]; McCarty v. Brick, 11 N. J. L. (6 Halst.) 27 [1829]; Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332 [1896].

² City of Little Rock v. Board of Improvements, etc., 42 Ark. 152 [1883].

³ Fitzgerald v. Walker, 55 Ark. 148, 17 S. W. 702 [1891].

⁴ Dunham v. People ex rel. McCrea, 96 Ill. 331 [1880].

litical subdivision in which such assessment district is situated. Such grant of power affords protection to the interests of the property owners and is regarded as valid.¹ Power to levy local assessments is sometimes conferred upon officers chosen by a popular vote, but by the vote of the electors of the political subdivisions which are included in whole or in part within such assessment district, and not by the vote of the electors or the property owners of such assessment district as a whole. Such officers are evidently not chosen for the express purpose of levying such local assessment, or participating therein, but such duty is merely incidental to the office to which they were primarily chosen. Such grant of power is generally held to be valid. Where the city is divided into assessment districts, the power to levy assessments is very often conferred upon the officers of the city generally without giving to the voters, or the property owners of the assessment district, any special claim to a voice in the selection of such officers. Such grant of power is ordinarily held to be valid.² The earlier cases denying the power of the legislature to authorize a city to divide its territory into districts for the purpose of local assessment have been reversed or overruled,³ as they practically deny the existence of the right to levy local assessments. In South Carolina the constitutional provision requiring uniformity of taxation⁴ has been held to prevent a city from being authorized

¹ *Lent v. Tillson*, 140 U. S. 316, 35 L. 419, 11 S. 825 [1891]; (affirming *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]); *Kilgour v. Drainage Commissioners*, 111 Ill. 342 [1885]; *Blake v. People for use of Caldwell*, 109 Ill. 504 [1884].

² *Minnesota & M. Land Improvement Co. v. City of Billings*, 111 Fed. 972, 50 C. C. A. 70 [1901]; *Crane v. Siloam Springs*, 67 Ark. 30, 55 S. W. 955 [1899]; *Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771 [1890]; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; *City of Kansas City v. Gibson*, 66 Kan. 501, 72 Pac. 222 [1903]; *Burnes v. Mayor and City Council of*

Atchison, 2 Kan. 454 (original edition) 2 Kan. 448 (second edition) [1864]; *Warren v. City of Grand Haven*, 30 Mich. 24 [1874]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910 [1888]; *State, McCloskey, Pros. v. Chamberlin*, 37 N. J. L. (8 Vr.) 388 [1875]; *People ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; *Hilliard v. City of Asheville*, 118 N. C. 845, 24 S. E. 738 [1896]; *State v. Moss*, 44 Wash. 91, 86 Pac. 1129 [1906].

³ *People ex rel. Post v. Mayor, etc., of Brooklyn*, 6 Barb. (N. Y.) 209 [1849].

⁴ Article X., § 5, Constitution of South Carolina [1895]. See §§ 118, 159.

to divide its geographical area into assessment districts.⁵ This, however, is, in effect, the reason given by the courts of this state for denying *in toto* the doctrine of the validity of local assessments.

**§ 251. Power of assessment not exercised by elective officers—
Local self-government.**

In some cases, statutes have conferred upon boards which are not chosen by the voters or property owners of the assessment district, nor of the political subdivisions therein included, the power to levy local assessments. Whether such a statute is a valid exercise of legislative power, is a question upon which there is a sharp conflict of authority. In some jurisdictions it is held that the right of local self-government is a constitutional right, even though not protected by any specific provision of the constitution, and that such statutes are unconstitutional as invasions of such right.¹ Similar views have been expressed in cases not involving local assessments.² Thus a statute which confers upon a city water board the additional power, not previously possessed by it, of requiring water-mains to be laid in the streets and of levying assessments therefor indirectly, by providing that such board shall submit its report to council, and council shall levy an assessment in accordance with such report, is invalid.³ However, a statute providing for a change in the term of drain com-

⁵ *Mauldin v. City Council of Greenville*, 53 S. C. 285, 69 Am. St. Rep. 855, 43 L. R. A. 101, 31 S. E. 252 [1898] (overruling, 42 S. C. 293, 46 Am. St. Rep. 723, 27 L. R. A. 284, 20 S. E. 842 [1893]).

¹ *Cook Farm Co. v. City of Detroit*, 124 Mich. 426, 83 N. W. 130 [1900]; *People ex rel. Board of Park Commissioners v. Common Council of Detroit*, 28 Mich. 228, 15 Am. Rep. 202 [1873]; "In making contracts and creating debts for the city the commissioners are in effect exercising a power of taxation which is one of the highest attributes of sovereignty, and the distance between their former power to advise and the power now claimed to compel can only be adequately measured when it is perceived that the one belongs

to the lowest grade of powers while the power to tax is the highest that can exist in local municipal government. No precedent entitled to respect can justify such a change of powers, for from the very dawn of our liberties the principle most unquestionable of all has been this; that the people shall vote the taxes they are to pay or be permitted to choose representatives for the purpose." *People ex rel. Board of Park Commissioners v. Common Council of Detroit*, 28 Mich. 228, 248 15 Am. Rep. 202 [1873].

² *Bailey v. Mayor, etc., of City of New York*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669 [1842].

³ *Cook Farm Co. v. City of Detroit*, 124 Mich. 426, 83 N. W. 130 [1900].

missioner of a certain county, and authorizing the Governor to appoint a drain commissioner for a period between the two terms for which under the statute no drain commissioner would be chosen, was held not to violate the right of local self-government.⁴ In other jurisdictions it is held that the legislature has the general power to make laws, except where restrained by some provision of the federal or state constitution, and that in the absence of specific restraint it confers the power of local self-government as a privilege and not as a right; that it may accordingly give as much or as little local self-government as it chooses, and if it sees fit to provide for the levy of a local assessment by a board which the voters or property owners of the district have no opportunity to choose, no legal objection can be raised to such a statute, the sole remedy of the people, if dissatisfied, being political.⁵ Thus, by the powers of a statute, a levee board was to be appointed by the legislature, and their successors were to be appointed by the Governor and vacancies filled by him. Such statute was held to be valid, the corporation being regarded as a quasi-public corporation and not as a private corporation. The right of local self-government is not here discussed.⁶ A statute authorizing supervisors of counties of a certain class to establish reclamation districts which might include lands in other counties without the consent of such other county, or of the land owners thereof, has been held to be constitutional.⁷ A statute naming three commissioners and providing that they should make a street improvement and levy a local assessment therefor, the act to take effect when approved by the city council, was held to be valid.⁸ Where commissioners were to be appointed to take charge of a public improvement, at the expense of the property owners, the city having no control over such work, it was assumed that such statute was valid.⁹ A statute

⁴ *Attorney General v. McClear*, 146 Mich. 45, 109 N. W. 27 [1906].

⁵ *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894].

⁶ *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894].

⁷ *Ilagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884].

⁸ *Lent v. Tillson*, 140 U. S. 316, 35 L. 419, 11 S. 285 [1891]; (affirming *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]).

⁹ *Astoria Heights Land Co. v. City of New York*, 179 N. Y. 579, 72 N. E. 1139 [1904]; (affirming, without opinion, 86 N. Y. S. 651, 89 App. Div. 512 [1903]).

which provides that improvements can be constructed only if the board of public works recommends an improvement ordinance to the council and the council enacts such ordinance, the council having ample power to refuse to pass it; and which provides that such board is to make a preliminary apportionment of the expense when the work is completed, and that the council, after hearing objections, has power to pass an assessing ordinance, does not deprive the city of its control of local affairs.¹⁰ Indeed, while local self-government is often referred to as a principle justifying the power of local assessments,¹¹ it has but seldom been considered by the courts to what extent, if any, it operates, in the absence of specific constitutional provisions, as a restriction upon such power. Probably questions of this sort would be presented for judicial consideration more frequently if it were not for specific constitutional provisions forbidding special legislation.¹² Under these constitutional provisions, only general laws can be passed; and the legislature is not likely to deprive the state at large of the privilege of local self-government by general laws.

§ 252. Power of legislature to prescribe specific improvement.

A question analogous to that involving the power of the legislature to confer upon boards not chosen by the voters or property owners of the assessment district, or of the political subdivisions therein included, the power to levy local assessments, is the question of the power of the legislature to designate and require the construction of a specific improvement leaving to the municipal corporation, or other public corporation, merely the ministerial duty of carrying into execution the mandate of the legislature. In the absence of some specific constitutional provision forbidding such statute, such as, for example, the constitutional provision forbidding special legislation, it is generally assumed

¹⁰ *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904]; (not affected on this point by reversal in *Londoner v. City and County of Denver*, 210 U. S. 373, 28 S. 708 [1908].

¹¹ "This court has held, in construing the effect of these statutes that they as well as the constitutional provision upon which they were

based, had their origin in the principle of local self-government." *Board of Improvement District No. 60 v. Cotter*, 71 Ark. 556, 76 S. W. 552 [1903]; (citing *Crane v. Siloam Springs*, 67 Ark. 300, 55 S. W. 955 [1899]).

¹² See § 176 *et seq.*

that the legislature has the power to require the construction of a specific improvement by local assessment.¹ Thus, in the District of Columbia, Congress may provide that certain water-mains shall be laid, and that the abutting property owners shall pay a certain amount per front foot therefor.² A statute has been upheld in which the legislature had provided for the widening of a specifically named street. In this case, however, the statute gave to a majority of the property owners the right to file a protest against such improvement, and thus to prevent it.³ A statute has been upheld in which the legislature provided two different methods of repairing the streets, one method for one portion of a specific street and the other method for the other portion.⁴ It has been held that the legislature can authorize a city to raise, by local assessment, an additional sum over and above the contract price, and pay the sum over to the contractor by whom the public improvement for which the original assessment was levied was constructed.⁵ Where a statute of this sort has been held to be unconstitutional, it has been on account of some constitutional provision forbidding special legislation, and not because of any unwritten principle of the constitution securing local self-government. Thus, in Ohio, a statute of this sort was at first held to be valid.⁶ Subsequently the Supreme Court overruled its

¹ *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898]; *Oakland Paving Co. v. Rier*, 52 Cal. 270 [1877]; *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222 [1874]; *In the Matter of the Confirmation of the Report of the Commissioners of Assessment for Grading, Paving and Otherwise Improving Sackett, Douglas and De Grew Streets in the City of Brooklyn*, 74 N. Y. 95 [1878]; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947 [1889].

² *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898].

³ *Lent v. Tillson*, 140 U. S. 316, 35 L. 419, 11 S. 285 [1891]; (affirming *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]).

⁴ *Oakland Paving Co. v. Rier*, 52 Cal. 270 [1877].

⁵ *Brewster v. City of Syracuse*, 19 N. Y. 116 [1859]; *In Granger v. City of Buffalo*, 6 Abb. N. C. 238 [1879] such a statute was said to be a "very remarkable legislative enactment," in authorizing work done under a prior contract, which had been held invalid, in *1 Sheldon Sup. Ct.* 445, to be credited as performed of a subsequent contract. For the same principle in taxation on realty to reimburse certain individuals who had voluntarily entered into a bond to pay extraordinary expenses of the termination of a canal in Utica; *Thomas v. Leland*, 24 Wend. (N. Y.) 65 [1840].

⁶ *State ex rel. Hibbs v. Board of County Commissioners of Franklin County*, 35 O. S. 458 [1880]; (A case of an improvement to be paid for by general taxation.)

earlier decision, and held such a statute invalid. The principle involved, however, was the effect upon such statutes of a provision in the constitution of Ohio requiring laws of a general nature to be uniform.⁷

§ 253. Public character of assessment districts.

Assessment districts comprising the land which is benefited by the proposed assessment, and formed by the consent of the property owners, are regarded as public corporations,¹ or at least as quasi public corporations,² and not as private corporations.³ Probably "public quasi corporation" is the term intended to be used instead of "quasi public corporation."⁴ The proceedings leading up to the formation of a drainage or reclamation district are, in legal effect, the levying of a local assessment for benefits.⁵ The organization of such a district "results in putting a burden on property against the will of the owners, and the requirements as to the proceedings of that character cannot be evaded by calling the governmental agency, through which the proceeding is

¹ *Lewis v. Symmes*, 61 O. S. 471, 76 Am. St. Rep. 428, 56 N. E. 194 [1900]; *Hixson v. Burson*, 54 O. S. 470, 43 N. E. 1000 [1896]; *State ex rel. v. Commissioners*, 54 O. S. 333, 43 N. E. 587 [1896].

² *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184 [1886]; *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514 [1894]; *Reclamation District No. 124 v. Gray*, 95 Cal. 601, 30 Pac. 779 [1892]; *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761 [1893]; *Ehmore v. Drainage Commissioners*, 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010 [1892]; *Board of Commissioners of County of Monroe v. Harrell*, 147 Ind. 500, 46 N. E. 124 [1896]; *New Eel River Draining Association v. Durbin*, 30 Ind. 173 [1868]; *Mound City Land & Stock Co. v. Miller*, 170 Mo. 240, 94 Am. St. Rep. 727, 60 L. R. A. 190, 70 S. W. 721 [1902]; *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53 [1866].

³ *Kedzie v. West Chicago Park Commissioners*, 114 Ill. 280, 2 N. E.

182 [1886]. Drainage districts are "created for public purposes, are in no sense private corporations, but on the other hand, they are at least quasi public corporations, and as such the laws providing for their organization are subject to be changed, modified or repealed, as the wisdom of the legislature may direct." *Smith v. People ex rel. Detrick*, 140 Ill. 355, 29 N. E. 676 [1893].

⁴ *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761 [1893].

⁵ *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894]; To the same effect see: *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 35 L. 446, 11 S. 790 [1891]; (affirming, *Essex Public Road Board v. Skinkle*, 49 N. J. L. (20 Vr.) 65, 6 Atl. 435 [1886] which was affirmed in *Essex Public Road Board v. Skinkle*, 49 N. J. L. (20 Vr.) 641, 10 Atl. 379 [1887]).

⁶ *Reclamation District No. 537 of Yolo County v. Burger*, 122 Cal. 442, 55 Pac. 156 [1898].

conducted, a corporation."⁶ Accordingly the legislature may take away from such assessment district a part or all of the powers which it has conferred upon it, as long as it does not prejudice those who have extended credit to such corporation in reliance upon the statutory powers which it then possesses.⁷ Common examples of such corporations are drainage districts⁸ park districts⁹ and road districts.¹⁰

§ 254. De facto districts.

If there is in existence a valid law under which an assessment district might be organized, and there has been a *bona fide* attempt to comply with such statute in organizing a district, the question of the regularity and validity of such organization cannot be raised collaterally as a defense in a suit to enforce such assessment or in an injunction suit to restrain the collection of such assessment.¹ An assessment levied by a *de facto* assessment district is as valid as one levied by an assessment district *de jure*.²

⁶ Reclamation District No. 537 of Yolo County v. Burger, 122 Cal. 442, 55 Pac. 156 [1898].

⁷ Cooper v. Arctic Ditchers, 56 Ind. 233 [1877].

⁸ People of the State of California v. Hagar, 52 Cal. 171 [1877]; Smith v. People ex rel. Detrick, 140 Ill. 355, 29 N. E. 676 [1893]; Springer v. Walters, 139 Ill. 419, 28 N. E. 761 [1893]; Wilson v. Board of Trustees, of the Sanitary District of Chicago, 133 Ill. 443, 27 N. E. 203 [1891]; Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 94 Am. St. Rep. 727, 60 L. R. A. 190, 70 S. W. 721 [1902].

⁹ Dunham v. People ex rel. McCrea, 96 Ill. 331 [1880]; People ex rel. Miller v. Brislin, 80 Ill. 423 [1875].

¹⁰ Essex Public Road Board v. Skinkle, 140 U. S. 334, 35 L. 446, 11 S. 790 [1891]; (affirming Essex Public Road Board v. Skinkle, 49 N. J. L. (20 Vr.) 65, 6 Atl. 435 [1886] which was affirmed in Essex Public Road Board v. Skinkle, 49 N. J. L. (20 Vr.) 641, 10 Atl. 379 [1887]).

¹ Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514 [1894]; Morrell v. Union

Drainage District No. 1, 118 Ill. 139, 8 N. E. 675 [1887]; Keigwin v. Drainage Commissioners of Hamilton Township, 115 Ill. 347, 5 N. E. 575 [1886]; Etchison Ditching Association v. Hillis, 40 Ind. 408 [1872]; Etchison Ditching Association v. Busenback, 39 Ind. 362 [1872]; Excelsior Draining Co. v. Brown, 38 Ind. 384 [1871]; New Eel River Draining Association v. Durbin, 30 Ind. 173 [1868].

² Lower Kings River Reclamation District No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 [1895]; Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514 [1894]; Reclamation District No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779 [1892]; Tucker v. People ex rel. Wall, 156 Ill. 108, 40 N. E. 451 [1895]; People ex rel. Wood v. Jones, 137 Ill. 35, 27 N. E. 294 [1892]; Wabash Eastern Railway Co. of Illinois v. Commissioners of East Lake Fork Drainage District, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781 [1891]; Evans v. Lewis, 121 Ill. 478, 13 N. E. 246 [1889]; Morrell v. Union Drainage District No. 1, 118 Ill. 139, 8 N. E. 675 [1887];

The same principle applies to an irrigation district.³ The validity of such assessment is said not to depend in any way upon the question whether the assessment district is a corporation *de jure* or *de facto*.⁴ If it is desired to attack the validity of the organization of the assessment district, this must be done directly by a proceeding in *quo warranto*.⁵ The rule that no collateral attack can be made upon the regularity and validity of the organization of a drainage district applies with a special force in cases where there has been a full opportunity for a hearing at the time of the organization of such district, and where the party who now wishes to set up the invalidity of the organization of such district has omitted or neglected to raise the questions which he now seeks to raise.⁶ Under some statutes and in some jurisdictions no opportunity for a hearing is given at the time that the district is organized, and the owner of lands which it is sought to assess may show in an action on the assessment that such district has no legal validity, since this is his first opportunity to

Keigwin v. Drainage Commissioners of Hamilton Township, 115 Ill. 347, 5 N. E. 575 [1886]; Blake v. People for use of Caldwell, 109 Ill. 504 [1884]; Etchison Ditching Association v. Hillis, 40 Ind. 408 [1872]; Etchison Ditching Association v. Busenback, 39 Ind. 362 [1872]; Excelsior Draining Co. v. Brown, 38 Ind. 384 [1871]; New Eel River Draining Association v. Durbin, 30 Ind. 173 [1868].

³ Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514 [1894].

⁴ Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514 [1894].

⁵ People ex rel. Wood v. Jones, 137 Ill. 35, 27 N. E. 294 [1892]; Wabash Eastern Railway Co. of Illinois v. Commissioners of East Lake Fork Drainage District, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781 [1891]; Evans v. Lewis, 121 Ill. 478, 13 N. E. 246 [1889]; Keigwin v. Drainage Commissioners of Hamilton Township, 115 Ill. 347, 5 N. E. 575 [1886]; Blake v. People for use of Caldwell, 109 Ill. 504 [1884].

⁶ Lower Kings River Reclamation District No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 [1895]; Reclamation District No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779 [1892]; In the Matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675 [1891]; People ex rel. Selby v. Dyer, 205 Ill. 575, 69 N. E. 70 [1903]; Tucker v. People ex rel. Wall, 156 Ill. 108, 40 N. E. 451 [1895]; People ex rel. Wood v. Jones, 137 Ill. 35, 27 N. E. 294 [1892]; Wabash Eastern Railway Co. of Illinois v. Commissioners of East Lake Fork Drainage District, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781 [1891]; Evans v. Lewis, 121 Ill. 478, 13 N. E. 246 [1889]; Morrell v. Union Drainage District No. 1, 118 Ill. 139, 8 N. E. 675 [1887]; Keigwin v. Drainage Commissioners of Hamilton Township, 115 Ill. 347, 5 N. E. 575 [1886]; Blake v. People for use of Caldwell, 109 Ill. 504 [1884].

raise such question.⁷ Such defense must, however, be made specifically. The articles of association of the drainage district are not properly a part of the complaint in a proceeding to enforce the assessment, and their sufficiency cannot therefore be tested by general demurrer.⁸ The property owners have a right to a hearing at the organization of the district, and if such hearing is denied them they have a right to raise the question of the validity of the organization of the district in a suit upon the assessment.⁹ Where a statute provides a means for direct attack upon the validity of the organization district, such means may, of course, be taken advantage of. The fact that the district has not exercised its powers or acted as a corporation can be made a ground for a proceeding to forfeit its charter, either by a direct act of the legislature or by a judgment of a court of competent jurisdiction acting under statutory authority.¹⁰ Such non-user cannot, however, be made the basis of a valid attack upon an assessment levied by such corporation.¹¹ If, however, a corporation does not purport to be organized under a statute conferring certain powers, it cannot exercise the powers given by the statute, and its acts, which can be only upheld by assuming that such powers are conferred upon it, are invalid.¹²

§ 255. Assessment by private corporations.

The legislature has occasionally attempted to confer upon private corporations the power to construct public improvements and levy assessments therefor. In some cases, such statutes have been held to be unconstitutional.¹ The theory often invoked is,

⁷ *Mack v. Polecat Drainage District*, 216 Ill. 56, 74 N. E. 691 [1905]; *Newton County Draining Co. v. Nofsinger*, 43 Ind. 566 [1873]; *New Eel River Draining Association v. Durbin*, 30 Ind. 173 [1868].

⁸ *Dobson v. Duck Pond Ditching Association*, 42 Ind. 312 [1873]; *Etchison Ditching Association v. Hillis*, 40 Ind. 408 [1872]; *Etchison Ditching Association v. Busenback*, 39 Ind. 362 [1872]; *Excelsior Draining Co. v. Brown*, 38 Ind. 384 [1871].

⁹ *Reclamation District No. 537 of Yolo County v. Burger*, 122 Cal. 442, 55 Pac. 156 [1898].

¹⁰ *Swamp Land District No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866 [1893].

¹¹ *Swamp Land District No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866 [1893].

¹² *Reclamation District No. 3 v. Kennedy*, 58 Cal. 124 [1881].

¹ *Cypress Pond Draining Co. v. Hooper*, 59 Ky. (2 Met.) 350 [1859]; *State, Kean, Pros. v. Driggs Drainage Co.*, 45 N. J. L. (16 Vr.) 91 [1883]; *Coster v. Tide Water Company*, 18 N. J. Eq. (3 C. E. Gr.) 54 [1866]; (affirmed in *Tide Water Company v. Coster*, 18 N. J. Eq. (3 C. E. Gr.) 518, 90 Am. Dec. 634 [1866]); In *Allentown v. Henry*, 73

that such a statute imposes a local burden for the private benefit of the members of the private corporation.² In these cases, however, the assessment imposed has been objectionable apart from the fact that it was levied by a private corporation. In one statute the area of the drainage district in question contained land amounting to more than one-third of the total area which would receive a very slight advantage from the drainage improvement, the owners of which land had nothing to do with obtaining the passage of the special act and no notice of the application therefor and had never assented to the provisions thereof. Such act was held to be unconstitutional.³ So a statute which gave to the private corporation the right to decide what land should be drained, and which provided for the payment of annual dividends, thus evidently contemplating that the corporation would operate at a profit, and would charge the property owners more than the cost of such drainage, was held to be unconstitutional.⁴ In another case, a private corporation was formed to drain certain swamps, under a contract to be entered into between them and certain commissioners appointed to make such contract. No power was given to the owners of the land improved to prevent such improvement. For these reasons the statute was held, in the lower court, to be unconstitutional.⁵ This decision was affirmed in the upper court, but apparently upon the sole ground that the amount of the assessment was not limited to the amount of the benefits conferred upon the land by the improvement for which such assessment was levied.⁶ In other cases, where it appears that the amount of the assessment is limited to the amount of the benefits conferred by the improvement for which such assessment is levied, statutes authorizing private corporations to make public improvements, and to procure assessments therefor, were upheld

Pa. St. 404 [1873]; a statute authorizing a water company "to lay reasonable assessments" was said to be unconstitutional. This observation, however, was an *obiter* as the real point decided was that when such powers were transferred to the city they might be constitutionally exercised by such city.

² *Cypress Pond Draining Co. v. Hooper*, 59 Ky. (2 Met.) 350 [1859].

³ *Cypress Pond Draining Co. v. Hooper*, 59 Ky. (2 Met.) 350 [1859].

⁴ *State, Kean, Pros. v. Driggs Drainage Co.*, 45 N. J. L. (16 Vr.) 91 [1883].

⁵ *Coster v. Tide Water Company*, 18 N. J. Eq. (3 C. E. Gr.) 54 [1866].

⁶ *Tide Water Company v. Coster*, 18 N. J. Eq. (3 C. E. Gr.) 518, 90 Am. Dec. 634 [1866].

as valid.⁷ In some of these cases, however, the assessment was to be made by public officers, acting upon the application of the private corporation.⁸ Occasionally corporations are created which in form are private corporations, but which by reason of their composition and powers, are essentially public corporations. Thus a corporation formed for the purpose of constructing a free turnpike, and levying assessments therefor, the officers of which are really county or township officers discharging the ordinary public duty of attending to the construction of a public road, is in reality a public corporation.⁹

§ 256. Effect of specific constitutional provisions—Arkansas.

The power of the legislature to confer the power of local assessment upon public corporations, quasi-corporations and assessment districts has been considered by the courts of some jurisdictions with reference to the specific provisions of their respective state constitutions. The constitution of Arkansas provides: "Nothing in this constitution shall be so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected. . . ."¹ This provision is regarded by the Supreme Court of Arkansas as not constituting a restriction upon the power of the legislature. The legislature may accordingly confer the power of levying local assessments upon bodies other than towns and cities, such as levee districts,² and improvement districts.³ The legislature furthermore is not thereby pre-

⁷ *New Haven & Port Wayne Turnpike Co. v. Bird*, 33 Ind. 325 [1870]; *Turner v. Thorntown & Mechanicsburg Gravel Road Co.*, 33 Ind. 317 [1870]; *Hoertz v. Jefferson Southern Pond Draining Co.*, 119 Ky. 824, 84 S. W. 1141, 27 Ky. L. R. 278 [1905]; *New Orleans Drainage Co.*, praying for the confirmation of a tableau, 11 La. Ann. 338 [1856].

⁸ *Hoertz v. Jefferson Southern Pond Draining Co.*, 119 Ky. 824, 84 S. W. 1141, 27 Ky. L. R. 278 [1905]; *New Orleans Drainage Co.*, praying for the confirmation of a tableau, 11 La. Ann. 338 [1856].

⁹ *Foster v. Commissioners of Wood County*, 9 O. S. 540 [1859].

¹ Article XIX, § 27, Constitution of Arkansas.

² *Ritter v. Drainage District No. 1, Poinsett County*, 78 Ark. 580, 94 S. W. 711 [1906]; *Carson v. St. Francis Drainage District*, 59 Ark. 513, 27 S. W. 590 [1894]; *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184.

³ *Crane v. Siloam Springs*, 67 Ark. 30, 55 S. W. 955 [1899]; *City of Little Rock v. Board of Improvements, etc.*, 42 Ark. 152 [1883].

vented from organizing an improvement district within a city, or one which in its territorial area embraces the entire territory of a city,⁴ but which, after its organization, is beyond the control of the city. A provision to the effect that “. . . the General Assembly may delegate the taxing power, with the necessary restrictions, to the state's subordinate, political and municipal corporations, to the extent of providing for their existence, maintenance and well-being, but no further,”⁵ does not apply to local assessments but merely to general taxation, and therefore does not restrict the legislature in granting the power of local assessment.⁶ Accordingly a statute which provided that the city council should lay off the city into improvement districts; that upon the petition of a majority in value of the owners of the realty in any such district for an improvement, the council should appoint three residents as a board to make such improvement; and that such board should make such improvement and report the cost thereof to the council, whereupon the council should levy an assessment for the cost of such improvement, was held to be valid on the ground that the discretion necessary in such a case need not necessarily be left to the city council but might be reposed elsewhere.⁷ A former constitution of Arkansas provided that the County Court “shall have jurisdiction in all matters relating to county taxes, disbursements of money for county purposes, and every other case that may be necessary to the internal improvement and local concerns of the respective counties.”⁸ This provision was held applicable to public internal improvements and local concerns for general county purposes, and not to improvements for special local purposes, the costs of which were to be paid by assessments upon the property benefited by the improvement.⁹

§ 257. Illinois—Restrictions on legislative power.

The constitution of Illinois provides: “The General Assembly may vest corporate authorities of cities, towns and villages with

⁴ Crane v. Siloam Springs, 67 Ark. 30, 55 S. W. 955 [1899].

⁵ Article II., § 23, Constitution of Arkansas [1874].

⁶ Cribbs v. Benedict, 64 Ark. 555, 44 S. W. 707 [1897].

⁷ City of Little Rock v. Board of

Improvements, etc., 42 Ark. 152 [1883].

⁸ Article VI., § 9, Constitution of Arkansas [1836].

⁹ McGehee v. Mathis, 21 Ark. 40 [1860]; (not affected on this point by reversal in McGee v. Mathis, 71 U. S. (4 Wall) 143 [1866]).

power to make local improvements by special assessments or by special taxation of contiguous property or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property with the jurisdiction of the body imposing the same."¹ Prior to this constitutional provision giving specific authority for special assessments, the power of levying local assessments was so restricted by the construction placed by the court upon the constitutional requirement of uniformity in taxation, that it was scarcely practicable to exercise it. The court held that local assessment must be apportioned either according to benefits *co nomine* or according to value, excluding such methods as according to frontage and the like.² Accordingly, the Supreme Court of Illinois has always tended to regard this constitutional provision as conferring the power of special assessments, and not as limiting the power given by the general grant of taxation.³ While in this respect the Supreme Court of Illinois entertains a view different from that held in most jurisdictions, the difference really dates from and is caused by the original hostile attitude of the Supreme Court of Illinois toward local assessments.

§ 258. Upon what corporations power of local assessment may be conferred.

After the adoption of this constitutional provision there has been no question as to the power of the legislature to confer the power of local assessment in general upon cities, towns and villages.¹ The serious questions which have arisen in this connection concern the power of the legislature to confer the power of local

¹ Article IX., § 9, Constitution of Illinois [1870].

² *City of Chicago v. Baer*, 41 Ill. 306 [1866]; *City of Ottawa v. Spencer*, 40 Ill. 211 [1866]; *City of Chicago v. Larned*, 34 Ill. 203 [1864]; The early attitude of the courts of Illinois toward local assessments prior to this constitutional provision, has been discussed elsewhere. See § 153.

³ *Givins v. City of Chicago*, 188 Ill. 348, 58 N. E. 912 [1900]; *Uphike v. Wright*, 81 Ill. 49 [1876].

¹ *City of Chicago v. Brede*, 218 Ill. 528, 75 N. E. 1044 [1905]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894]; *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; *Linck v. City of Litchfield*, 141 Ill. 469, 31 N. E. 123 [1893]; *Potwin v. Johnson*, 108 Ill. 70 [1883]; *Faleh v. People ex rel. Johnson*, 99 Ill. 137 [1881]; *People ex rel. Miller v. Sherman*, 83 Ill. 165 [1876].

assessment upon public corporations other than cities, towns and villages, and the meaning of the term "corporate authorities." Under this provision there are two general grants of power. The second grant is that of general taxation, and is conferred upon "all municipal corporations." The first grant concerns the power to make local improvements by special assessments, or by special taxation of contiguous property. This power is not conferred upon municipal corporations generally, but merely upon the corporate authorities of cities, towns and villages. The phraseology of this provision, therefore, prevents the legislature from conferring the power of special assessment of special taxation upon any municipal corporations other than cities, towns and villages, or upon a private corporation.² Under this provision, the legislature attempted to provide for the creation and organization of drainage districts, and the construction of drainage improvements to be paid for by local assessments. No provision was made for obtaining the consent of the people to be taxed, and the statute provided for the levying of assessments for drainage improvements by commissioners, or juries, or by the County Court. This statute was held to be unconstitutional.³ It was held that under such constitutional provision the power of levying general taxes might be conferred upon public corporations other than cities, towns and villages, but that such taxes must be uniform within such district with respect to persons and property. This statute was also said to be unconstitutional as not providing for obtaining the consent of the electors of the district to the organization thereof, to the construction of the improvement, or to levying a local assessment for the cost thereof. As a result of this decision the constitution of Illinois was amended so as to enable the legislature to provide for drainage districts by the adoption of the following provision: "The General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others, and to provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state by special assessments upon

² *Updike v. Wright*, 81 Ill. 49 [1876].

³ *Updike v. Wright*, 81 Ill. 49 [1876].

the property benefited thereby.”⁴ After the adoption of this last provision, the power of the legislature to provide for the creation and organization of drainage districts, and of empowering such districts to levy local assessments, has been recognized without question.⁵ Furthermore, the power of the legislature to authorize cities and villages to levy local assessments for the purpose of drainage, has been recognized.⁶ It may also provide for drainage districts, to include both city and county.⁷

§ 259. Who are corporate authorities.

Under both of the foregoing sections of the Illinois constitution it is provided that the legislature may vest the “corporate authorities” of the cities, towns, villages and drainage districts with the power of levying local assessments. Since, as has been before stated, it is held in Illinois that the legislature derives its power to authorize special assessments, apportioned upon the basis of frontage or other similar basis entirely from these specific provisions in the constitution, it follows that in that state the legislature can confer the power of levying local assessments only upon the corporate authorities of the public corporations named in the constitution.¹ In determining the meaning of the term “corporate authorities” the Supreme Court of Illinois has held that the term implies the officers in charge of such public corporation who have been elected by the voters of such corporation, or who have been chosen by officers who were elected by such voters.² “The cor-

⁴ Article IV., § 31 [1878].

⁵ *Rogne v. People ex rel. Goedtner*, 224 Ill. 449, 79 N. E. 662 [1906]; *Carr v. People ex rel. Goedtner*, 224 Ill. 160, 79 N. E. 648 [1906]; *People ex rel., etc., v. Drainage Commissioners District No. 7, of Town of Young America*, 143 Ill. 417, 32 N. E. 688 [1895]; *Badger v. Inlet Drainage District*, 141 Ill. 540, 31 N. E. 170 [1893]; *Wilson v. Board of Trustees of the Sanitary District of Chicago*, 133 Ill. 443, 27 N. E. 203 [1891]; *Owners of Lands v. People*, 113 Ill. 297 [1885]; *Houston v. Clark*, 112 Ill. 344 [1885].

⁶ *Wilson v. Board of Trustees of the Sanitary District of Chicago*, 133 Ill. 443, 27 N. E. 203 [1891].

⁷ *Wilson v. Board of Trustees, of Sanitary District of Chicago*, 133 Ill. 443, 27 N. E. 203 [1891].

¹ *Givins v. City of Chicago*, 188 Ill. 348, 58 N. E. 912 [1900]; *Cornell v. People ex rel.*, 107 Ill. 372 [1883]; See to the same effect, *Board of Directors v. Houston*, 71 Ill. 318 [1874]; *Gage v. Graham*, 57 Ill. 144 [1870]; *Hessler v. Drainage Commissioners*, 53 Ill. 105 [1870]; *Harward v. St. Clair & Monroe Levee & Drainage Co.*, 51 Ill. 130 [1869]; *People v. Solomon*, 51 Ill. 37 [1869].

² *Citizens' Savings Bank & Trust Co. v. City of Chicago*, 215 Ill. 174, 74 N. E. 115 [1905]; *Givins v. City of Chicago*, 188 Ill. 348, 58 N. E. 912 [1900].

porate authorities upon whom the power of taxation may be conferred within the purview of this provision of the constitution are the authorities of the municipality who are either elected directly by the people to be taxed or appointed in some mode to which they have given their assent.”³ No other officials, it seems to be held, can be made the corporate authorities of the public corporation within the meaning of this provision of the constitution. Subject to this limitation, however, the legislature has the power of determining who shall constitute the corporate authorities of the public corporation, and what the powers of such corporate authorities shall be.⁴ The legislature may dispose of the revenues of such corporations.⁵ Accordingly the legislature may provide for the formation of a drainage district on petition of the adult land owners of lands lying in the proposed district amounting to one-half in number of such owners, and to one-third in ownership of the total amount of land in such district, giving to the other land owners in the district an opportunity to contest the formation of such district. It may provide that the county commissioners shall be the drainage commissioners of such district, although they are not elected by the voters or land owners of such district, at least if the assessment is merely a lien upon the property benefited and not a personal charge upon the owners of land. It may further constitute the county surveyor, county treasurer and sheriff a board of appeal from the orders of the drainage commissioners confirming special assessments, giving an appeal from such board to the County Court.⁶ The corporate authorities of a city or village may be made drainage commissioners within such city or village and given authority to determine what lands require drainage.⁷ The legislature may constitute the highway commis-

³ *Givins v. City of Chicago*, 188 Ill. 348, 58 N. E. 912 [1900]; *Snell v. City of Chicago*, 133 Ill. 413, 8 L. R. A. 858, 24 N. E. 532; *Wetherell v. Devine*, 116 Ill. 631, 6 N. E. 24; *Cornell v. People ex rel.*, 107 Ill. 372 [1883].

⁴ *Wilson v. Board of Trustees of the Sanitary District of Chicago*, 133 Ill. 443, 27 N. E. 203 [1891]; *Owners of Land v. People ex rel. Stookey*, 113 Ill. 29 [1886]; *Huston v. Clark*, 112 Ill. 344 [1885].

⁵ *Owners of Lands v. People ex rel. Stookey*, 113 Ill. 296 [1886].

⁶ *Owners of Land v. People ex rel. Stookey*, 113 Ill. 296 [1886]. This case was decided under Article V., § 10, and Article IV., § 31 of the Constitution of Illinois; and Article IX., § 9, of such Constitution does not operate to restrict the power of the legislature.

⁷ *Village of Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846 [1888].

sioners of a drainage district a board of drainage commissioners.⁸ The supervisor and assessor of a town are corporate authorities within the meaning of these constitutional provisions, and the power of levying special assessments may accordingly be conferred upon them.⁹ The legislature may provide for a board of local improvements and confer upon it power to do preliminary work with reference to local improvements. It may provide that if a majority in quantity of the owners of property in two or more contiguous blocks abutting upon the street to be improved shall petition for an improvement the board may recommend such improvement, and on such recommendation an ordinance must be passed therefor. Such board is regarded as an agent of the municipal corporation for the purpose of restricting the power of the corporate authorities thereof in the interest of the property owners. Its power to recommend such improvements, thereby making an ordinance therefor compulsory, is based upon the petition of the property owners.¹⁰ The legislature may authorize the formation of a park district consisting of several towns, and may authorize the corporate authorities of such towns to issue bonds for the cost of such improvement.¹¹ The power of levying local assessments may be conferred upon such park districts,¹² though such board is appointed by the Governor of the state, the act being submitted to popular vote.¹³ Accordingly, as the lands in such park are under the ex-

⁸ *People ex rel. etc., v. Drainage Commissioners District No. 1 of Town of Young America*, 143 Ill. 417, 32 N. E. 688 [1893]; *Kilgour v. Drainage Commissioners*, 111 Ill. 342.

⁹ *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894]; *The People ex rel. v. Gage*, 83 Ill. 486;

¹⁰ *Givins v. City of Chicago*, 188 Ill. 348, 58 N. E. 912 [1900].

¹¹ *Dunham v. People ex rel. McCrea*, 96 Ill. 331 [1880]; *People ex rel. Miller v. Brislin*, 80 Ill. 423 [1875]; Under the Constitution of 1848 a statute providing for the organization of such park district and giving it the power of general taxation was held valid. *People ex rel. Wilson v. Salomon*, 51 Ill. 37 [1869].

¹² *West Chicago Park Commissioners v. Sweet*, 167 Ill. 326, 47 N. E.

728 [1897]; *Chicago & N. W. Ry. Co. v. West Chicago Park Commissioners*, 151 Ill. 204, 25 L. R. A. 300, 37 N. E. 1079; *Kedzie v. West Chicago Park Commissioners*, 114 Ill. 280, 2 N. E. 182 [1886]; *West Chicago Park Commissioners v. Western Union Telegraph Co.*, 103 Ill. 33 [1882]; *People v. Walsh*, 96 Ill. 232, 36 Am. Rep. 135; *South Park Commissioners v. Dunlevy*, 91 Ill. 49 [1878]; *Wileox v. People*, 90 Ill. 186 [1878]; *People v. Salomon*, 51 Ill. 37.

¹³ Act of 1869, Feb. 27; 1 Priv. Laws, 1869, p. 342. *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1897, 1898]; *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894].

clusive control of the park commissioners for assessment purposes the city cannot levy an assessment against such lands.¹⁴ The powers of such park district may be amended by action of the legislature without obtaining the consent of the voters resident therein,¹⁵ though such park districts, as originally formed, were accepted by the vote of the qualified voters resident in such districts.¹⁶ Accordingly, a statute authorizing the park commissioners to levy assessments for park purposes independent of the town authorities, and not requiring such park commissioners to act through the town authorities, as before, is valid.¹⁷ A special assessment district cannot be created for levee construction.¹⁸ Under a similar provision of the constitution of California,¹⁹ power to levy an assessment on an irrigation district may be conferred upon the board of supervisors of the county in case the directors of the irrigation district fail to levy such assessment.²⁰ Under a constitutional provision to the effect that "all city, town and village officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns and villages, or appointed by such authorities thereof as the legislature shall designate," the legislature may confer power to improve certain streets near a park upon the park commissioners.²¹ A provision in the constitution of California forbidding the legislature to levy taxes on public corporations, but authorizing the grant of power to the corporate authorities of such public corporation to assess and collect taxes is not violated by a statute which authorizes an assessment and levy by a board of supervisors.²²

§ 260. Minnesota.

The constitution of Minnesota provides: "The legislature may, by general law or special act, authorize municipal corporations to

¹⁴ *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731 [1897]; *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894].

¹⁵ *Andrews v. People ex rel. Rumsey*, 83 Ill. 529 [1876]; *People ex rel. Miller v. Brislin*, 80 Ill. 423 [1875].

¹⁶ *People ex rel. Wilson v. Salomon*, 51 Ill. 37.

¹⁷ *West Chicago Park Commission-*

ers v. Farber, 171 Ill. 146, 49 N. E. 427 [1897, 1898].

¹⁸ *Udike v. Wright*, 81 Ill. 49 [1876].

¹⁹ Article XI., § 12.

²⁰ *Nevada National Bank v. Board of Supervisors of Kern County*, 5 Cal. App. 638, 91 Pac. 122 [1907].

²¹ *Astor v. Mayor*, 62 N. Y. 567 [1875].

²² *Nevada National Bank v. Board of Supervisors of Kern County*, 5 Cal. App. 638, 91 Pac. 122 [1907].

levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited. . . . ”¹ Under this constitutional provision the term “municipal corporation” seems to be regarded as being broad enough to include any public corporation,² such as a board of park commissioners,³ or a county.⁴ The legislature is, furthermore, not restricted in the form of city government which it may provide. It may leave the determination of the price to be paid for the improvement for which the assessment is to be levied, to the board of public works, without any restriction as to the maximum price to be paid.⁵

§ 261. Nebraska.

The constitution of Nebraska contains a provision which is substantially identical with the foregoing provision of the constitution of Illinois,¹ providing that “the legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes. . . . ”² The Supreme Court of Nebraska has taken a different view as to the effect of this constitutional provision from that entertained by the Supreme Court of Illinois, and has held that this provision is not a limitation or restriction upon the power of the legislature to confer the power of local assessment. On the contrary, it is there held that the power of local assessment is a branch of the general power of taxation, and that accordingly such power may be conferred upon other public corporations,³ such as counties,⁴ and drainage districts.⁵ The reason for this

¹ Article IX., § 1, Constitution of Minnesota.

² *State of Minnesota ex rel. Merriek v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885].

³ *State of Minnesota ex rel. Merriek v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885].

⁴ *Dowlan v. Sibley County*, 36 Minn. 430, 31 N. W. 517 [1887].

⁵ *Rogers v. City of St. Paul*, 22 Minn. 494 [1876].

¹ See § 257.

² Article IX., § 6, Constitution of Nebraska.

³ *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819 [1891]; *State of Nebraska ex rel. Abbott v. Board of County Commissioners of Dodge County*, 8 Neb. 124, 30 Am. Rep. 819 [1879].

⁴ *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819 [1891].

⁵ *State of Nebraska ex rel. Abbott v. Board of County Commissioners of Dodge County*, 8 Neb. 124, 30 Am. Rep. 819 [1879].

difference of judicial opinion is in part the fact that in Illinois the power of special assessment was much limited and restricted under the prior decisions of the Supreme Court of Illinois up to the adoption of the constitutional provision concerning local assessments, while in Nebraska the power of the legislature to authorize local assessment was never so restricted.

§ 262. Washington.

The constitution of Washington provides: "The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes all municipal corporations may be vested with authority to assess and collect taxes. . . ." ¹ This provision differs from the provisions in Illinois and Nebraska, in that in the constitution of Washington the further grant of power is for "all corporate purposes," while in Illinois and Nebraska the grant of power is for "all other corporate purposes." This distinction has been noted and commented upon. ² The actual result reached by the Supreme Court of Washington is in harmony with the Nebraska decisions, and contrary to those of Illinois; and is to the effect that the legislature is not restricted by such constitutional provision, but that the legislature may confer the power of levying local assessments upon public corporations other than cities, towns and villages, ³ such as counties, ⁴ and diking districts. ⁵

§ 263. Statutory provisions conclusive as to officers by whom assessment may be levied.

As long as the legislature does not impair the constitutional right of local self-government, ¹ it has full power to determine by what officers local assessments shall be levied. ² Even if by constitutional provision the power of levying special assessments is conferred upon public corporations, such as cities or villages, such

¹ Article VII., § 9. Constitution of Washington.

² Hansen v. Hammer, 15 Wash. 315, 315, 46 Pac. 332 [1896].

³ Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332 [1896]; Seanor v. Board of County Commissioners, 13 Wash. 48, 42 Pac. 552 [1895].

⁴ Seanor v. Board of County Com-

missioners, 13 Wash. 48, 42 Pac. 552 [1895].

⁵ Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332 [1896].

¹ See § 244.

² Markley v. City of Chicago, 190 Ill. 276, 60 N. E. 512 [1901]; Crawford v. The People, Rumsey, 83 Ill. 557 [1876].

corporations can act only through their officers or agents, and it is for the legislature to determine who these officers or agents shall be.³ Accordingly, the legislature has a wide range of discretion in determining by what officers assessments are to be levied and assessments can be levied only by the officers thus authorized by statute.⁴ Thus where an assessment is to be levied by commissioners, the county collector cannot levy an assessment or special tax against a lot not assessed by them.⁵ If, by statute, city commissioners are required to apportion the cost in proportion to benefits, an assessment made by the council, on the report of the engineer, without referring the matter to the commissioners, is invalid.⁶ So, if a board of viewers is to determine the amount to be assessed, the board of county commissioners cannot determine such amount without referring it to the viewers.⁷ If the statute requires a reference to commissioners and to a disinterested surveyor who is to make a map of the improvement, reference to the commissioners alone is insufficient.⁸ If assessment is to be levied by the council, the clerk of the village cannot levy such assessments by certifying them to the auditor of the county to be entered on the

³ *Crawford v. The People, Rumsey*, 83 Ill. 557 [1876].

⁴ *Walker v. District of Columbia*, 6 Mackey (D. C.) 352 [1888]; *People v. Patton*, 223 Ill. 379, 79 N. E. 51 [1906]; *Langlois v. Cameron*, 201 Ill. 301, 66 N. E. 332 [1903]; *County of Jefferson v. City of Mt. Vernon*, 145 Ill. 80, 33 N. E. 1091 [1893]; *Crawford v. The People, Rumsey*, 83 Ill. 557 [1876]; *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Oglesby*, 165 Ind. 542, 76 N. E. 165 [1905]; *Alley v. City of Lebanon*, 146 Ind. 125, 44 N. E. 1003 [1896]; *Board of Commissioners, Montgomery Co. v. Fullen*, 111 Ind. 410, 12 N. E. 298 [1887]; *Second Municipality of New Orleans v. Botts*, 8 Robinson, (La.) 198 [1844]; *State of Minnesota ex rel. Merrick v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885]; *Stewart, Pros. v. Mayor and Common Council of the City of Hoboken*, 57

N. J. L. (28 Vr.) 330, 31 Atl. 276 [1894]; *Burns v. Mayor of New York*, 3 Hun. 212 [1874]; *In re Locust Ave.*, 87 N. Y. S. 798, 93 App. Div. 416 [1904]; *In re Opening of Quarry Road*, 82 N. Y. S. 965, 84 App. Div. 418 [1903]; *Brewer v. Village of Bowling Green, Ohio*, 7 Ohio C. C. 489 [1893]; *Horiston v. City Council of Charleston*, 1 Me-Cord (S. C.) 345 [1821]; *Quarles v. Town of Sparta*, 2 Tenn. Ch. App. 714 [1902].

⁵ *Langlois v. Cameron*, 201 Ill. 301, 66 N. E. 332 [1903].

⁶ *Pittsburgh, C. C. & St. L. Ry. Co. v. Oglesby*, 165 Ind. 542, 76 N. E. 165 [1905].

⁷ *Board of Commissioners, Montgomery Co. v. Fullen*, 111 Ind. 410, 12 N. E. 298 [1887].

⁸ *State, White, Pros. v. Mayor and Council of the City of Bayonne*, 49 N. J. L. (20 Vr.) 311, 8 Atl. 295 [1887].

tax duplicate for collection.⁹ Commissioners appointed to apportion the assessment cannot correct any mistake which the authorities of the public corporation may have made in determining the nature and character of the improvement.¹⁰ So if an assessment is, by statute, to be levied by the board of supervisors, the township supervisor cannot refuse to comply with their order to place the assessment on the township rolls on the ground that, in his judgment, the proceedings were irregular.¹¹ The power thus conferred upon special officers is not of course an arbitrary one. Since assessments must, in theory at least, be apportioned according to the benefits, power cannot be given to any officers to levy the assessments according to their arbitrary personal discretion.¹² The legislature may of course alter pre-existing statutory provisions, and confer the power of levying local assessments on other officers than those theretofore empowered to levy such assessments.¹³ A subsequent statute which does not expressly repeal a prior statute, and which can be reconciled therewith, will not be regarded as working a repeal by implication, and the officers already authorized to levy such assessment, will retain such authority under the new statutes.¹⁴ A change of statute which does not apply in express terms or by necessary implication to pending proceedings will not be regarded as applying thereto.¹⁵ If power to require certain improvements to be made, such as grade crossings, is placed in the hands of railway commissioners, the authorities of a city cannot require such improvements to be made, and accordingly cannot levy local assessments therefor, even if in the absence of such provision conferring power on the railway commission.

⁹ *Brewer v. Incorporated Village of Bowling Green, Ohio*, 7 Ohio C. C. 489 [1893].

¹⁰ *County of Jefferson v. City of Mt. Vernon*, 145 Ill. 80, 33 N. E. 1091 [1893].

¹¹ *Scholtz v. Smith*, 119 Mich. 634, 78 N. W. 668 [1899].

¹² *State v. Hudson County Avenue, Commissioners*, 37 N. J. L. (8 Vr.) 12 [1874].

¹³ *State v. Jersey City*, 31 N. J. L. (2 Vr.) 575 [1865]; *In the Matter of Livingston*, 121 N. Y. 94, 24 N.

E. 290 [1890]; *People ex rel. Ward v. Asten*, 6 Daly 18 [1875]; *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902].

¹⁴ *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894]; *Kansas City v. Smart*, 128 Mo. 272, 30 S. W. 773 [1895]; *Bradshaw v. Commissioners of Guilford Co.*, 92 N. C. 278 [1885]; See also *Wand v. Green*, 7 Mo. App. 82 [1879]; *Adams v. Lindell*, 5 Mo. App. 197 [1878].

¹⁵ *Cincinnati v. Davis*, 58 O. S. 225, 50 N. E. 918 [1898].

power to construct such improvements will be conferred by the general grant of power to the city.¹⁶

§ 264. Council.

By statutory provisions, power to levy an assessment in a public corporation is often conferred upon the council or some corresponding body.¹ If by statute the council is to act in two separate boards, it has no authority to act at a joint meeting of such boards.² In the absence of a statute requiring it, the council is not obliged, as a preliminary step, to determine what land is benefited by the improvement, but it may leave such determination to commissioners appointed in accordance with statutory authority.³ If by statute the council is to appoint a special committee to report on a given improvement, a standing committee on streets and sidewalks is not the proper committee to whom to refer questions of street improvements.⁴

§ 265. Boards of revision or review.

Under statutory authority therefor, assessments may be referred to boards of revision, review, and the like, for final ap-

¹⁶ Fair Haven & Westville Railroad Co. v. City of New Haven, 77 Conn. 494, 59 Atl. 737 [1905].

¹ Harris v. City of Ansonia, 73 Conn. 359, 47 Atl. Rep. 672 [1900]; Birket v. City of Peoria, 185 Ill. 369, 57 N. E. 30 [1900]; County of Jefferson v. City of Mt. Vernon, 145 Ill. 80, 33 N. E. 1091 [1893]; State ex rel. Keith v. Common Council of Michigan City, 138 Ind. 455, 37 N. E. 1041 [1894]; City of Elkhart v. Wickwire, 121 Ind. 331, 22 N. E. 342 [1889]; Jackson v. Smith, 120 Ind. 520, 22 N. E. Rep. 431 [1889]; Moherry v. City of Jeffersonville, 36 Ind. 198 [1871]; City of Lafayette v. Fowler, 34 Ind. 140 [1870]; Hydes v. Joyce, 4 Bush. (67 Ky.) 464, 96 Am. Dec. 311 [1868]; Whitney v. Common Council of Village of Hudson, 69 Mich. 189, 37 N. W. 184 [1888]; Steckert v. City of East Saginaw, 22 Mich. 104 [1870]; Kansas City v. Bacon, 147 Mo. 259, 48 S. W.

860 [1898]; City of Sedalia to use of Sedalia National Bank v. Donohue, 190 Mo. 407, 89 S. W. 386 [1905]; City of Nevada to use of Gilfillan v. Eddy, 123 Mo. 546, 27 S. W. 853 [1894]; Kiley v. Forsee, 57 Mo. 390 [1874]; In the Matter of Roberts, 81 N. Y. 62 [1880]; Baltimore & Ohio Railroad Co. v. City of Bellaire, 60 O. S. 301, 54 N. E. 263 [1899]; Brewer v. Incorporated Village of Bowling Green, Ohio, 7 Ohio C. C. 489 [1893]; City of Toledo for the use of Gates v. Lake Shore & Michigan Southern Railway Company, 4 Ohio C. C. 113 [1889]; Green v. Ward, 82 Va. 324 [1886].

² Harris v. City of Ansonia, 73 Conn. 359, 47 Atl. Rep. 672 [1900].

³ State ex rel. Peters v. Mayor and Common Council of City of Newark, 31 N. J. L. (2 Vr.) 360 [1865].

⁴ Gregory v. City of Bridgeport, 52 Conn. 40 [1884].

proval.¹ By statutory provision the council may be the body which is to act as such board of revision or review.² Such a statute is not invalid, as conferring judicial power upon legislative and administrative bodies.³ The power of such boards of review is limited by the statutory grant of authority. A board of review, authorized to pass on questions involving the apportionment of the assessment, has no power to set the assessment aside because the public corporation has no authority to impose such assessment.⁴ If by statute an assessment is to be referred for final action to a board of revision, it is not necessary that the common council should confirm such assessment.⁵ In the absence of statute, a board of estimate and apportionment, though having power to revise the acts of its predecessor, the board of public improvements has no power to revise its own determinations after they have been made and announced.⁶

§ 266. Administrative boards.

The power of constructing public improvements, and requiring assessments to be levied therefor, may be conferred upon a board of improvements within a city.¹ If the council refuses to levy an assessment, to pay for improvements ordered by the board within their statutory authority, the council may be compelled by mandamus to levy such tax.² If such board fails to make the annual report required by law, the council has no power to re-

¹State ex rel. Ashby v. Three States Lumber Co., 198 Mo. 430, 95 S. W. 333 [1906]; Wales v. Warren, 66 Neb. 455, 92 N. W. 590 [1902]; In the Matter of Lange, 85 N. Y. 307 [1881]; In the Matter of Roberts, 81 N. Y. 62 [1880]; In the Matter of Palmer to have Assessment for Building Sewer in 34th Street Vacated, 31 Howard (N. Y.) 42 [1865]; In the Matter of Lester, 21 Hun. (N. Y.) 130 [1880]; Richards v. Low, 77 N. Y. S. 1102, 38 Misc. Rep. 500 [1902].

²Wales v. Warren, 66 Neb. 455, 92 N. W. 590 [1902]; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432 [1898].

³Heath v. McCrea, 20 Wash. 342, 55 Pac. 432 [1898]. Such power has been said to be judicial in a case in

which the power of the county board of equalization was recognized. State ex rel. Ashby v. Three States Lumber Co., 198 Mo. 430, 95 S. W. 333 [1906].

⁴In the Matter of Lange, 85 N. Y. 307 [1881].

⁵In the Matter of Roberts, 81 N. Y. 62 [1880];

⁶Richards v. Low, 77 N. Y. S. 1102, 38 Misc. Rep. 500 [1902].

¹Morrilton Waterworks Improvement District v. Earl, 71 Ark. 4, 69 S. W. 577, 71 S. W. 666 [1903]; City of Little Rock v. Board of Improvements, etc., 42 Ark. 152 [1883].

²City of Little Rock v. Board of Improvements, etc., 42 Ark. 152 [1883].

move them by ordinance without notice and to appoint their successors, since if the council has power to remove such officers, it must be for cause and after a hearing of which notice is given.³ Such board is not technically the agent of the city.⁴ Provision is frequently made for a board of public works which is to determine the nature and character of improvements to be constructed.⁵ If such board has power to determine the necessity of improvements, it will be presumed that it acts upon its own motion in preparing an improvement ordinance and submitting it to council, although council may have ordered it so to do; it being presumed that, since council had no power to make such order, the board of improvements regarded such order as a mere petition.⁶ If the improvement is ordered, and the assessment levied, the board of improvements has no power to make a material change in the nature and character of the improvements.⁷ The power of constructing local improvements to be paid for by assessment may also be conferred upon the board of supervisors of a city.⁸ The territorial area of a public corporation, such as a city, may be divided between different boards, some of which have power to construct improve-

³ *Morrilton Waterworks Improvement District v. Earl*, 71 Ark. 4, 69 S. W. 577, 71 S. W. 666 [1903].

⁴ *Morrilton Waterworks Improvement District v. Earl*, 71 Ark. 4, 69 S. W. 577, 71 S. W. 666 [1903]; *Fitzgerald v. Walker*, 55 Ark. 148 [1891].

⁵ *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331 [1905]; *In the Matter of the proceedings to change the grade of Beale Street in the city and county of San Francisco*, 39 Cal. 495 [1876]; *Houston v. McKenna*, 22 Cal. 550 [1863]; *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904]; *Thorn v. West Chicago Park Commissioners*, 130 Ill. 594, 22 N. E. 520 [1890]; *Masonic Building Association v. Brownell*, 164 Mass. 306, 41 N. E. 306 [1895]; *Goodwillie v. City of Detroit*, 103 Mich. 283, 61 N. W. 526 [1894]; *Cuning v. City of Grand Rapids*, 46 Mich. 150, 9 N. W. 141 [1881]; *State ex rel. Hughes v. District*

Court of Ramsey County, 95 Minn. 70, 103 N. W. 744 [1905]; *State of Minnesota ex rel. Lewis v. District Court of Ramsey County*, 33 Minn. 164, 22 N. W. 295 [1885]; *The Dollar Savings Bank v. Ridge*, 62 Mo. App. 324 [1895]; *Heiser v. The Mayor, Aldermen and Commonalty of New York*, 104 N. Y. 68, 9 N. E. 866 [1887]; *In the matter of DePeyster*, 80 N. Y. 565 [1880]; *In the matter of DePeyster*, 18 Ill. 445 [1879]; *Pittelkow v. City of Milwaukee*, 94 Wis. 651, 69 N. W. 803 [1897]; *Liebermann v. City of Milwaukee*, 89 Wis. 336, 61 N. W. 1112 [1895].

⁶ *Gage v. City of Chicago*, 207 Ill. 56, 69 N. E. 588 [1904].

⁷ *Young v. People ex rel. Raymond*, 196 Ill. 603, 63 N. E. 1075 [1902].

⁸ *Lent v. Tillson*, 140 U. S. 316, 35 L. 419, 11 S. 825 [1891]; *Affirming Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]).

ments and levy assessments for certain purposes in a given part of the area of such city, while the general city authorities have power to construct improvements for other purposes and improvements in the remaining parts of such city. A common example of this is found where park boards are given authority to construct park improvements, and levy assessments therefor, while the city authorities have power to construct improvements other than for park purposes and levy assessments for such improvements.⁹ Under such statutes the board of park commissioners can act without an ordinance of the council,¹⁰ and can levy assessments for park boulevards,¹¹ or for improving streets giving access to the park and part of the general park system,¹² but not for drainage sewers in a park boulevard, intended to drain neighboring residences and not for the benefit of the boulevard,¹³ nor for streets not included within their territorial jurisdiction.¹⁴ Park commissioners may be authorized to levy assessments directly, and not through the town authorities.¹⁵ A similar division of power may be made between the city and an aqueduct board,¹⁶ or between the city authorities and the trustees of a sanitary district.¹⁷ If, however, the power of the trustees of a sanitary district becomes exclusive only when the system of sewers in the sanitary district is completed, the city will have authority to levy such assessments in the absence of evidence that such system has been completed.¹⁸ The power of levying assessments may be conferred upon the trustees of an incorporated village.¹⁹ They

⁹ *West Chicago Park Commissioners v. Sweet*, 167 Ill. 326, 47 N. E. 728 [1897]; *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1897-1898]; *Kedzie v. West Chicago Park Commissioners*, 114 Ill. 280, 2 N. E. 182 [1886]; *Dunham v. The People ex rel. McCrea*, 96 Ill. 331 [1880]; *Hundley & Rees v. Commissioners, etc., of Lincoln Park*, 67 Ill. 559 [1873]; *Kittinger v. City of Buffalo*, 148 N. Y. 332, 42 N. E. 803 [1896]; In the matter of the petition of Knaust, 101 N. Y. 188, 4 N. E. 338 [1886]; In the Matter of Hearn, 96 N. Y. 378 [1884]; In the matter of Deering, 85 N. Y. 1 [1881].

¹⁰ In the matter of Knaust, 101 N. Y. 188, 4 N. E. 338 [1886].

¹¹ *Kedzie v. West Chicago Park Commissioners*, 114 Ill. 280, 2 N. E. 182 [1886].

¹² *Kittinger v. City of Buffalo*, 148 N. Y. 332, 42 N. E. 803 [1896].

¹³ *Lingle v. City of Chicago*, 172 Ill. 170, 50 N. E. 192 [1898].

¹⁴ In the matter of Deering, 85 N. Y. 1 [1881].

¹⁵ *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898].

¹⁶ *Burns v. Mayor, etc., of the City of New York*, 3 Hun. 212 [1874].

¹⁷ *Gage v. City of Chicago*, 225 Ill. 218, 80 N. E. 127 [1907].

¹⁸ *Gage v. City of Chicago*, 225 Ill. 218, 80 N. E. 127 [1907].

¹⁹ *Crawford v. The People ex rel. Rumsey*, 83 Ill. 557 [1876]; *Town*

cannot, however, act arbitrarily by increasing the assessment without any examination in fact of the benefits conferred.²⁰ The power of levying assessments for local improvements is frequently conferred upon the officers of a county, such as the boards of supervisors, county commissioners, and the like.²¹ Special boards of water commissioners may be created by statute, having charge of the water supply and with power to levy assessments therefor.²² The power of levying assessments may be conferred upon the trustees of a road district.²³ In the absence of statute requiring unanimous action on their part, it is not necessary that all the trustees concur in making such improvement.²⁴ The power of levying local assessments may also be conferred upon a drainage district board,²⁵ or upon a drainage commissioner.²⁶ Provision is occasionally made for a special board for levying assessments for the construction of levees.²⁷ Such board may be authorized to determine the rate of taxation as well as to de-

of *Greenwood v. State*, ex rel. *Lawson*, 159 Ind. 267, 64 N. E. 849 [1902]; *People of the State of New York ex rel. Gage v. Lohnas*, 54 Hun. 604, 8 N. Y. Supp. 104 [1889]; *Merritt v. Village of Port Chester*, 29 Hun. 619 [1883].

²⁰ *State, Souther, Pros. v. Village of South Orange*, 46 N. J. L. (17 Vr.) 317 [1884].

²¹ *Reclamation District No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676 [1884]; *Mayor v. Board of Commissioners of Jay County*, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893]; *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890]; *Fleener v. Claman*, 126 Ind. 166, 25 N. E. 900; *Stipp v. Claman*, 123 Ind. 532, 24 N. E. 131; *Anderson v. Claman*, 123 Ind. 471, 24 N. E. 175 [1889]; *White v. Fleming*, 114 Ind. 560, 16 N. E. 487 [1887]; *Board of Commissioners of Montgomery Co. v. Fullen*, 111 Ind. 410, 12 N. E. 298 [1887]; *Scholtz v. Smith*, 119 Mich. 634, 78 N. W. 668 [1899]; *Morris v. Merrill*, 44 Neb. 423, 62 N. W. 865 [1895]; *In the Matter of Church*, 92 N. Y. 1 [1883]. Such power may be withheld by the legislature in the case of streets which have been duly

located. *Philadelphia, Wilmington & Baltimore Railroad Co. v. Shipley*, 72 Md. 88, 19 Atl. 1 [1890].

²² *State v. Jersey City*, 31 N. J. L. (2 Vr.) 575 [1865]; *Burns v. Mayor, etc., of the City of New York*, 3 Hun. 212 [1874].

²³ *Corry v. Gaynor*, 22 O. S. 584 [1872].

²⁴ *Corry v. Gaynor*, 22 O. S. 584 [1872].

²⁵ *People ex rel. v. Drainage Commissioners, of the Town of Young America*, 143 Ill. 417, 32 N. E. 688 [1893]; *Commissioners of Mason & Tazewell Special Drainage District v. Griffin*, 134 Ill. 330, 25 N. E. 995 [1891]; *Owners of Lands v. The People ex rel. Stookey*, 113 Ill. 296 [1886]; *Turnquist v. Cass County Drainage Commissioners*, 11 N. D. 514, 92 N. W. 852 [1902].

²⁶ *Attorney General ex rel. Alexander v. McClear*, 146 Mich. 45, 109 N. W. 27 [1906]; *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091 [1897].

²⁷ *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184; *McGehee v. Mathis*, 21 Ark. 40 [1860]; *Missouri, Kansas & Texas Railway Co. v. Cambern*, 66 Kan. 365, 71 Pac. 809 [1903].

termine what lands are subject to be taxed for the construction of the levee.²⁸ Such board may be given power to adjust the assessment and levy of the tax, and to decide all questions relative thereto.²⁹ In such action the board acts as a ministerial, and not as a judicial body.³⁰ By a special statutory authority the board of commissioners in charge of the construction of levees, may act as viewers, or may themselves appoint viewers.³¹ Such board ordinarily has discretion in determining whether an improvement is necessary, and cannot be compelled by mandamus to levy assessments for repairs, unless their action is shown to be arbitrary or fraudulent, or to accomplish their own personal or selfish ends.³² Authority to construct public improvements and to levy assessments therefor may by statute be conferred upon police juries.³³ Provision is sometime made by statute for a permanent board of assessors who are to assess the property benefited by public improvements.³⁴ Statutory authority is necessary, however, for appointing such a board. If the statute provides for the appointment of three impartial commissioners to determine the expense of an improvement when it is completed, such commissioners must be appointed for each specific case, and a public corporation cannot establish a permanent board to act in all cases.³⁵ If a permanent board or set of officials is empowered to undertake assessment proceedings, and to levy an assessment, the fact that the individuals composing such board have been changed during the proceedings, does not invalidate such proceedings.³⁶

§ 267. Other officers.

Power of levying assessments may be conferred upon other officials, and thus made a part of their official duties. The legis-

²⁸ *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184.

²⁹ *McGehee v. Mathis*, 21 Ark. 40 [1860].

³⁰ *McGehee v. Mathis*, 21 Ark. 40 [1860].

³¹ *Missouri, Kansas & Texas Railway Co. v. Cambern*, 66 Kan. 365, 71 Pac. 809 [1903].

³² *Bromwell v. Flowers*, 217 Ill. 174, 75 N. E. 466 [1905].

³³ *Barrow v. Helper*, 34 La. Ann. 362 [1882].

³⁴ *Smith v. City of Buffalo*, 159 N. Y. 427, 54 N. E. 62 [1899]; *People ex rel. Ward v. Asten*, 6 Daly, 18 [1875].

³⁵ *State, Ogden, Pros. v. Mayor and Common Council of the City of Hudson*, 29 N. J. L. (5 Dutcher) 104 [1860].

³⁶ *The Central Savings Bank of Baltimore v. The Mayor and City Council of Baltimore*, 71 Md. 515, 18 Atl. 839, 20 Atl. 283 [1889]; *In the Matter of Lewis*, 35 Howard 162 [1868].

lature may provide that executive officers,¹ such as assessors,² shall determine questions of fact in levying the assessment. The supervisor and assessor of a village may be empowered, as corporate authorities, to levy assessments.³ A county surveyor may be authorized to repair existing ditches, and to certify the cost thereof to the county auditor, who may then be required to draw his warrant in favor of the certificate holders upon the county treasurer who is to be reimbursed by subsequent assessments.⁴ By statute, the superintendent of streets may be authorized to assess benefits for the construction of sewers.⁵ Statutes conferring such authority are not invalid, although the street superintendent is not a member of the council,⁶ and although the exact method of assessment is not described.⁷ If such power is conferred exclusively upon the street superintendent, the co-operation of the council is not necessary.⁸ If the street superintendent is authorized by statute to act in making certain repairs in public improvements, and he makes such report, signed by him in his official capacity, the fact that a superfluous order of the court appointed him superintendent of special assessment in that particular proceeding, does not impair the authority conferred upon him by statute.⁹ A city engineer may be given, by statute, authority to act in proceedings leading up to local assessments;¹⁰ such as power to decide upon the material to be used,¹¹ or to make

¹ *Shimmons v. City of Saginaw*, 104 Mich. 511, 62 N. W. 725 [1895].

² *Cleveland, Cincinnati, Chicago & St. Louis R. R. Co. v. People*, 212 Ill. 638, 72 N. E. 725 [1904]; *Extension of Hancock Street*, 16 Pa. St. (6 Harr.) 26 [1851].

³ *People ex rel. Huck v. Gage*, 83 Ill. 486 [1876].

⁴ *State ex rel. French v. Johnson*, 105 Ind. 463, 5 N. E. 553 [1885]; See also *Kirkpatrick v. Taylor*, 118 Ind. 329, 21 N. E. 20 [1888].

⁵ *Greenwood v. Morrison*, 128 Cal. 350, 60 Pac. 971 [1900]; *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877 [1897]; *Citizens' Savings Bank & Trust Co. v. City of Chicago*, 215 Ill. 174, 74 N. E. 115 [1905]; *Storrs v. City of Chicago*, 208 Ill. 364, 70 N. E. 347 [1904]; *Schenley v. Common-*

wealth for use of City of Allegheny, 36 Pa. St. (12 Casey) 64 [1859].

⁶ *Citizens' Sav. Bank & Trust Co. v. City of Chicago*, 215 Ill. 174, 74 N. E. 115 [1905].

⁷ *Greenwood v. Morrison*, 128 Cal. 350, 60 Pac. 971 [1900].

⁸ *Schenley v. Commonwealth for use of City of Allegheny*, 36 Pa. St. (12 Casey) 64 [1859].

⁹ *Storrs v. City of Chicago*, 208 Ill. 364, 70 N. E. 347 [1904].

¹⁰ *Linville v. State ex rel.*, 130 Ind. 210, 29 N. E. 1129; *Van Sickle v. Belknap*, 129 Ind. 558, 28 N. E. 305 [1891]; *Taber v. Grafmiller*, 109 Ind. 206, 9 N. E. 721 [1886]; *Akers v. Kolkemyer & Co.*, 97 Mo. App. 520, 71 S. W. 536 [1902]; *Waud v. Green*, 7 Mo. App. 82 [1879].

¹¹ *Ray v. City of Jeffersonville*, 90 Ind. 567 [1883].

an estimate and apportionment of the cost of the improvement.¹² Statutes are occasionally found authorizing officers of a township to construct public improvements at the expense of the owners of property benefited thereby, and to levy and collect assessments for such improvements.¹³

§ 268. Combined action of public officials.

It is frequently provided that assessments are to be levied only by the combined action of two or more public officials or sets of officials.¹ The board of public works may be given power to determine the limits of the taxing district, the council may be given power to determine the purpose for which money is to be raised, and the combined action of the two may be necessary in order to determine how much shall be raised for the improvement undertaken.² A similar division of authority may be made between the board of improvement and the council, giving the council power to lay off the assessment district and to appoint the board, the board to make the improvement and report the cost to the council and the council to levy the assessment therefor.³ The council may be given authority to create a board of public works which is to take charge of the construction of public improvements.⁴ Under some statutes power is given to two or more boards to levy local assessments only when acting together at a joint meeting.⁵ If the record of the proceedings is ambiguous, it will be presumed that the officers performed their legal duty, and that the meeting was a joint one.⁶ If action is not taken at a joint meeting, it has been held that such defect may be cured by joint action, taken at a subsequent regular meeting.⁷

¹² *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889 [1891].

¹³ *The Chicago & Northwestern Railroad Company v. The People ex rel. Miller*, 83 Ill. 467 [1876]; *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600 [1887].

¹ *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902].

² *Rogers v. City of St. Paul*, 22 Minn. 494 [1876]; See also *City of Toledo for the use of Gates v. Lake Shore & Michigan Southern Railway Company*, 4 Ohio C. C. 113 [1889].

³ *City of Little Rock v. Board of*

Improvements, 42 Ark. 152 [1883]; See also *Morrilton Waterworks Improvement District v. Earl*, 71 Ark. 4, 69 S. W. 577, 71 S. W. 666 [1903].
⁴ *Green v. Ward*, 82 Va. 324 [1886].

⁵ *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890]; *Bradshaw v. Commissioners of Guilford Co.*, 92 N. C. 278 [1885].

⁶ *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890].

⁷ *Bradshaw v. Commissioners of Guilford Co.*, 92 N. C. 278 [1885].

§ 269. Interest of public officials.

While it is not advisable that permanent officers of a corporation should be authorized to act in assessments, or indeed in any matters, in which they have personal interests, such questions should be addressed to the discretion of the legislature, and not to the courts, and if the legislature sees fit to authorize officers to act in spite of their interests, they may so act.¹ Defects in the personal qualification of public officers cannot be the ground for a collateral attack upon the assessment under most statutes.² If the city engineer in office when the work is done, goes out of office without giving the certificate of performance, his successor in office at the time the certificate is given, is the proper person to give it.³ The fact that one who acts as engineer and surveyor, owns land which is to be assessed,⁴ and is related to other owners of land to be assessed,⁵ does not disqualify him. By special statute a surveyor may be forbidden to act if land owned by him or by persons related to him within certain degrees of consanguinity are benefited by the improvement or are liable to assessment therefor.⁶ In the absence of specific statute the fact that a member of a common council owns land which is subject to assessment, does not disqualify him from acting.⁷ In the absence of specific statute, officers such as county commissioners,⁸ or drainage commissioners,⁹ are not disqualified because they own land liable to assessment. It is said that, at least, the proceedings are not absolutely void, but are at most merely voidable.¹⁰ It is not necessary that the election and qualification of town trustees should be shown affirmatively.¹¹ The fact that a trustee owns land subject to assessment does not disqualify him in the

¹ *The People ex rel. Miller v. Brislin*, 80 Ill. 423 [1875].

² *Dows v. Village of Irvington*, 66 Howard (N. Y.) 93 [1883].

³ *Hornung v. McCarthy*, 126 Cal. 17, 58 Pac. 303 [1899].

⁴ *Thompson v. Goldthwait*, 132 Ind. 20, 31 N. E. 451 [1892]; *Thompson v. Love*, 42 O. S. 61 [1884].

⁵ *Thompson v. Goldthwait*, 132 Ind. 20, 31 N. E. 451 [1892].

⁶ *Markley v. Rudy*, 115 Ind. 533, 18 N. E. 50 [1888].

⁷ *Corliss v. Village of Highland Park*, 132 Mich. 152, 95 N. W. 254, 93 N. W. 610; (Affirmed on rehearing, 95 N. W. 416 [1903]).

⁸ *Thompson v. Love*, 42 O. S. 61 [1884].

⁹ *The People ex rel. Samuel, Sr. v. Cooper*, 139 Ill. 461, 29 N. E. 872 [1893].

¹⁰ *Carr v. Duhme*, 167 Ind. 76, 78 N. E. 322 [1906].

¹¹ *Sloenn v. Dallas*, 165 Ind. 710, 75 N. E. 823 [1905].

absence of specific statute.¹² It has even been held that a trustee who has done work and expended money in constructing the improvement, may collect therefor where his vote is not necessary for the allowance of his claim by the majority of the board.¹³ If the court before which assessment proceedings are to be held is by reason of interest incapable of acting, provision is made for appointing other judges to act.¹⁴ Under special statutory provisions it has been held that a member of a board of public works, who owns property affected by an improvement is disqualified to act by reason of his interest, and that if he does act, the ordinance and assessment are invalid.¹⁵

§ 270. Exercise of authority by public officers.

The public officers by whom an assessment may be levied must exercise the authority which is conferred upon them in substantial compliance with the provisions of the statute by which such power is conferred.¹ Under general language the officers of a corporation will not have authority to levy an assessment upon lands outside of the territorial limits of the corporation of which they are officers, even though such land is benefited by the improvement constructed.² Thus, authority to locate "any ditch" does not authorize county commissioners to locate a ditch within the limits of a city or village, and levy an assessment therefor, upon land within such municipal corporation.³ If the statute specifically provides therefor, land which is benefited by the improvement may be assessed, although it is outside the territorial limits of the corporation making the assessment.⁴ Land cannot, however, be included in two or more assessment districts, where the effect is to assess such tract in excess of the tax imposed

¹² *Corliss v. Village of Highland Park*, 132 Mich. 152, 95 N. W. 254, 95 N. W. 416 [1903].

¹³ *Lower Kings River Reclamation District No. 531 v. McCullah*, 124 Cal. 175, 56 Pac. 887 [1899].

¹⁴ *In the Matter of Broadway Widening*, 63 Barb. 572 [1872].

¹⁵ *Hunt v. City of Chicago*, 60 Ill. 183 [1871].

¹ See § 229, 234.

² *Drain Commissioner v. Baxter*, 57 Mich. 127; *sub nomine Robertson v. Baxter*, 23 N. W. 711 [1885].

³ *City of Joliet v. Spring Creek Drainage District*, 222 Ill. 441, 78 N. E. 836 [1906]; *Village of Pleasant Hill v. Commissioners*, 71 O. S. 133, 72 N. E. 896 [1904].

⁴ *Reclamation District No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945 [1884]; *Hudson v. Bunch*, 116 Ind. 63, 18 N. E. 390 [1888]; *Watkins v. State ex rel. Van Aiken*, 151 Ind. 123, 51 N. E. 79, 49 N. E. 169 [1898]; *Crist v. State ex rel. Whitmore*, 97 Ind. 389 [1884].

upon other lands similarly situated.⁵ County commissioners may order an improvement at a special session.⁶ Oral notice of such special session is sufficient.⁷ They cannot, however, during an adjournment, without a call for a special session, make an order for an improvement, and an assessment levied for an improvement so made is invalid.⁸ Where an improvement is constructed jointly by two counties, the proceedings are not absolutely void, if the boards of commissioners of the two counties act as one tribunal, even if the statute contemplates separate action. Such proceedings may be irregular but are not absolutely void.⁹ A board of review which has authority to correct errors and irregularities in assessment proceedings has no authority to adjudge such proceedings illegal.¹⁰

§ 271. Action of court in levying assessment.

The legislature may confer upon a court the power to decide upon the necessity of the improvement,¹ as in the case of a drainage district.² It may be provided by statute that a public corporation, such as a city or village, shall construct certain improvements by filing a petition therefor with the proper court and securing an order of the court for the construction of such improvements at the cost of the owners of property benefited thereby.³ It may be provided that a park board shall petition

⁵ *Abaseal v. Bouny*, 37 La. Ann. 538 [1885].

⁶ *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890]; *Fleener v. Claman*, 126 Ind. 166, 25 N. E. 900; *Stipp v. Claman*, 123 Ind. 532, 24 N. E. 131; *Anderson v. Claman*, 123 Ind. 471, 24 N. E. 175 [1889]; *White v. Fleming*, 114 Ind. 560, 16 N. E. 487 [1887].

⁷ *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890].

⁸ *Morris v. Merrill*, 44 Neb. 423, 62 N. W. 865 [1895].

⁹ *Sarber v. Rankin*, 154 Ind. 236, 56 N. E. 225 [1899].

¹⁰ *Cavanaugh v. Sanderson*, — Mich. —, 115 N. W. 955 [1908]; *Thayer Lumber Co. v. City of Muskegon*, — Mich. —, 115 N. W. 957 [1908].

¹ *State of Washington ex rel. Matson v. Superior Court for Skagit County*, 42 Wash. 491, 85 Pac. 264 [1905].

² *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588 [1898]; *State v. Superior Court of Skagit County*, 42 Wash. 491, 85 Pac. 264 [1905].

³ *Drainage Improvement; Stack v. People ex rel. Talbott*, 217 Ill. 220, 75 N. E. 347 [1905]; *McChesney v. Village of Hyde Park*, 151 Ill. 634, 37 N. E. 858 [1894]; *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893]; *Hosmer v. The Hunt Drainage District*, 134 Ill. 360, 26 N. E. 584 [1891]; *City of Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686 [1886]; *Kennedy v. State ex rel. Dorsett*, 124 Ind. 239, 24 N. E. 748 [1890]; *Street Improvement; In the*

the court for authority to open a driveway through the park.⁴ The court has been empowered to pass upon the plan of the improvement.⁵ The court may be authorized to determine what lands are benefited by the proposed improvement,⁶ as in the case of a levee district;⁷ or to determine the amount of benefits to each tract of land.⁸ The court may be empowered to determine whether a sufficient number of property owners have petitioned for an improvement.⁹ The court may be authorized to appoint commissioners by whom the question of benefits is to be determined, and by whom the assessment is to be apportioned.¹⁰ The court may be authorized to adjust assessments already levied,¹¹ and to reduce the amount thereof so that the assessments do not exceed the benefit conferred upon the property.¹² The

Matter of the Mayor, Aldermen and Commonalty of the City of New York, 20 Johnson 269 [1822].

⁴Astor v. Mayor, Aldermen and Commonalty of the City of New York 62 N. Y. 567 [1875].

⁵In the Matter of the Mayor, Aldermen and Commonalty of the City of New York, 20 Johnson 269 [1822]; (The validity of such grant of power was questioned in this case.) See also Badger v. Inlet Drainage District, 141 Ill. 540, 31 N. E. 170 [1893].

⁶Overstreet v. Levee Dist. No. 1 of Conway County, 80 Ark. 462, 97 S. W. 676 [1906]; City of Valparaiso v. Parker, 148 Ind. 379, 47 N. E. 330 [1897]; State ex rel. Wilcox v. Jackson, 118 Ind. 553, 21 N. E. 321 [1888]; State of Washington on the relation of Matson v. Superior Court of Skagit County, 42 Wash. 491, 85 Pac. 264 [1905].

⁷Overstreet v. Levee Dist. No. 1 of Conway County, 80 Ark. 462, 97 S. W. 676 [1906].

⁸State of Washington on the relation of Matson v. Superior Court of Skagit County, 42 Wash. 491, 85 Pac. 264 [1905].

⁹Blake v. The People, for use of Caldwell, 109 Ill. 504 [1884].

¹⁰Trigger v. Drainage District No. 1, etc., 193 Ill. 230, 61 N. E. 1114

[1901]; Davis v. City of Litchfield, 155 Ill. 384, 40 N. E. 354 [1895]; Sargeant v. City of Evanston, 154 Ill. 268, 40 N. E. 440 [1894]; MeChesney v. Village of Hyde Park, 151 Ill. 634, 37 N. E. 858 [1894]; Smith v. The People ex rel. Detrick, 140 Ill. 355, 29 N. E. 676 [1893]; Murphy v. City of Peoria, 119 Ill. 509, 9 N. E. 895 [1888]; Taylor v. Burnap, 39 Mich. 739 [1878]; Bakman, Pros. v. Hackensack Improvement Commission, 70 N. J. L. (41 Vr.) 499, 57 Atl. 141 [1904]; Striker v. Kelley, 2 Denio, 323 [1845]; *In re* Main St. in Borough of Nicholson, 27 Pa. Super. Ct. 570 [1905].

¹¹Chicago Consolidated Traction Co. v. Village of Oak Park, 225 Ill. 9, 80 N. E. 42 [1907]; Birket v. City of Peoria, 186 Ill. 369, 57 N. E. 30 [1900]; City of Jacksonville v. Hamill, 178 Ill. 235, 52 N. E. 949 [1899]; Blanchet v. Municipality No. 2, 13 La. 322 [1839]; In Report of Commissioners of Elizabeth, 49 N. J. L. (20 Vr.) 488, 10 Atl. 363 [1887]; In the Matter of Livingston, 121 N. Y. 94, 24 N. E. 290 [1890]; In the Matter of Auchmuty, 18 Hun. 324 [1879].

¹²Chicago Consolidated Traction Co. v. Village of Oak Park, 225 Ill. 9, 80 N. E. 42 [1907].

court may be authorized to levy an assessment with the co-operation of a jury,¹³ or to order commissioners to make such levy.¹⁴ Under some statutes the court is to act in confirming an assessment.¹⁵ The amount of the assessment may be referred to the court for determination.¹⁶ Under a statute giving to the court power to modify, change, alter or annul an assessment, the court may deduct a certain per cent. from the amount assessed against property owners and impose such reduction upon the public corporation.¹⁷ In the absence of specific authority conferred by statute the court cannot levy an assessment if no ordinance has been passed.¹⁸ If by statute the property owners are entitled to the determination of commissioners as to the amount of benefits, the court cannot determine such fact,¹⁹ nor can it decide what amount should be raised by assessment.²⁰ If the amount of damage caused by the exercise of the right of eminent domain is to be determined, as well as the amount of benefits caused by the improvement, a judicial inquiry of some sort is necessary.²¹ In taking part in levying an assessment, the judges are said to act as commissioners rather than as a court.²²

§ 272. Jury.

The property owners have, as has been said before,¹ no constitutional right to a jury in determining the question of the amount and apportionment of benefits.² It is therefore within the power of the legislature to provide that damages should be assessed by a jury and benefits by drain commissioners.³ The legislature has, however, full power to provide for a hearing by

¹³ *Robeson v. People ex rel. Curry*, 161 Ill. 176, 43 N. E. 619 [1896].

¹⁴ *Trigger v. Drainage District, No One*, 193 Ill. 230, 61 N. E. 1114 [1901].

¹⁵ See § 910 *et seq.*

¹⁶ *Zahn v. Borough of Rutherford*, 72 N. J. L. (43 Vr.) 446, 60 Atl. 1123 [1905].

¹⁷ *In the Matter of Pike Street, Seattle*, 42 Wash. 551; *sub nomine, In re City of Seattle*, 85 Pac. 45 [1906].

¹⁸ *Brewer v. Incorporated Village of Bowling Green, Ohio*, 7 Ohio C. C. 489 [1893].

¹⁹ *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172 [1893].

²⁰ *Boskowitz v. Thompson*, 144 Cal. 724, 78 Pac. 290 [1904].

²¹ *City of Chicago v. Ward*, 36 Ill. 9 [1864].

²² *In the Matter of the Mayor, Aldermen and Commonalty of the City of New York*, 20 Johnson 269 [1822].

¹ See § 201 *et seq.*

² *Trigger v. Drainage District, No One, etc.*, 193 Ill. 230, 61 N. E. 1114 [1901]; *The Chicago & Alton Railway Company v. City of Joliet*, 153 Ill. 649, 39 N. E. Rep. 1077 [1894];

³ *Ross v. Prante*, — N. D. —, 115 N. W. 833 [1908]; *Tyler v. Shea*, 4 N. D. 278, 50 Am. St. Rep. 660, 61 N. W. 468.

a jury upon the question of benefits, and if by statute it is provided that such matters must be determined by a jury, such statute must be complied with substantially.⁴ If the statute requires a jury without specifying the number, it is held that the term jury implies twelve men.⁵ If, however, the statute provides for a different number,⁶ as for a jury of six men,⁷ compliance with such provision is sufficient. At a meeting to correct an assessment of damages and benefits a new juror cannot be appointed to take the place of one who acted in making the preliminary assessment.⁸ The jury is frequently empowered by statute to determine certain facts essential to the assessment proceedings, leaving the remaining steps to be taken by the city officials.⁹ Thus the council may be empowered to determine the boundaries of the district benefited, while the jury is to find as a fact how much the benefits are to each tract of land.¹⁰ Under a statute requiring a jury without any provision as to its method of selection it has been held that an ordinance requiring the mayor to furnish the names of freeholders from whom the jury is to be drawn if the persons whose names were on the list were "good and unexceptional men," was "perhaps unwise and inexpedient but not void."¹¹ It has been held that clerical errors in a verdict may be corrected by the foreman after the jury has separated, where by statute the foreman alone is to certify to the assessment.¹² Under some statutes provision is made for levying an assessment by public officers or commissioners chosen for that purpose, subject to the revision of a jury.¹³ If a trunk sewer and lateral sewers are constructed under one contract as an entire improvement the property owner cannot object that

⁴ Robeson v. People ex rel. Curry, 161 Ill. 176, 43 N. E. 619 [1896]; Huston v. Clark, 112 Ill. 344 [1885]; Bibel v. The People for use of the City of Bloomington, 67 Ill. 172 [1873]; Taylor v. Burnap, 39 Mich. 739 [1878]; In the Matter of the Appeal of Powers, 29 Mich. 504 [1874]; Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860 [1898].

⁵ Bibel v. The People for use of the City of Bloomington, 67 Ill. 172 [1873].

⁶ City of Kansas City v. Hill, 80 Mo. 523 [1883].

⁷ City of Kansas v. Hill, 80 Mo. 523 [1883].

⁸ Gilkerson v. Scott, 76 Ill. 509 [1875].

⁹ Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860 [1898].

¹⁰ Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860 [1898].

¹¹ State of Missouri ex rel. Caverder v. City of St. Louis, 52 Mo. 574 [1873].

¹² Huston v. Clark, 112 Ill. 344 [1885].

¹³ Butler v. City of Worcester, 112 Mass. 541 [1873].

different juries were not appointed to view the trunk sewer and the laterals.¹⁴

§ 273. Delegation of discretionary power.

Under constitutional provisions which confer the power of levying local assessments upon public corporations, the legislature may provide what agents or officers of the corporation shall have power to levy the assessment.¹ A public corporation has no power to act except by and through its officers, and accordingly such constitutional provision must be regarded as contemplating action through agents or officers to be designated by the legislature.² In the absence of a statutory authority for delegating power to subordinates or other officials, discretionary power vested by the legislature in one official, or set of officials, cannot be delegated to other officials.³ Thus, the official or set of officials are authorized to determine the necessity of the improvement,⁴ or the character,⁵ or the cost thereof,⁶ or are authorized

¹⁴ *In re Reynolds Street Sewer*, 34 Pa. Super. Ct. 209 [1907].

¹ *State of Minnesota ex rel. Merrick v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885].

² *State of Minnesota ex rel. Merrick v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885].

³ *California Improvement Co. v. Reynolds*, 125 Cal. 88, 55 Pac. 802 [1898]; *Rauer v. Lowe*, 107 Cal. 229, 40 Pac. 337 [1895]; *Warren v. Ferguson*, 108 Cal. 535, 41 Pac. 417 [1895]; *Bolton v. Gilleran*, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881 [1894]; *Murray v. Tucker*, 10 Bush. (73 Ky.) 241 [1874]; *Hydes v. Joyce*, 4 Bush. (67 Ky.) 464, 96 Am. Dec. 311 [1868]; *Whitney v. Common Council of the Village of Hudson*, 69 Mich. 189, 37 N. W. 184 [1888]; *Seafeld v. City of Lansing*, 17 Mich. 437 [1868]; *City of Sedalia to use of Sedalia National Bank v. Donohue*, 190 Mo. 407, 89 S. W. 386 [1905]; *City of Nevada to use of Giffillan v. Eddy*, 123 Mo. 546, 27 S. W. 471 [1894]; *City of Westport v. Whiting*, 62 Mo. App. 647 [1895];

The Dollar Savings Bank v. Ridge, 62 Mo. App. 324 [1895]; *McQuiddy v. Vineyard*, 60 Mo. App. 610 [1894]; *The King Hill Brick Manufacturing Co. v. Hamilton*, 51 Mo. App. 120 [1892]; *State, Mann, Pros. v. Mayor and Common Council of Jersey City*, 24 N. J. L. (4 Zabriskie) 662 [1855]; *In the Matter of Hearn*, 96 N. Y. 378 [1884]; *In the Matter of Emigrant Industrial Savings Bank*, 75 N. Y. 388 [1878]; *Merritt v. Village of Port Chester*, 29 Hun. 619 [1883]; *Whyte v. Mayor and Aldermen of Nashville*, 32 Tenn. (2 Swan.) 364 [1852].

⁴ *Hydes v. Joyce*, 67 Ky. (4 Bush.) 464, 96 Am. Dec. 311 [1868]; *Whyte v. Mayor and Aldermen of Nashville*, 32 Tenn. (2 Swan.) 364 [1852].

⁵ *California Improvement Company v. Reynolds*, 123 Cal. 88, 58 Pac. 802 [1898]; *Murray v. Tucker*, 10 Bush. (73 Ky.) 241 [1874]; *King Hill Brick Manufacturing Company v. Hamilton*, 51 Mo. App. 120 [1892].

⁶ *Bolton v. Gilleran*, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881 [1894]; *Merritt v. Village of Port Chester*, 29 Hun. 619 [1883].

in their discretion to dispense with a formal contract for the improvement,⁷ or are authorized to issue a certificate of the performance of the contract,⁸ or are empowered to define the limits of the tax district,⁹ or are authorized to apportion the tax, issue tax bills, and the like,¹⁰ or to determine what proportion of the expense is to be borne by the property owners,¹¹ cannot delegate to other officials the authority to exercise such discretionary powers. If by statute power is conferred upon certain officials, or sets of officials, and it is furthermore provided expressly that such power may be conferred by such officials upon others, such statutes are valid; and if power is thus conferred by the officials specified upon other officials in the manner provided for by statute, the latter set of officials may exercise such power.¹² Such provisions are, however, construed strictly.¹³ Substantial compliance with the provisions of the statute has, however, been held to be sufficient.¹⁴ If, by statute, an engineer is authorized to appoint a deputy to act in place of such engineer, and the statute requires such appointment to be made in writing, it has been held that if such deputy has been appointed orally, but he acts as a deputy and is recognized as such, he may exercise the powers conferred by the statute upon the deputy.¹⁵

§ 274. Delegation of non-discretionary power.

It cannot, however, be intended by the legislature that the chief officials of the city shall personally attend to all the details of the

⁷ Matter of Petition of Emigrant Industrial Savings Bank, 75 N. Y. 388 [1878].

⁸ Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337 [1895]; Warren v. Ferguson, 108 Cal. 535, 41 Pac. 417 [1895].

⁹ Whitney v. Common Council of the Village of Hudson, 69 Mich. 189, 37 N. W. 184 [1888].

¹⁰ Scofield v. City of Lansing, 17 Mich. 437 [1868]; City of Sedalia to use of Sedalia National Bank v. Donohue, 190 Mo. 407, 89 S. W. 386 [1905]; Dollar Savings Bank v. Ridge, 183 Mo. 506, 82 S. W. 56 [1904]; City of Nevada to use of Gilfillan v. Eddy, 123 Mo. 546; (Reversing City of Nevada to use of Gilfillan v. Morris, 43 Mo. App. 586

[1891]); City of Westport v. Whiting, 62 Mo. App. 647 [1895]; Dollar Savings Bank v. Ridge, 62 Mo. App. 324 [1895]; State, Mann, Pros. v. Mayor, etc., of Jersey City, 4 Zabriskie (24 N. J. L.) 662 [1855]; In the Matter of Hearn, 96 N. Y. 378 [1884].

¹¹ Scofield v. City of Lansing, 17 Mich. 437 [1868].

¹² City of Chicago v. Nodeck, 202 Ill. 257, 67 N. E. 39 [1903].

¹³ City of Chicago v. Nodeck, 202 Ill. 257, 67 N. E. 39 [1903].

¹⁴ Kiley v. Forsee, 57 Mo. 390 [1874].

¹⁵ Kiley v. Forsee, 57 Mo. 390 [1874].

various tasks placed upon them by statute. Accordingly, non-discretionary ministerial powers may be delegated by such officials to subordinates, or to other officials.¹ Thus, if the officials to whom discretionary power is delegated have determined all the facts which are essential to the validity and the amount of the assessment, and only a mathematical calculation is necessary to determine the amount of the assessment, power to make such mathematical calculation may be delegated to subordinates.² So, the work of making out an apportionment warrant is not the same thing as levying a tax, and may accordingly be performed by an executive board which has no authority to levy a tax.³

§ 275. Adoption or ratification of acts of subordinates.

The fact that a given body is authorized by law to take certain steps with reference to an assessment, while, in fact, such body appoints a committee to investigate and report recommendations to such body, which recommendations it adopts, and upon which it acts, does not amount to a delegation of power to such committee, since, while the original investigation is made by the committee, the ultimate action is taken by the body appointing such committee.¹ Upon the same principle the fact that the officer or officers authorized to levy the assessment ask for the reports of other officers upon matters relative thereto, and act upon such reports, does not amount to a delegation of power, since the ultimate discretion is exercised by the officer to whom au-

¹ *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825 [1887]; *Walker v. District of Columbia*, D. C. (6 Mackey) 352 [1888]; *City of Burlington v. Quick*, 47 Ia. 222 [1877]; *Mayor and City Council of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1 [1880]; *Heman Construction Co. v. Loevy*, 179 Mo. 455, 78 S. W. 613 [1903]; *City of Harrisburg v. Shepler*, 190 Pa. St. 374, 42 Atl. 893 [1899].

² *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825 [1887]; *Walker v. District of Columbia*, 6 Mackey (D. C.) 352 [1888]; *City of Burlington v. Quick*, 47 Ia. 222 [1877]; *Mayor and City Council of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1 [1880];

City of Harrisburg v. Shepler, 190 Pa. St. 374, 42 Atl. 893 [1899].

³ *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. Law Rep. 128, 63 S. W. 964 [1901].

¹ *Main v. Fort Smith*, 49 Ark. 480, 5 S. W. 801 [1887]; *Bassett v. City of New Haven*, 76 Conn. 70, 55 Atl. 579 [1903]; *Bartram v. City of Bridgeport*, 55 Conn. 122, 10 Atl. 470 [1887]; *Bosell v. City of Marion*, — Ind. App. —, 79 N. E. 1053 [1907]; *Sears v. Board of Aldermen of Boston*, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 138, 1 Mun. Corp. Cas. 497 [1899]; *Cruikshanks v. City Council*, 1 McCord (S. C.) 360 [1821].

thority is given to exercise such discretion.² Thus, if a subordinate computes a tax bill, and such computation is accepted by the authority authorized to issue the bill, and the bill is signed by them, such tax bill is sufficient.³ If an assessment is incorrectly apportioned by mistake, and is made by the assistant of the engineer under a statute authorizing the engineer to make such assessment, such fact does not invalidate a subsequent assessment apportioned upon a correct basis and made by the city engineer.⁴ If the council fixes the limits of an assessment district just after the enactment of a statute conferring such power upon the board of public works, and on learning of such amendment the board of public works proceeds to fix the limits of the assessment district, and fixes them exactly as they were fixed by the council, such action of the board of public works is valid.⁵ If an improvement has been ordered by an officer not authorized to bind the city, and such improvement has been constructed, the city cannot, after the construction of such improvement, adopt the acts of such unauthorized officer, and by ratification render the improvement a lawful one for which the property owner must pay the assessment imposed upon him.⁶

§ 276. Assessment by de facto officers.

If the assessment is levied by persons who assume to be lawful officers of the public corporation, who are in fact exercising the authority conferred by statute, and are de facto officers, the validity of their exercise of official powers cannot be questioned

² *Bassett v. City of New Haven*, 76 Conn. 70, 55 Atl. 579 [1903]; *City of Burlington v. Quick*, 47 Ia. 222 [1877]; *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887]; *Shimmons v. City of Saginaw*, 104 Mich. 511, 62 N. W. 725 [1895]; *Cuning v. City of Grand Rapids*, 46 Mich. 150, 9 N. W. 141 [1881]; *Smith v. City of Buffalo*, 90 Hun. 118, 35 N. Y. S. 635 [1895]. See also *Baisch v. City of Grand Rapids*, 84 Mich. 666, 48 N. W. 176 [1891]. *Contra*, the adoption by a board of trustees of the report of commissioners fixing the assess-

ment is not the determination by the board of the costs and expenses; *Merritt v. Village of Port Chester*, 29 Hun. 619 [1883].

³ *Heman Construction Co. v. Loevy*, 179 Mo. 455, 78 S. W. 613 [1903].

⁴ *Casey v. City of Leavenworth*, 17 Kan. 189 [1876].

⁵ *Shimmons v. City of Saginaw*, 104 Mich. 511, 62 N. W. 725 [1895].

⁶ *Second Municipality of New Orleans v. Botts*, 8 Robinson (La.) 198 [1844].

in a proceeding to enforce the assessment.¹ Thus the fact that township officers omitted to take an oath of office before entering upon their duties does not render invalid an assessment levied by them.² The right to exercise the powers of the office which they are exercising, can be questioned only by a proceeding in the nature of *quo warranto*.³ The same principle has been invoked to uphold the acts of commissioners who omitted to take the prescribed oath of office.⁴ If one who assumes to act as an officer is neither an officer de jure or de facto the property owner who is assessed can have no relief in equity as his remedies at law are ample.⁵

§ 277. Method of attacking authority of officers.

The question of the authority of public officers to construct an improvement and levy an assessment therefor, must be raised in the trial court, when the case is heard upon its merits,¹ and cannot be raised for the first time by a motion for a new trial,² or by collateral attack.³

§ 278. Necessity and authority of special commissioners.

Provision by a statute is frequently made for the appointment of commissioners, viewers, and the like, often by appointment in each particular case, who are to co-operate with the public authorities in determining the facts, such as the amount of benefits, the extent of the land benefited, and the like, which are by statute referred to them for determination.¹ The advantage of

¹ *Betts v. City of Naperville*, 214 Ill. 380, 73 N. E. 752 [1905]; *Smith v. The People ex rel Detrick*, 140 Ill. 355, 29 N. E. 676 [1893]; *Samuels v. Drainage Commissioners*, 125 Ill. 536, 17 N. E. 829 [1889]; *Harmon v. Dallas*, 165 Ind. 710, 75 N. E. 823 [1905]; *Deane v. Indiana Macadam & Construction Company*, 161 Ind. 371, 68 N. E. 686 [1903]; *Akers v. Kolkmeyer & Company*, 97 Mo. App. 520, 71 S. W. 536 [1902]; *Downs v. Village of Irvington*, 66 Howard (N. Y.) 93 [1883].

² *Downs v. Village of Irvington*, 66 Howard (N. Y.) 93 [1883].

³ *Samuels v. Drainage Commissioners*, 125 Ill. 536, 17 N. E. 829 [1889].

⁴ In the matter of *Kendall*, 85 N. Y. 302 [1881]. See § 281.

⁵ *President, Managers Canal Company v. Atkins, Collector*, 121 N. Y. 246, 24 N. E. 319 [1890].

¹ *Goodwine v. Leak*, 127 Ind. 569, 27 N. E. 161 [1890].

² *Goodwine v. Leak*, 127 Ind. 569, 27 N. E. 161 [1890].

³ *Downs v. Village of Irvington*, 66 Howard (N. Y.) 93 [1883]. See § 1375.

⁴ *Paulsen v. Portland*, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]; (affirming *Paulson v. City of Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]); *Swamp Land District No. 307 v. Gwynn*, 70 Cal. 566,

such a method of determining benefits over the method of having the council determine them has been pointed out by the courts.² If special assessors are chosen to determine the fact and amount of benefits, and to apportion the assessment upon the property benefited, such assessors can determine only such questions as are referred to them by statute.³ If by statute the trustees of a town have the authority to determine the fact that the benefits conferred upon real property equal or exceed the cost of the improvement, the commissioners need not determine such fact again.⁴ On the other hand, the officers of the town, or public corporation, cannot control the commissioners in matters which by statute are left to the determination of the commissioners.⁵ Commissioners can only act if authorized by stat-

12 Pac. 462 [1886]; *People v. Hagar*, 49 Cal. 229 [1874]; *People v. Coghill*, 47 Cal. 361 [1874]; *Sumner v. Village of Milford*, 214 Ill. 388, 73 N. E. 742 [1905]; *Trigger v. Drainage District No. 1*, 193 Ill. 230, 61 N. E. 1114 [1901]; *Ryder's Estate v. City of Alton*, 175 Ill. 94, 51 N. E. 821 [1898]; *Brethold v. Village of Wilmette*, 168 Ill. 162, 48 N. E. 38 [1897]; *Pike v. City of Chicago*, 155 Ill. 656, 40 N. E. 567 [1895]; *Wright v. City of Chicago*, 48 Ill. 285 [1868]; *Scammon v. City of Chicago*, 42 Ill. 192 [1866]; *Board of Commissioners, Montgomery Co. v. Fullen*, 111 Ind. 410, 12 N. E. 298 [1887]; *Crist v. State ex rel. Whitmore*, 97 Ind. 389 [1884]; *Blanchett v. Municipality No. 2*, 13 La. 322 [1839]; *Kelley v. Minneapolis*, 57 Minn. 294, 47 Am. St. Rep. 605, 26 L. R. A. 92, 59 N. W. 304 [1894]; *Williams v. Monroe*, 125 Mo. 574, 28 S. W. 853 [1894]; *State, King, Pros. v. Reed*, 43 N. J. L. (14 Vr.) 186 [1881]; *State, Johnson, Pros. v. Inhabitants of City of Trenton*, 43 N. J. L. (14 Vr.) 166 [1881]; *State, Freeholders of County of Hudson, Pros. v. Inferior Court of Common Pleas of County of Hudson*, 42 N. J. L. (13 Vr.) 608 [1880]; *State, Simmons, v. City of Passaic*, 38 N. J. L. (9 Vr.) 60 [1875]; *State, Peters, Pros. v. Mayor and Common Council of City*

of Newark, 31 N. J. L. (2 Vr.) 360 [1865]; *State, Mann, Pros. v. Mayor, etc., of Jersey City*, 24 N. J. L. (4 Zab.) 662 [1855]; *In the matter of the Application of Emily P. Woolsey*, 95 N. Y. 135 [1884]; *Olmsted v. Dennis*, 77 N. Y. 378 [1879]; *People ex rel. Kilmer v. McDonald*, 69 N. Y. 362 [1877]; *In the matter of the Extension of Church Street*, 49 Barb. 455 [1867]; *Gilbert v. Havemeyer*, 4 N. Y. Sup. Ct. 506 [1849]; *Vacation of Howard Street*, 142 Pa. St. 601, 21 Atl. 974 [1891]; *Pittsburg's Petition for Board of Viewers*, 138 Pa. St. 401, 21 Atl. 757, 759, 761 [1890]; *Extension of Hancock Street*, 18 Pa. St. (6 Harr.) 26 [1851]; *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279 [1905]; *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545 [1887].

² *Warren v. City of Grand Haven*, 30 Mich. 24 [1874].

³ *Union Building Association v. City of Chicago*, 61 Ill. 439 [1871.]

⁴ *Crawford v. People ex rel. Rumsey*, 82 Ill. 557 [1876].

⁵ *Steckert v. City of East Saginaw*, 22 Mich. 104 [1870]. If the determination of the amount of the assessment is left by statute to commissioners, it cannot be the subject of arbitration; *Smadbeck v. City of Mt Vernon*, 109 N. Y. S. 70 [1908].

ute, and accordingly if provision is made for a jury, commissioners can not act.⁶ A formal report of the commissioners is *prima facie* valid.⁷ It cannot subsequently be impeached by the testimony of one of the commissioners.⁸ The appointment, as shown by the record, cannot be impeached by the testimony of one of the commissioners.⁹

§ 279. Appointment and compensation of commissioners.

The commissioners may be appointed, and are required to be appointed, in the manner specified by statute.¹ If the legislature chooses, and there are no constitutional provisions preventing local legislation, the legislature may appoint.² The legislature may provide that the commissioners or assessors shall be chosen by the electors of the district,³ or by the president of the board of local improvements in a village,⁴ or by the township commissioners,⁵ or by the city council.⁶ Such assessors or commissioners must be appointed by ordinance, and not by resolution.⁷ If it is provided by statute that no ordinance can be passed at the meeting at which it has been introduced, it is held that a change of name of one of the commissioners appointed by the ordinance makes it necessary to lay such ordinance over for another week after such change is made.⁸ Under a statute providing that commissioners shall appoint, the mayor cannot appoint.⁹ It is fre-

⁶ Taylor v. Burnap, 39 Mich. 739 [1878]; Strachan v. Brown, 39 Mich. 168 [1878].

⁷ Trigger v. Drainage District No. 1, etc., 193 Ill. 230, 61 N. E. 1114 [1901]; Allen v. City of Chicago, 176 Ill. 113, 52 N. E. 33 [1898]. See §§ 923, 1283.

⁸ Ryder's Estate v. City of Alton, 175 Ill. 94, 51 N. E. 821 [1898]; Brethold v. Village of Wilmette, 168 Ill. 162, 48 N. E. 38 [1897].

⁹ Boynton v. People ex rel. Kern, 155 Ill. 66, 39 N. E. 622 [1895].

¹ Bibel v. The People, for use of the City of Bloomington, 67 Ill. 172 [1873]; Astor v. Mayor, Aldermen and Commonalty of the City of New York, 37 N. Y. Sup. Ct. Rep. 539 [1874]. As to the effect of a change of statute as to the appointment of commissioners, see State, Copeland, Pros. v. Village of Passaic, 36 N. J. L. (7 Vr.) 382 [1873].

² People ex rel. Kilmer v. McDonald, 69 N. Y. 362 [1877].

³ Williams v. Corcoran, 46 Cal. 553 [1873].

⁴ Sumner v. Village of Milford, 214 Ill. 388, 73 N. E. 742 [1905].

⁵ Anderson v. Lower Merion Township, 217 Pa. 369, 66 Atl. 1115 [1907].

⁶ City of Elkhart v. Wickwire, 121 Ind. 331; 22 N. E. 342 [1889]; Laimbeer v. Mayor, Aldermen and Commonalty of City of New York, 6 N. Y. Sup. Ct. Rep. 109 [1850]; Scovill v. City of Cleveland, 1 O. S. 126 [1853].

⁷ State, Gleason, Pros. v. Town of Bergen, 33 N. J. L. (4 Vr.) [1868.]

⁸ State, Ackerman, Pros. v. Town of Bergen, County of Hudson, 33 N. J. L. (4 Vr.) 39 [1868].

⁹ Bibel v. The People for use of

quently provided by statute that the commissioners are to be appointed by a court.¹⁰ Such a statute is valid under a constitutional provision to the effect that the legislature may vest the corporate authorities of cities with the power to make local improvements by special assessment, since the statute does not confer upon the court the power to make the assessment.¹¹ What court has such power, is determined and controlled by the provisions of the statute;¹² as is also the question of the term of the court at which such appointment may be made.¹³ If the appointment is made by the judge in writing, but is not filed as a part of the record of the court, such appointment must be shown to be genuine in order to be admissible to show the power of such commissioner.¹⁴ If commissioners are appointed in an improper manner by an official or body of officials, not having authority to make such appointment, subsequent proceedings are invalid.¹⁵ Such mistake does not, however, invalidate prior proceedings, but it is sufficient if the proceedings are corrected at the point at which the improper appointment of a commissioner was made.¹⁶ The same result follows if the record does not show that some of the persons who act as commissioners were appointed at all.¹⁷ If the persons who certify to the assessment roll are not assessors, either *de jure* or *de facto*, the assessment is said to be absolutely void.¹⁸ An objection to the appointment of commissioners ;

City of Bloomington, 67 Ill. 172 [1873].

¹⁰ Allen v. City of Chicago, 176 Ill. 113, 52 N. E. 33 [1898]; Township of Whiteford v. Phinney, 53 Mich. 130, 18 N. W. 593 [1884]; *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279 [1905].

¹¹ *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279 [1905].

¹² Smith v. The People ex rel. De-trick, 140 Ill. 355, 29 N. E. 676 [1893].

¹³ Commissioners may be appointed at a probate term. Davis v. City of Litchfield, 155 Ill. 384, 40 N. E. 354 [1895]; Murphy v. City of Peoria, 119 Ill. 509, 9 N. E. 895 [1888]. The appointment is *prima facie* regular if the record can be so construed fairly. Sargent v. City of Evanston, 154 Ill. 268, 40 N. E. 440 [1894].

¹⁴ Bannister v. Grassy Fork Ditching Association, 52 Ind. 178 [1875].

¹⁵ Williams v. Corcoran, 46 Cal. 553 [1873]; State, Ackerman, Pros. v. Town of Bergen, in County of Hudson, 33 N. J. L. (4 Vr.) 39 [1868]; State ex rel. Hosley, Pros. v. Mayor and Aldermen of the City of Paterson, 37 N. J. L. (8 Vr.) 409 [1875]; State, Hoetzel, Pros. v. Inhabitants of East Orange, 50 N. J. L. (21 Vr.) 354, 12 Atl. 911 [1888].

¹⁶ Village of Melrose Park v. Dannelbecke, 210 Ill. 422, 71 N. E. 431 [1904].

¹⁷ Murphy v. City of Chicago, 186 Ill. 59, 57 N. E. 847 [1900].

¹⁸ People ex rel. President, Manager and Company of Delaware & Hudson Canal Company v. Parker, 117 N. Y. 86, 22 N. E. 752 [1889].

waived if not made until after confirmation.¹⁹ Such objection cannot be interposed under a statute providing that an assessment shall not be vacated for irregularities.²⁰ The tribunal which is authorized to appoint commissioners or assessors is generally empowered to fill vacancies in such body.²¹ If one of the commissioners is interested and the assessment is for that reason set aside on confirmation, new commissioners may be appointed without a new petition.²² Under most statutes it is necessary to fill vacancies in order to render the assessment valid, if vacancies existed.²³ Under some statutes it is discretionary with the appointing officials whether to fill vacancies or not.²⁴ The power to fill vacancies is liberally construed. Thus, power to appoint a successor in case of death, absence, or other disability, is regarded as conferring power to appoint in case of the resignation of one or more commissioners.²⁵ If no provision is made for filling vacancies it is said that the surviving commissioners can act and that no power to appoint successors exists.²⁶ The tribunal appointing commissioners is held, in some cases, to have power to remove them.²⁷ In other jurisdictions it is said that the tribunal appointing the commissioners has no inherent power to remove them in the absence of some statutes specifically providing therefor.²⁸ If the council has authority to remove one

¹⁹ *Astor v. The Mayor, Aldermen and Commonalty of the City of New York*, 62 N. Y. 580 [1875].

²⁰ *Astor v. The Mayor, Aldermen and Commonalty of the City of New York*, 62 N. Y. 580 [1875].

²¹ *Osborn v. Sutton*, 108 Ind. 443, 9 N. E. 410 [1886]; *The People ex rel. Moore v. The Mayor, etc., of the City of New York*, 5 Barb. 43 [1848]; *Laimbeer v. Mayor, Aldermen and Commonalty of the City of New York*, 6 N. Y. Sup. Ct. Rep. 109 [1850]; *Rector of Trinity Church v. Higgins*, 27 N. Y. Sup. Ct. Rep. 1 [1866].

²² *Ewart v. Village of Western Springs*, 180 Ill. 318, 54 N. E. 478 [1899].

²³ In the matter of *Beekman*, 31 Howard 16 [1865]; *Matter of Beekman's Petition*, 1 Abb. Pr. N. S. 449, affirming *Beekman's Petition*, 19 Abb. Pr. 244 [1865].

²⁴ *Williams v. Little White Lick Gravel Road Company*, Wilson's Sup. Ct. Rep. (Ind.) 7 [1871].

²⁵ *State, King, Pros. v. Duryea*, 45 N. J. L. (16 Vr.) 258 [1883]; *State, Water Commissioners of Jersey City, Pros. v. Mayor and Common Council of City of Newark*, 27 N. J. L. (2 Dutcher) 185 [1858].

²⁶ *People ex rel. Howlett v. Mayor and Common Council of the City of Syracuse*, 63 N. Y. 291 [1875].

²⁷ *Laimbeer v. Mayor, Aldermen and Commonalty of the City of New York*, 6 N. Y. Sup. Ct. Rep. 109 [1850]; *The People ex rel. Moore v. The Mayor, etc., of the City of New York*, 5 Barb. 43 [1848].

²⁸ *State, Terhune, Pros. v. City of Passaic*, 41 N. J. L. (12 Vr.) 90 [1879].

commissioner, and instead of so doing it removes three commissioners, and then re-appoints two of those who were improperly removed, together with another commissioner, it has been held that such irregular action does not invalidate the assessment, since it is equivalent in legal effect to removing and appointing one of the commissioners.²⁹ Acceptance by the appointee is necessary to enable him to act officially.³⁰ The commissioners may be appointed after the ordinance is signed and before it is approved by the mayor if it is approved ultimately.³¹ If the statute requires the commissioner to qualify by giving bond, such bond must be given.³² The fact that the commissioners receive an excessive compensation, is not ground for a collateral attack upon the assessment proceedings.³⁴ If compensation is provided for the assessment commissioners by statute, such compensation is proper.³⁵ Since they are regarded as officers of the court, it is not necessary that a special appropriation be made for paying them.³⁶

§ 280. Qualifications of commissioners.

The qualifications of commissioners are determined by statute.¹ Under a statute requiring that commissioners shall be competent to serve as jurors, a personal privilege of exemption from jury duty does not render such person incompetent to serve as a commissioner.² It is frequently provided by statute that the commissioners must be freeholders,³ and that they must be disinter-

²⁹ *State, Simmons, Pros. v. City of Passaic*, 42 N. J. L. (13 Vr.) 524 [1880].

³⁰ *Township of Whiteford v. Phinney*, 53 Mich. 130, 18 N. W. Rep. 593 [1884].

³¹ *City of Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686 [1886].

³² *Township of Whiteford v. Phinney*, 53 Mich. 130, 18 N. W. Rep. 593 [1884].

³⁴ *Pittman v. Mayor, etc., of the City of New York*, 3 Hun. 370 [1875].

³⁵ *Kimble v. City of Peoria*, 140 Ill. 157, 29 N. E. 723 [1893].

³⁶ *Kimble v. City of Peoria*, 140 Ill. 157, 29 N. E. 723 [1893].

¹ *State, Hampton, Pros. v. Mayor and Aldermen of the City of Paterson*, 36 N. J. L. (7 Vr.) 159 [1873];

State, Bramhall, Pros. v. Bayonne, 35 N. J. L. (6 Vr.) 476 [1872]; *State, Clark, Pros. v. City of Elizabeth*, 32 N. J. L. (3 Vr.) 357 [1867].

² *Heerman's Heirs v. Municipality No. 2*, 15 Curry (La.) 597 [1840].

³ *City of Bridgeport v. Giddings*, 43 Conn. 304 [1876]; *Judson v. City of Bridgeport*, 25 Conn. 426 [1857]; *Laughlin v. Ayers*, 66 Ind. 445 [1879]; *Seits v. Sinel*, 62 Ind. 253 [1878]; *State, Coward, Pros. v. Mayor, etc., of North Plainfield*, 63 N. J. L. 61, 42 Atl. 805 [1899]; *Dederer v. Voorhies*, 81 N. Y. 153 [1880]; *Porter v. Purdy*, 29 N. Y. 106, 86 Am. Dec. 283 [1864]; *Pittsburg v. Chuley*, 74 Pa. St. (24 P. F. Smith) 262 [1873].

ested.⁴ It has been held that freeholders cannot act unless disinterested, even in the absence of such specific statutory provision, on the theory that their power is in its nature judicial, and that it is accordingly essential that they be impartial and disinterested.⁵ By the term "disinterested," with reference to commissioners or other persons who are to take part in assessment proceedings, it is meant that such persons must have no particular interest in the property affected by the improvement, or to be assessed therefor.⁶ The owner of property which is to be assessed is not a disinterested person.⁷ If property upon the line of the improvement, but not immediately opposite the improvement is not subject to assessment, the owner of such property is a disinterested person.⁸ If, however, such property is subject

⁴City of Bridgeport v. Giddings, 43 Conn. 304 [1876]; Murr v. City of Naperville, 210 Ill. 371, 71 N. E. 380 [1904]; White v. City of Alton, 149 Ill. 626, 37 N. E. 96 [1894]; Chase v. City of Evanston, 172 Ill. 403, 50 N. E. 241 [1898]; Philadelphia & Reading Coal and Iron Company v. City of Chicago, 158 Ill. 9, 41 N. E. 1102 [1895]; Shreve v. Town of Cicero, 129 Ill. 226; *sub nomine* Albertson v. Town of Cicero, 21 N. E. 815 [1890]; Pearce v. Village of Hyde Park, 126 Ill. 286, 18 N. E. 824 [1890]; City of Chicago v. Wheeler, 25 Ill. 478, 79 Am. Dec. 342 [1861]; Bradley v. City of Frankfort, 99 Ind. 417 [1884]; Laughlin v. Ayers, 66 Ind. 445 [1879]; Seits v. Sinel, 62 Ind. 253 [1878]; Combs v. Etter, 49 Ind. 535 [1875]; Roberts v. Smith, 115 Mich. 5, 72 N. W. 1091 [1897]; McKusick v. City of Stillwater, 44 Minn. 372, 46 N. W. 769 [1890]; Hendrickson v. Borough of Point Pleasant, 65 N. J. L. 535, 47 Atl. 465 [1900]; State, Coward, Pros. v. Mayor, etc., of North Plainfield, 63 N. J. L. (34 Vr.) 42 Atl. 805 [1899]; State, Kingsland, Pros. v. Township of Union, County of Bergen, 37 N. J. L. (8 Vr.) 268 [1874]; State, Winans, Pros. v. Crane, 36 N. J. L. (7 Vr.) 394 [1873]; O'Reilly v. City of

Kingston, 114 N. Y. 439, 21 N. E. 1004 [1889]; People ex rel. Howlett v. Mayor and Common Council of City of Syracuse, 63 N. Y. 291 [1875]; O'Reilly v. City of Kingston, 39 Hun. 285 [1886]; Hopkins v. Mason, 42 Howard, 115 [1871]; Hopkins v. Mason, 61 Barb. 469 [1871]; Main Street, Big Run Borough, 137 Pa. St. 590, 20 Atl. 711 [1890].

⁵State, Winans, Pros. v. Crane, 36 N. J. L. (7 Vr.) 394 [1873].

⁶City of Bridgeport v. Giddings, 43 Conn. 304 [1876].

⁷Nutwood Drainage and Levee District v. Reddish, 234 Ill. 130, 84 N. E. 750 [1908]; Commissioners of Union Drainage District No. 1 v. Smith, 233 Ill. 417, 84 N. E. 376 [1908]; Vandalia Levee and Drainage District v. Hutchins, 234 Ill. 31, 84 N. E. 715 [1908]; Shreve v. Town of Cicero, 129 Ill. 226; *sub nomine* Albertson v. Town of Cicero, 21 N. E. 815 [1890]; Batchelor v. Borough of Avon-by-the-Sea. — N. J. —, 68 Atl. 124 [1907]; State, Kingsland, Pros. v. Inhabitants of Township of Union, in County of Bergen, 37 N. J. L. (8 Vr.) 268 [1874]; State, Winans, Pros. v. Crane, 36 N. J. L. (7 Vr.) 394 [1873].

⁸State, Coward, Pros. v. Mayor, etc., of North Plainfield, 63 N. J. L. (34 Vr.) 61, 42 Atl. 805 [1899].

to assessment, though not actually upon the improvement, the owner of such property is not disinterested.⁹ The trustee of a religious corporation, the property of which is liable to assessment, is a disinterested person where the office of trustee does not confer any legal interest in the property of the corporation, nor render the trustee personally liable for its debts or assessments.¹⁰ In some of the lower New York courts it is held that a pew holder who is a regularly contributing church member, has such a pecuniary interest in the property of the church that he is incompetent to act in assessment proceedings by which the property of such church might be assessed.¹¹ A person who is interested in a public contract may act in spreading the assessment for such improvement.¹² Thus if A is to act as engineer and receive as compensation five per cent. of the total cost, but the rights of the property owners are protected by requiring competitive bidding and by giving the property owners the right to do the work if they elect to do it, A may act as commissioner in spreading the assessment and is not disqualified by reason of his interest.¹³ The fact that commissioners after resignation undertake part of the work and receive compensation therefor, is said not to avoid the contract in the absence of fraud or injury to the public interests, although the amount paid to them as compensation must be deducted from the amount of the assessment.¹⁴ The secretary of the board of trustees of a reclamation district is not thereby disqualified to act as a commissioner, though he is appointed by the board and receives a salary from them.¹⁵ A city officer, who receives a fixed percentage on the amount of special assessments as compensation for his services, has such an interest as disqualifies him from acting as commis-

⁹ Main Street, Big Run Borough, 137 Pa. St. 590, 20 Atl. 711 [1890].

¹⁰ People ex rel. Howlett v. Mayor, etc., of the City of Syracuse, 63 N. Y. 291 [1875].

¹¹ Hopkins v. Mason, 42 Howard 115 [1871]; Hopkins v. Mason, 61 Barb. 469 [1871].

¹² Betts v. City of Naperville, 214 Ill. 380, 73 N. E. 752 [1905]; (overruling Murr v. City of Naperville, 210 Ill. 371, 71 N. E. 380 [1904], where it was held that one who was employed by a city to design a sys-

tem of waterworks, and to make plans, specifications and estimates for a certain per cent. of the cost of the work was not disinterested).

¹³ Betts v. City of Naperville, 214 Ill. 380, 73 N. E. 752 [1905]; (overruling Murr v. City of Naperville, 210 Ill. 371, 71 N. E. 380 [1904].

¹⁴ Fisher v. City of Rochester, 6 Lansing 225 [1872].

¹⁵ Lower Kings River Reclamation District No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 [1895].

sioner.¹⁶ A petitioner for an improvement is disqualified to act as a commissioner to assess damages and benefits caused thereby.¹⁷ One who testifies as an expert witness as to the effect of the improvement upon other property, is not disqualified from acting as a commissioner to make the assessment for the same improvement upon another tract of land.¹⁸ In the absence of a specific statutory provision, the fact that one of the owners of property to be assessed is a near relative of a commissioner, does not render the latter disqualified to act.¹⁹ Thus, the fact that the son of one of the assessors owns one of the lots assessed, and that a hotel is located thereon in which such assessor lives, has been held not to disqualify him, since he is not shown to be interested in the property, or to be an occupant thereof.²⁰ The fact that one commissioner is a brother-in-law of a person whose property is not assessed does not disqualify him.²¹ If, by statute, it is provided that the commissioners or assessors must not be of kin to the parties, such relationship disqualifies them from acting.²² Thus, the father-in-law of a person whose property will be affected by the improvement, cannot act as commissioner.²³ The fact that a commissioner was an employe of a person who is the agent of the owners of some of the property assessed in the name of the employer, does not render such commissioner an interested person.²⁴ A general taxpayer is a disinterested

¹⁶ *Chase v. City of Evanston*, 172 Ill. 403, 50 N. E. 241 [1898]; (a case where the commissioner was also superintendent of special assessments, receiving one per cent. of the total amount; and collector, receiving two per cent. of the total amount as compensation).

¹⁷ *Hendrickson v. Borough of Point Pleasant*, 65 N. J. L. (36 Vr.) 535, 47 Atl. 465 [1900]; (citing *Foster v. Cape May*, 60 N. J. L. (31 Vr.) 78; *Traction Co. v. Board of Works*, 56 N. J. L. (27 Vr.) 431; *State, Winans, Pros. v. Crane*, 36 N. J. L. (7 Vr.) 394 [1873]).

¹⁸ *Philadelphia & Reading Coal and Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895].

¹⁹ *O'Reilly v. City of Kingston*, 114 N. Y. 439, 21 N. E. 1004 [1889].

²⁰ *O'Reilly v. City of Kingston*, 114 N. Y. 439, 21 N. E. 1004 [1889]; *O'Reilly v. City of Kingston*, 39 Hun. 285 [1886].

²¹ *Rowe v. Commissioners and Assessments of East Orange*, 69 N. J. L. (40 Vr.) 600, 55 Atl. 649 [1903].

²² *Bradley v. City of Frankfort*, 99 Ind. 417 [1884]; *Laughlin v. Ayers*, 66 Ind. 445 [1879]; *Seits v. Sinel*, 62 Ind. 253 [1878]; *Combs v. Etter*, 49 Ind. 535 [1875].

²³ *Bradley v. City of Frankfort*, 99 Ind. 417 [1884].

²⁴ *Pearee v. Village of Hyde Park*, 126 Ill. 287, 18 N. E. 824 [1899]; See also *Rowe v. Commissioners and Assessments of East Orange*, 39 N. J. L. (40 Vr.) 600, 55 Atl. 649 [1903].

person within the meaning of these statutes.²⁵ A commissioner may be a resident of the public corporation which is conducting the improvement and making the assessment;²⁶ and it is sometimes provided that he must reside in such city;²⁷ and sometimes that the commissioners must reside in different wards.²⁸ If the commissioners or assessors are appointed by the proper officers, and the only irregularity in such appointment is the fact that such commissioners are not qualified, such objection may be made at the time of the appointment, but if not made then such objection is regarded as waived, and the assessments cannot subsequently be attacked as invalid because the appraisers are not qualified.²⁹ Thus, if a commissioner or assessor is not a freeholder, such objection must be interposed when such commissioner is appointed, and before the work is done, and the assessment made.³⁰ An objection to the competency of a commissioner must be made at the time of the appointment, or within a reasonable time after his want of competency becomes known, or such objection will be regarded as being waived.³¹ Failure to object until the commissioners have filed their report waives such objection.³² Objections to the method of appointing the commissioners will not be considered after the commissioners have completed the public improvement.³³ Such objections are waived if

²⁵ *Hibben v. Smith*, 191 U. S. 310, 24 S. 88 [1903]. (affirming *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1901]); *City of Bridgeport v. Giddings*, 43 Conn. 304 [1876]; *McKusick v. City of Stillwater*, 44 Minn. 372, 46 N. W. 769 [1890]; *State, Conklin, Pros. v. Bergen County Circuit Court*, 64 N. J. L. (35 Vr.) 536, 45 Atl. 981 [1900]; *State, Bowker, Pros. v. Wright*, 54 N. J. L. (25 Vr.) 130, 23 Atl. 116 [1891]; *State, Winans, Pros. v. Crane*, 36 N. J. L. (7 Vr.) 394 [1873].

²⁶ *McKusick v. City of Stillwater*, 44 Minn. 372, 46 N. W. 769 [1890]; *State, Bowker, Pros. v. Wright*, 54 N. J. L. (25 Vr.) 130, 23 Atl. 116 [1891].

²⁷ *State, Clark, Pros. v. City of Elizabeth*, 32 N. J. L. (3 Vr.) 357 [1867].

²⁸ *State, Malone, Pros. v. Mayor and Common Council of Jersey City*, 28 N. J. L. (4 Dutcher) 500 [1860].

²⁹ *Dederer v. Voorhies*, 81 N. Y. 153 [1880]; *Astor v. The Mayor, Aldermen and Commonalty of the City of New York*, 62 N. Y. 580 [1875]; *Porter v. Purdy*, 29 N. Y. 106; 86 Am. Dec. 283 [1864]; *Thurston v. City of Elmira*, 10 Abb. Pr. (N. S.) 119 [1868]; *Pittsburg v. Chuley*, 74 Pa. St. (24 P. F. Smith) 262 [1873].

³⁰ *Porter v. Purdy*, 29 N. Y. 106, 86 Am. Dec. 283 [1864]; *Thurston v. City of Elmira*, 10 Abb. Pr. (N. S.) 119 [1868].

³¹ *City of Valparaiso v. Parker*, 148 Ind. 379, 47 N. E. 330 [1897]; *Osborn v. Sutton*, 108 Ind. 443, 9 N. E. 410 [1886].

³² *City of Valparaiso v. Parker*, 148 Ind. 379, 47 N. E. 330 [1897].

³³ *State, Skinkle, Pros. v. Inhabitants of Township of Clinton, in County of Essex*, 39 N. J. L. (10 Vr.) 656 [1877].

not interposed before confirmation.³⁴ Whether it will be presumed that commissioners have the proper qualifications, or whether the fact of the existence of proper qualifications must appear affirmatively upon the record, is a question upon which there is a conflict of authority. In some cases it is held that such qualifications are presumed where the court appoints the commissioners.³⁵ It has furthermore been held that where public officials, such as the council,³⁶ or the county commissioners,³⁷ appoint the commissioners, their qualifications will be presumed to exist, and need not appear affirmatively upon the record. In other cases it has been held that where public officers,³⁸ such as the council,³⁹ or the mayor,⁴⁰ are to appoint commissioners, the qualification of such commissioners must appear affirmatively upon the record. It has been held that if commissioners have been appointed to fill vacancies, their qualifications must appear affirmatively.⁴¹ While there is some conflict of authority as to whether the qualifications of commissioners appointed to levy assessments for a particular improvement must appear affirmatively upon the record, it is generally held that the qualifications of commissioners who are permanent officers of the city need not appear affirmatively upon the record, but will be presumed.⁴²

³⁴ *Nutwood Drainage and Levee District v. Reddish*, 234 Ill. 130, 84 N. E. 750 [1908]; *Commissioners of Union Drainage District No. 1 v. Smith*, 233 Ill. 417, 84 N. E. 376 [1908].

³⁵ *Philadelphia & Reading Coal and Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895].

³⁶ *State, Malone, Pros. v. Mayor and Common Council of Jersey City*, 28 N. J. L. (4 Dutcher) 500 [1860].

³⁷ *Kellogg v. Price*, 42 Ind. 360 [1873].

³⁸ *State ex rel. Speer, Pros. v. City of Passaic*, 38 N. J. L. (9 Vr.) 168 [1875].

³⁹ *Vreeland v. Mayor and Council of the City of Bayonne*, 54 N. J. L. (25 Vr.) 488, 24 Atl. 486 [1892]; *The State, Tims, Pros. v. Mayor and Common Council of Newark*, 25 N. J. L. (1 Dutcher) 399 [1856]; *State ex rel. Little, Pros. v. Mayor and Common Council of Newark*, 36 N.

J. L. (7 Vr.) 170 [1873]; *State, Pope, Pros. v. Town of Union, in County of Hudson*, 32 N. J. L. (3 Vr.) 343 [1867]; *State, Bramhall, Pros. v. Mayor, etc., of the City of Bayonne*, 35 N. J. L. (6 Vr.) 476 [1872]; *State ex rel. Harris, Pros. v. Mayor, Aldermen, etc., of Jersey City*, 38 N. J. L. (9 Vr.) 85 [1875]; *State, ex rel. Hosley, Pros. v. Mayor, etc., of the City of Paterson*, 37 N. J. L. (8 Vr.) 409 [1875].

⁴⁰ *Judson v. City of Bridgeport*, 25 Conn. 426 [1857].

⁴¹ *Vreeland v. Mayor and Council of the City of Bayonne*, 54 N. J. L. (25 Vr.) 488, 24 Atl. 486 [1892]; *The State, Tims, Pros. v. Mayor and Common Council of Newark*, 25 N. J. L. (1 Dutcher) 399 [1856].

⁴² *State, Hoboken Land & Improvement Company, Pros. v. Mayor, etc., of Hoboken*, 36 N. J. L. (7 Vr.) 291 [1873].

§ 281. Oath of commissioners.

It is frequently provided by statute that the commissioners must take oath in some prescribed form. If such oath is not taken, or if it is taken without complying substantially with the requirements of the statute, subsequent proceedings are invalid.¹ The commissioners must be sworn for each particular case.² If commissioners have been sworn with reference to a particular improvement, and their report is referred to them for recasting, it is not necessary that they be sworn a second time.³ If the evidence before the lower courts is not preserved, it will be presumed that the evidence showed that the commissioners took the oath required by law.⁴ If no oath has been taken, it has been said that the assessment cannot be attacked collaterally on such ground.⁵ This is true especially where the assessment has been confirmed before a court of competent jurisdiction.⁶ The oath must be in substantial compliance with the statutory formalities.⁷ Additional clauses, not inconsistent with the statutory requirements, may be disregarded.⁸ Under a statute requiring an oath "fairly and impartially to execute the duties imposed on them by statute," an oath that the commissioners "will fairly and impartially execute duties imposed upon them by the above appointment, and make a just and true report according to the best of their skill and judgment," has been held to be sufficient, the latter part of the oath being regarded as surplusage.⁹ Under a statute requiring an oath "faithfully and fully to discharge the duties" required by statute, an oath by the commissioners that each would perform the duties "to the best of his ability"

¹ *Wheeler v. City of Chicago*, 57 Ill. 415 [1870]; *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304 [1885]; *Hendrickson v. Borough of Point Pleasant*, 65 N. J. L. (36 Vr.) 535, 47 Atl. 465 [1900]; *State, Spear, Pros. v. City of Perth Amboy*, 38 N. J. L. (9 Vr.) 425 [1876]; *State, Hosley, Pros. v. Mayor and Aldermen of City of Paterson*, 37 N. J. L. (8 Vr.) 409 [1875]; *Merrit v. Village of Port Chester*, 71 N. Y. 309, 27 Am. Rep. 47 [1877].

² *State ex rel. Graham, Pros. v. Mayor, etc., of City of Paterson*, 37 N. J. L. (8 Vr.) 380 [1875].

³ *Schemick v. City of Chicago*, 151 Ill. 336, 37 N. E. 888 [1894].

⁴ *Gross v. Village of Grossdale*, 176 Ill. 572, 52 N. E. 370 [1898].

⁵ *Caskey v. City of Greensburg*, 78 Ind. 233 [1881]; *In the matter of Kendall*, 85 N. Y. 302 [1881].

⁶ *Walker v. People ex rel. Kochersperger*, 169 Ill. 473, 48 N. E. 694 [1897].

⁷ *Rich v. City of Chicago*, 59 Ill. 286 [1871].

⁸ *Rich v. City of Chicago*, 59 Ill. 286 [1871].

⁹ *State, Wilkinson, Pros. v. City of Trenton*, 35 N. J. L. (6 Vr.) 485 [1872].

is insufficient.¹⁰ Under a statute requiring an oath to perform duties "impartially and according to their best judgment," a report that the commissioners have been sworn "to the faithful discharge of their duties," is insufficient.¹¹ The officer specified by statute is the proper one to administer the oath to the commissioners.¹² If the commissioners are sworn to before a notary public who is also the attorney of the city, such action is irregular; but if objection is not made to such proceedings on the ground of such irregularity, it is regarded as waived.¹³ If the petition is signed "Joseph E. Paden, City Attorney," and the certificate to the oath is signed "J. E. Paden, Notary Public," it will not be presumed on appeal that the persons were identical.¹⁴ A notary who is superintendent of the assessment department of a city may administer the oath to special assessment commissioners, and is not disqualified on the ground of his office.¹⁵ An oath is not invalid because taken at an earlier time than that provided for by law.¹⁶ The commissioners are required to take the oath before acting, but not before giving notice of their first meeting.¹⁷ It has been held to be sufficient if the oath is taken after the assessment is made, and before it is reported to the common council.¹⁸ If the commissioners are sworn when they make the assessment it is not necessary that they be sworn before hearing the evidence submitted on objections to the assessment.¹⁹

§ 282. Exercise of power by commissioners.

The commissioners who are appointed to determine benefits and to apportion the assessment, must exercise their authority in substantial compliance with the terms of the subject which authorizes them to act.¹ The authority of assessment commissioners is ex-

¹⁰ *Merrit v. Village of Port Chester*, 71 N. Y. 309, 27 Am. Rep. 47 [1877].

¹¹ *Cambria Street*, 75 Pa. St. (25 P. F. Smith) 357.

¹² *Shreve v. Town of Cicero*, 129 Ill. 226; *sub nomine Albertson v. Town of Cicero*, 21 N. E. 815 [1890].

¹³ *Linck v. City of Litchfield*, 141 Ill. 469, 31 N. E. 123 [1893].

¹⁴ *Linck v. City of Litchfield*, 141 Ill. 469, 31 N. E. 123 [1893].

¹⁵ *McChesney v. City of Chicago*, 159 Ill. 223, 42 N. E. 894 [1896].

¹⁶ *Gurnee v. City of Chicago*, 40 Ill. 165 [1866].

¹⁷ *Page v. Mayor and City Council of Baltimore*, 34 Md. 558 [1871].

¹⁸ *Lainbeer v. Mayor, Aldermen and Commonalty of the City of New York*, 6 N. Y. Sup. Ct. Rep. 109 [1850].

¹⁹ *Trigger v. Drainage District*, 193 Ill. 230, 61 N. E. 1114 [1901].

¹ The details of the method of exercising this power are considered in connection with the method of levying an assessment and of making an apportionment. See Chapter XV.

hausted when they have prepared and filed a formal report of their proceedings, and they cannot act subsequently in the absence of some statutory provision specifically authorizing them to act further.² If a special committee is appointed to levy an assessment, or make out a special tax bill, such bill must be in writing, and signed and certified by all the members of the committee.³

² People ex rel. Reynolds v. City of Brooklyn, 49 Barb. (N. Y.) 136 [1867].

way, 188 Ill. 156, 58 N. E. 979 [1900]; Murphy v. City of Chicago, 186 Ill. 59, 57 N. E. 847 [1900].

³ Vennum v. People ex rel. Callo-

CHAPTER VIII.

IMPROVEMENTS FOR WHICH ASSESSMENTS MAY BE LEVIED.

A.—GENERAL NATURE OF IMPROVEMENT.

§ 283. Nature of improvement in assessment for benefits—Must be for public use.

The elements which an improvement must possess in order to be one for which a local assessment may be levied based on the theory of benefits, are certainly two in number, and possibly three. (1) In order to justify a local assessment the improvement must be a public one;¹ that is, it must be one which confers a general benefit upon the public at large, and which, therefore, the public acting through its government may construct without the consent of the particular individuals affected thereby. Local assessment for benefits is a form of taxation and the very nature of taxation implies that it is for a public interest.² An improvement which lacks this element is essentially a private improvement, and no matter how useful or advantageous it may be, the public cannot compel its construction, nor can it pay therefor by funds raised by general taxation.³ Being a private improvement it must be left to the judgment and voluntary consent of the owners of the private property affected thereby. "The power to make special assessments is referable to and included in the taxing power. . . . Even the owner of land benefited cannot be taxed to improve it unless public considerations are involved, but must be

¹ In the Matter of opening and Grading Market Street, 49 Cal. 546 [1875]; *Chambers v. Satterlee*, 40 Cal. 497 [1871]; *Illinois Central Railroad Company v. City of Decatur*, 154 Ill. 173, 38 N. E. 626 [1894]; *Sears v. Street Commissioners of the City of Boston*, 190 Mass. 274, 62

N. E. 397 [1902]; In the Matter of Johnston 103 N. Y. 260, 8 N. E. 399 [1886].

² *People on the Petition of Butler v. Supervisors of Saginaw County*, 26 Mich. 22 [1871]. See §§ 4, 8.

³ *Loan Association v. Topeka*, 37 U. S. (20 Wall.) 655, 22 L. 455.

left to improve it or not as he may choose.”⁴ Thus a statute providing an assessment for making connection with a sewer system put down by a private contractor is invalid.⁵ Conversely a corporation to which the power of levying local assessments can lawfully be given must be a public corporation.⁶ If, however, an improvement which is to be used by all the public whose lands are so situated with reference thereto that it can be used by them, such as a sewer, is termed a “private sewer,” it may nevertheless be paid for by local assessment.⁷ It is not what the statute calls it, but what in its essential nature it is that determines whether its cost can be paid by local assessment or not. If the expense incurred is one which should have been borne by a private individual, a local assessment cannot be levied therefor. Thus, if gas pipes must be moved in grading a street,⁸ or in laying a sewer,⁹ and the expense is one which should be borne primarily by the gas company a local assessment cannot be levied therefor. Another example of an improvement which is not public in its nature and for which therefore the owners of property benefited by such improvement cannot be compelled to pay local assessments is found in some jurisdictions where assessments cannot be levied for draining large tracts of land, where no considerations of public welfare, utility or health supervene, although the owners of such property will be greatly benefited by such improvement.¹⁰ The courts are not unanimous in their application of this principle, however, requiring the use to be a public one. Thus it has been held that an assessment may be levied for connections running from the lots which are assessed to the pipes of a private water company.¹¹ So in some jurisdictions drainage assessments are upheld without reference to any public utility to be subserved.¹²

⁴ *Elmore v. Drainage Commissioners*, 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010 [1892].

⁵ *Weaver v. Canon Sewer Co.*, 18 Colo. App. 242, 70 Pac. 953 [1902].

⁶ *Elmore v. Drainage Commissioners*, 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010 [1892].

⁷ *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559 [1900].

⁸ In the Matter of the Petition of

Deering to Vacate an Assessment, 93 N. Y. 361 [1883].

⁹ In the Matter of *Johnston*, 103 N. Y. 260, 8 N. E. 399 [1886]; *People of the State of New York ex rel. Jessup v. Kelley*, 33 Hun. 389 [1884].

¹⁰ See 334 *et seq.*

¹¹ *Palmer v. City of Danville*, 154 Ill. 156, 38 N. E. 1067 [1894]; *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249 [1899].

¹² See § 338.

§ 284. Improvement must confer special local benefit.

(2) In order to justify a local assessment, the improvement must not only be public in its nature, but it must confer an especial and local benefit upon the property which is to be assessed therefor.¹ If the improvement confers an especial local benefit, it is no objection to an assessment therefor that it is constructed so as to benefit the public as much as possible and to injure it as little as possible.² Improvements of this sort must "have a double aspect of general public benefit and also of peculiar local benefit."³ The attempt to state in general terms what constitutes a local special benefit has often been made. "Benefits are special when they increase the value of the land, relieve it from a burden, or make it especially adapted to a purpose which enhances its value."⁴ "Whatever gives an additional value to the particular parcel of land is a special and not a general benefit, and it may be a special benefit, although not an immediate one."⁵ Without such local benefit the improvement may be public in character, so that the expense thereof may be borne by general taxation, but a local assessment, based upon the theory of benefits, cannot be levied therefor.⁶

¹ *Ferguson v. Borough of Stamford*, 60 Conn. 432, 22 Atl. 782 [1891]; *City of Bridgeport v. New York & New Haven Railroad Company*, 36 Conn. 255, 4 Am. Rep. 63 [1869]; *Northwestern University v. Village of Wilmette*, 230 Ill. 85, 82 N. E. 615 [1907]; *Village of Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611 [1895]; *Illinois Central Railroad Company v. City of Decatur*, 154 Ill. 173, 38 N. E. 626 [1894]; *Gauen v. Drainage District*, 131 Ill. 446, 23 N. E. 633; *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160 [1885]; *Law v. Madison, Smyrna & Graham Turnpike Company*, 30 Ind. 77 [1868]; *Sears v. Street Commissioners of the City of Boston*, 180 Mass. 274, 62 L. R. A. 144, 62 N. E. 397 [1902]; *W. F. Stewart Co. v. City of Flint*, 147 Mich. 697, 111 N. W. 352 [1907]; *Wreford v. City of Detroit*, 132 Mich. 348, 93 N. W. 876 [1903]; *Rogers v. City of St. Paul*, 22 Minn. 494

[1876]; *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045 [1900]; *Morewood Avenue, Chamber's Appeal*, 159 Pa. St. 20, 28 Atl. 123 [1893].

² *W. F. Stewart Co. v. City of Flint*, 147 Mich. 697, 111 N. W. 352 [1907].

³ *Sears v. Street Commissioners of the City of Boston*, 180 Mass. 274, 281, 62 L. R. A. 144, 62 N. E. 397 [1902].

⁴ *Lipes v. Hand*, 104 Ind. 503, 508, 1 N. E. 871, 4 N. E. 160 [1885]; (citing *Allen v. City of Charleston*, 109 Mass. 243 [1872]; *Whitney v. City of Boston*, 98 Mass. 312 [1867]; *Farwell v. Cambridge*, 77 Mass. (11 Gray) 413 [1858]; *Milwaukee, etc., R. Co. v. Eble*, 3 Pinney (Wis.) 334 [1851]).

⁵ *Lipes v. Hand*, 104 Ind. 503, 507, 1 N. E. 871, 4 N. E. 160 [1885].

⁶ See § 360, § 367 *et seq.*

§ 285. Permanency.

(3) A third element which is said in some jurisdictions to be essential is that of permanency. While no public improvement can be said to be absolutely and unqualifiedly permanent, and no such requirement is made by any courts, yet some improvements are of a sort calculated to last ordinarily for a very considerable space of time, while others are ephemeral in their duration. In some jurisdictions it is held that permanency is an essential element of public improvements for which local assessments may be made, and the right to assess is denied in the case of improvements of the transient type. In other jurisdictions it is denied that permanency is an essential element of such improvements and it is held that if the improvement has the other requisite elements, local assessments may be levied therefor even though it is one which will last for but a short space of time.¹

§ 286. Meaning of "local improvement."

In some states are found constitutional provisions which permit local assessments to be levied for "local improvements."¹ The term "local improvement" thus used has substantially the same meaning as that which is already discussed.² It is said to be a public improvement by which the realty adjoining or near the locality of such improvement is especially benefited,³ or one which is confined to a locality and enhances the value of adjacent property in addition to the benefits which it confers upon the public generally.⁴ "A local improvement within the meaning of the law is an improvement which by reason of its being confined to a locality enhances the value of property situated within the particular district, as distinguished from benefits diffused by it throughout the municipality."⁵

§ 287. Definition of local improvement.

In view, then, of the foregoing discussion of the general elements of a public improvement for which a local assessment may

¹ For a detailed discussion of this subject see § 367 et seq.

² Article IX., § 9, Constitution of Illinois; Constitution of Minnesota, Article IX., § 1.

³ See § 283 et seq.

⁴ *Rogers v. City of St. Paul*, 22 Minn. 494 [1876].

⁵ *Illinois Central Railroad Company v. City of Decatur*, 154 Ill. 173, 38 N. E. 626 [1894].

⁶ *City of Butte v. School District No. 1*, 29 Mont. 336, 339, 74 Pac. 369 [1904]; (citing *City of Chicago v. Blair*, 149 Ill. 310, 314, 315, 24 L. R. A. 412, 36 N. E. 829 [1894].

be levied on the theory of benefits, it may be defined as follows: An improvement for which a local assessment may be levied is one which confers both a general benefit to the public and also an especial and peculiar local benefit to the neighboring property.¹

§ 288. Nature of improvement in assessment for legal duty.

In considering the forms of improvement for which assessments of the second type may be levied, we must keep in mind that the theory on which assessments of this type are justified is, that the owner of the realty owes a duty to the public to do, or to refrain from doing, certain acts with reference to his realty, that he has omitted to perform his duty, and that accordingly the public has the power to do such act, and to charge the owner of such realty with the expense thereof. Accordingly, the essential feature of such an improvement is that it must be some act which the owner was bound to perform, and which in the event of his failure to perform the public has the right to do at his expense.¹ There is little conflict of authority as to the general nature of such an improvement. The difficult questions which are presented in improvements of this type arise out of the conflict of authority upon the question of what specific improvements or acts the owner of realty is legally bound to do, as distinguished from the acts which the public may do, but which if done must be paid for out of funds raised either by general taxation or by local assessment.

§ 289. Nature of improvement in assessment for goods sold.

In determining for what purposes assessments of the third type may be levied, it must be kept in mind that so-called assessments of this sort are charges against the owner or tenant of property for personal benefit of some sort furnished for use upon such premises and voluntarily used by such owner or tenant, under an agreement, express or implied, that he is to make compensation therefor. Such a so-called assessment is, as we have already seen, not a true assessment, but a form of genuine con-

¹ *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160 [1885]; *Thomas v. Woods*, — Ky. —, 108 S. W. 878 [1908]; *Sears v. Street Commissioners of the City of Boston*, 180 Mass. 274, 62 L. R. A. 144, 62

N. E. 397 [1902]; *State v. Reis*, 38 Minn. 371, 38 N. W. 97; *Morewood Avenue*, Chamber's Appeal, 159 Pa. St. 20, 28 Atl. 123 [1893]; See §§ 11, 283, 285.

¹ See § 13.

tract entered into by the voluntary consent of the parties thereto. A charge of this sort may therefore be levied for anything which the municipal corporation or other corporation has a right to furnish to the owner or tenant of property, and which the owner or tenant of such property is left free to accept, thus rendering himself liable to such charge, or to decline, thus preventing any liability for such charge, as he may choose.¹

B.—EFFECT OF LEGISLATIVE DETERMINATION.

§ 290. **Conclusiveness of legislative determination in assessments for benefits.**

In determining for what purposes an assessment for benefits may be levied, we are met with the question of the effect of a legislative determination that a given improvement is public in its nature, and that it confers a special local benefit. Is such a legislative determination valid? If it is valid in all cases, there is little room for constitutional questions, since an assessment can be levied for any purpose for which the legislatures may see fit to levy an assessment. Is the correctness of the legislative determination to be inquired into in each case as a question of fact? If it is, then the validity and constitutionality of an assessment statute is to be determined in each case as a question of fact, not law. This is only one phase of the same question which arises in determining what property is benefited, and is liable to assessment, and in determining how the assessment is to be apportioned among the tracts of land upon which a special local benefit is conferred by such improvement. In determining this question, two general principles must be kept in mind: (1) A legislature has power to tax, but under American constitutions private property is protected from confiscation even by the legislature. To attempt to levy a general tax for a purpose which is not public in its nature, is to attempt to take private property without due process of law. To attempt to levy a local assessment for a purpose which is not public in its nature, and which does not confer a special local benefit upon the property which it is sought to assess, is an attempt in another form to take property without due process of law. (2) On the other

¹ See § 14.

hand, the legislature is presumed to have a competent knowledge of the subject-matter concerning which it legislates to understand the constitutional restrictions which are imposed upon its power, and to exercise only such power as is thus conferred upon it by the constitution in obedience to such restrictions. While these two general principles are not inconsistent, widely different results may be reached by giving more force to the one or to the other of them. From their joint application the following specific results have been reached by the courts.

§ 291. If improvement clearly improper, legislative determination ineffectual.

If the improvement is one which in its nature cannot combine the necessary elements of a public use, and a special local benefit, the legislature has no power to levy a local assessment therefor, and its action in attempting so to do, is unconstitutional. A statute of this sort has no legal effect and the legislative determination that such an improvement is a proper one for levying local assessments is subject to review by the courts.¹ While

¹ *New York Life Insurance Co. v. Prest*, 71 Fed. 815, 37 U. S. App. 481 [1896]; *Harts v. People ex rel. Kochensperger*, 171 Ill. 458, 49 N. E. 538 [1898]; *O'Neill v. People ex rel. Kochensperger*, 166 Ill. 561, 46 N. E. 1096 [1897]; *Village of Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611 [1895]; *Crane v. West Chicago Park Commissioners*, 153 Ill. 348, 26 L. R. A. 311, 38 N. E. 943 [1894]; *City of Chicago v. Blair*, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829 [1894]; *City of Chicago v. Law*, 144 Ill. 569, 33 N. E. 855 [1893]; *Elmore v. Drainage Commissioners*, 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010 [1892]; *Gifford Drainage District v. Shroer*, 145 Ind. 572, 44 N. E. 636; *Zigler v. Menges*, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782 [1889]; *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902]; *Kinnie v. Bare*, 68 Mich. 625, 36 N. W. 672 [1889]; *People ex rel. Butler v. Supervisors of Saginaw County*, 26 Mich. 22 [1872]; *State ex rel. Utick v. Board of*

County Commissioners of Polk County, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216 [1902]; *Kansas City v. O'Connor*, 82 Mo. App. 655 [1899]; *City of Butte v. School District No. 1*, 29 Mont. 336, 74 Pac. 869 [1904]; *State, Skinkle, Pros. v. Inhabitants of the Township of Clinton in the County of Essex*, 39 N. J. L. (10 Vr.) 656 [1877]; *Chicago & Erie Railroad Co. v. Keith*, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902]; *Reeves v. Treasurer of Wood County*, 8 O. S. 333 [1858]; *Scran-ton City v. Sturges*, 202 Pa. St. 182, 51 Atl. 764 [1902]; *Harrisburg v. Funk*, 200 Pa. St. 348, 49 Atl. 992 [1901]; *Leake v. City of Philadelphia*, 171 Pa. St. 125, 32 Atl. 1110 [1895]; *Washington Avenue*, 69 Pa. St. (19 P. F. Smith) 8 Am. Rep. 255, 352 [1871]; *Hammitt v. Philadelphia*, 65 Pa. St. (15 P. F. Smith) 146, 3 Am. Rep. 615 [1870]; *Pettit v. Duke*, 10 Utah 311, 37 Pac. 568 [1894]; *In re Theresa Drainage District*, 90 Wis. 301, 63 N. W. 288.

there is upon some questions great divergence of judicial opinion as to whether certain kinds of improvements combine the requisite elements of public use and especial local benefit—a divergence illustrated in the cases cited—yet upon the proposition in question, that legislative determination of the existence of these elements is not conclusive, the courts are practically harmonious. Some courts have said that the act of a public corporation in attempting to levy a local assessment for an improvement which does not combine the requisite elements therefor is *ultra vires*.² If there is no statutory authority therefor such an act is of course *ultra vires*, but it is also a violation of constitutional rights.

§ 292. Finality of legislative determination if improvement may be proper.

If the improvement is one which in its nature may possibly combine the elements of a public use and a special local benefit, but under the special facts and circumstances of the case it is claimed that it does not combine such elements, we find a divergence of judicial opinion. According to one theory in cases of this sort, the legislative determination that the improvement possesses these necessary elements is final, and is not subject to review by the courts.¹ In other cases the rule is stated in a less positive manner, and the legislative determination is said to be final unless clearly mistaken.² This principle has been applied where the legislature provides by statute for a specific improve-

²City of Chicago v. Blair, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829 [1894].

¹Carson v. Brockton Sewerage Commissions, 182 U. S. 398, 48 L. 1115 [1901]; (affirming, Carson v. Sewerage Commissioners of Brockton, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]); Williams, Treasurer, v. Eggleston, 170 U. S. 304, 42 L. 1047, 18 S. 617 [1898]; (affirming State v. Williams, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 421 [1896]); Heath v. Manson 147 Cal. 694, 82 Pac. 331 [1905]; Rich v. City of Chicago, 152 Ill. 18, 38 N. E.

255 [1894]; Otter v. Barber Asphalt Paving Co., — Ky. —, 96 S. W. 862 [1906]; Broadway Baptist Church v. McAtee, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871]; Mayor and City Council of Baltimore v. Johns Hopkins Hospital, 56 Md. 1 [1880]; Philadelphia to use v. Jewell 135 Pa. St. 329, 19 Atl. 947 [1890].

²Parsons v. District of Columbia, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898]; Laguna Drainage District v. Charles Martin Co., 144 Cal. 209, 77 Pac. 933 [1904]; Piper's Appeal in the Matter of Widening Kearney Street 32 Cal. 530 [1867].

ment.³ Another theory, differing from the former both in form and in the results reached thereunder, is that if an improvement is one which might confer a public benefit and a special local benefit, but under the circumstances of the particular case, one or both of these elements is lacking, the legislative determination that such an improvement is a proper one to construct by local assessment is not final, but that the courts may investigate the question of public use and special local benefit as a matter of fact. Under this theory, accordingly, if under the special facts the improvement does not combine these two necessary elements the statute will be held to be unconstitutional.⁴ Thus if the city charter gives to the council the power to order a street improved whenever it shall be unsafe, it has been held that the resolution of the council declaring the street to be unsafe is not binding on the court, but that the street must be unsafe in fact—a question which the court will determine.⁵

§ 293. Delegation of discretion to public corporation as finality.

If the improvement is one which in its nature may combine the necessary elements of a public use and a special local benefit, and the legislature has delegated to a public corporation or quasi-corporation the power to determine whether the improvement in question is necessary or not, we find a difference of judicial opinion similar to that which exists where the legislature itself has undertaken to determine the necessity of the improvement. In many jurisdictions, it is held that the legislature may delegate to a public corporation or quasi-corporation the power to determine the necessity and propriety of the improvement as a finality. Under this theory, if the legislature confers upon the city the power to determine whether to make an improvement of this sort or not, the action of the city in determining to make such improvement upon the basis of local assessment is final and conclusive as to the question that the improvement is both public in its character and one which confers a special local benefit. In such a case the courts have no power to pass upon the ques-

³ *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898]; *Lent v. Tillson*, 140 U. S. 316, 35 L. 419, 11 S. 825 [1891]; (affirming, *Lent v. Tillson*, 72 Cal. 404,

14 Pac. 71 [1887]); *Oakland Paving Co. v. Rier*, 52 Cal. 270 [1877].

⁴ *Smith v. Minto*, 30 Or. 351, 48 Pac. 166 [1897].

⁵ *Smith v. Minto*, 30 Or. 351, 48 Pac. 166 [1897].

tion of the necessity of the particular improvement.¹ Hence it is no defense in a proceeding to confirm an assessment to show that a different kind of improvement made out of different ma-

- ¹ French v. Barber Asphalt Paving Co., 181 U. S. 324, 45 L. 879, 21 S. 625 [1901]; (affirming Barber Asphalt Paving Co. v. French, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]); James v. Pine Bluff, 49 Ark. 199, 4 S. W. 760 [1887]; Lent v. Tillson, 72 Cal. 404, 14 Pac. 71 [1887]; Gilbert v. City of New Haven, 39 Conn. 467 [1872]; Draper v. City of Atlanta, 126 Ga. 649, 55 S. E. 929 [1906]; Lingle v. West Chicago Park Com'rs., 222 Ill. 384, 78 N. E. 794 [1906]; Bromwell v. Flowers, 217 Ill. 174, 75 N. E. 466 [1905]; Givins v. City of Chicago 188 Ill. 348, 58 N. E. 912 [1900]; Topliff v. City of Chicago, 196 Ill. 215, 63 N. E. 692 [1902]; Peyton v. Village of Morgan Park, 172 Ill. 102, 49 N. E. 1003 [1898]; McChesney v. City of Chicago, 171 Ill. 253, 49 N. E. 548 [1898]; Pike v. City of Chicago, 155 Ill. 656, 40 N. E. 567 [1895]; Illinois Central Railroad Company v. City of Decatur, 154 Ill. 173, 38 N. E. 626 [1894]; English v. City of Danville, 150 Ill. 92, 36 N. E. 994 [1894]; Vane v. City of Evanston, 150 Ill. 616, 37 N. E. 901 [1894]; Washington Ice Company v. City of Chicago 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378 [1894]; The Chicago, Burlington & Quincy Railroad Company v. City of Quincy, 139 Ill. 355, 28 N. E. 1069 [1893]; Chicago, Burlington & Quincy Railroad Company v. City of Quincy, 136 Ill. 563, 29 Am. St. Rep. 334, 27 N. E. 192 [1892]; City of Bloomington v. The Chicago & Alton Railroad Company, 134 Ill. 451, 26 N. E. 366 [1891]; Louisville & Nashville Railroad Company v. City of East St. Louis, 134 Ill. 656, 25 N. E. 962 [1891]; Murphy v. City of Peoria, 119 Ill. 509, 9 N. E. 895 [1888]; People ex rel. Thatcher v. Village of Hyde Park, 117 Ill. 462, 6 N. E. 33 [1887]; Cason v. City of Lebanon, 153 Ind. 567, 55 N. E. 768 [1899]; Barber Asphalt Paving Company v. Edgerton, 125 Ind. 455, 25 N. E. 436 [1890]; Holden v. City of Crawfordsville, 143 Ind. 558, 41 N. E. 370 [1898]; Sample v. Carroll, 132 Ind. 496, 32 N. E. 220 [1892]; Kirkpatrick v. Taylor, 118 Ind. 329, 21 N. E. 20 [1888]; Leeds v. City of Richmond, 102 Ind. 372, 1 N. E. 711 [1885]; Yeakel v. City of Lafayette, 48 Ind. 116 [1874]; Mayor and Common Council of Michigan City v. Roberts, 34 Ind. 471 [1870]; Coates v. Nugent, — Kan. —, 92 Pac. 597; McGrew v. City of Kansas City, 64 Kan. 61, 67 Pac. 438 [1902]; Wilkin v. Houston, 48 Kan. 584, 30 Pac. 23 [1892]; State of Kansas, on the relation of Young v. City of Neodesha, 3 Kans. App. 319, 45 Pac. 122 [1896]; Seward v. Rheiner, 2 Kan. App. 95, 43 Pac. 423 [1895]; Hydes v. Joyes, 67 Ky. (4 Bush.) 464, 96 Am. Dec. 311 [1868]; Parsons v. City of Grand Rapids, 141 Mich. 467, 104 N. W. 730 [1905]; Gates v. City of Grand Rapids, 134 Mich. 96, 95 N. W. 998 [1903]; Roberts v. Smith, 115 Mich. 5, 72 N. W. 1091 [1897]; Simmons v. City of Saginaw, 104 Mich. 511, 62 N. W. 725 [1895]; Wilkins v. Detroit, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427 [1881]; Nugent v. City of Jackson, 72 Miss. 1040, 18 So. 493 [1895]; Heman v. Schulte, 166 Mo. 409, 66 S. W. 163 [1901]; Skinker v. Heman, 148 Mo. 349, 49 S. W. 1026 [1898]; (reversing 64 Mo. App. 441 [1895]); Michael v. City of St. Louis, 112 Mo. 610, 20 S. W. 666 [1892]; McCormack v. Patchin, 53 Mo. 33, 14 Am. Rep. 440 [1873]; Heman v. Ring, 85 Mo. App. 231 [1900]; City of Marionville to use of Grubaugh v. Henson, 65 Mo. App. 397 [1895]; City of Kansas City to the use of

terials would have given better results at a lower cost,² or that the improvement was not necessary.³ The public corporation may, however, show the necessity of the improvement without prejudicing the adversary party.⁴ If the public corporation deems it unwise to construct a given improvement, the courts will not review its exercise of discretion and compel it to construct such improvement.⁵ So the commissioners of a drainage and levee district are not bound to petition for authority to levy an assessment for repairs if no funds are available. It is within their sound discretion to determine whether to make such repairs or not, and unless it appears that their action is arbitrary, fraudulent, or to accomplish their own personal or selfish ends, their discretion will not be controlled.⁶ The legislature may, of course, provide some means for a review of the propriety and necessity of the improvement.⁷ This usually takes the form of a direct proceeding attacking the order for the improvement, such as an appeal from the order of the common council for the improvement.⁸ Even where the determination of the public corporation is regarded as final, it is subject to review if the discretion of the public corporation has been abused.⁹

Adkins v. Richards, 34 Mo. App. 521 [1889]; *Eyermann v. Blakesley*, 9 Mo. App. 231 [1880]; *Seibert v. Tiffany*, 8 Mo. App. 33 [1879]; *Matter of the Extension of Church Street from Fulton Street to Morris Street, in the City of New York*, 49 Barb. (N. Y.) 455 [1867]; *The State ex rel. Hibbs v. Board of County Commissioners of Franklin County*, 35 O. S. 458 [1880]; *Beers v. Dallas City*, 16 Or. 334, 18 Pac. 835 [1888]; *Philadelphia to use v. Jewell*, 135 Pa. St. 329, 19 Atl. 947 [1890]; *City of Williamsport v. Beek*, 128 Pa. St. 147, 18 Atl. 329 [1889]; *Michener v. City of Philadelphia*, 118 Pa. St. 535, 12 Atl. 174 [1888]; *Brientnall v. City of Philadelphia*, 104 Pa. St. 156 [1883]; *Adams v. Fisher*, 75 Tex. 657, 6 S. W. 772 [1890].

² *City of Blomington v. Chicago & Alton Railroad Company*, 134 Ill. 451, 26 N. E. 366 [1891].

³ *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396 [1901].

⁴ *Chicago & Northern Pacific Railroad Company v. City of Chicago*, 172 Ill. 66, 49 N. E. 1006 [1898].

⁵ *People ex rel. Thatcher v. Village of Hyde Park*, 117 Ill. 462, 6 N. E. 33 [1887].

⁶ *Bromwell v. Flowers*, 217 Ill. 174, 75 N. E. 466 [1905].

⁷ *Gilbert v. City of New Haven*, 39 Conn. 467 [1872].

⁸ *Gilbert v. City of New Haven*, 39 Conn. 467 [1872].

⁹ *City of Bloomington v. Chicago & Alton Railroad Company*, 134 Ill. 451, 26 N. E. 366 [1891]; *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. L. 128, 63 S. W. 964 [1901]; "Speaking in general terms the authorities of a city may be said to have a large discretion as to the necessity or expediency of the ordinances which they adopt. But their powers in this regard are by no means omnipotent; otherwise the citizen would be with-

§ 294. Delegation of discretion to specific officers.

By the terms of some statutes, power to determine the necessity and propriety of certain kinds of improvement is sometimes vested in certain public officials. The action of such officials is generally regarded as final, at least in the absence of circumstances of fraud and oppression.¹ Thus if the county surveyor has power to pass upon the question of the propriety of repairing a public ditch, his decision is final.² By the application of similar principles the action of commissioners who are appointed specially to pass upon the question, is regarded as final.³ So the action of a board as to the necessity of the improvement may be final.⁴ The same result follows where township officials are given the power to determine whether a certain improvement confers a public benefit and a special local benefit.⁵

§ 295. Unreasonable and oppressive ordinances.

It is often said that by the principles of common law the ordinances of a municipal corporation must be reasonable; and that if unreasonable and arbitrary, such ordinances are invalid upon common law principles.¹ Whether this common law principle exists, independent of constitutional and statutory restrictions, or whether it is merely a different form of stating certain of the constitutional rights of the property owners, is a question upon which there is comparatively little direct authority.² It has been

out remedy or redress. Those powers must be exercised within the bounds of reason and apparent necessity; they must not impose a burden without a benefit, and the reasonableness of their exercise is a fit subject for inquiry. This principle has been expressly recognized by this court, Judge Bliss saying: 'That corporations have none of the elements of sovereignty; that they cannot go beyond the powers granted them, and that they must exercise such granted powers in a reasonable manner, are propositions that cannot be disputed.' *City of St. Louis v. Weber*, 44 Mo. 547; *Corrigan v. Gage* 68 Mo. 541, 544, 545 [1878]; See § 295 *et seq.*

¹ *Kirkpatrick v. Taylor*, 118 Ind. 329, 21 N. E. 20 [1888].

² *Kirkpatrick v. Taylor*, 118 Ind. 329, 21 N. E. 20 [1888].

³ *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947 [1882].

⁴ *Simonton v. Hays*, 88 Ind. 70 [1882]; *State, Jersey City & Bergen R. R. Co., Pros. v. Mayor and Common Council of Jersey City*, 31 N. J. L. (2 Vr.) 575 [1865].

⁵ *Reeves v. Treasurer Wood County*, 8 O. S. 333 [1858].

¹ *City of Belleville v. Perrin*, 225 Ill. 437, 80 N. E. 270 [1907]; *Borough of Greensburg v. Young*, 53 Pa. St. 280 [1866].

² *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893].

said that the common law rule which requires the ordinances of a corporation to be reasonable and not to impose a burden without a fair equivalent, is a rule which operates in addition to the constitution and statutes of the state.³ An ordinance which is in compliance with the provisions of a constitutional statute cannot be successfully attacked as unreasonable.⁴ The objection that an ordinance is unreasonable, and therefore void, is, however, made most frequently where the ordinance is defective for various specific reasons, which seem to be summed up by the courts under the same general and comprehensive objection of unreasonableness. The question of the unreasonableness of an ordinance has been raised most frequently in Illinois in special taxation. In that state, as has been said before, a special tax is regarded as an equivalent or compensation for the enhancement of value, real or presumptive, due to the improvement for which such special tax is levied.⁵ In this respect it resembles the special assessment. It differs from the special assessment in that the assessment must be apportioned to the benefits, and provision made for inquiry in some form into the existence and amount of such benefits; while in special taxation the imposition of the tax is said to be in itself a determination that the benefits to the contiguous property will be as great as the burden of the taxation imposed thereon.⁶ Accordingly, if the determination of the city is arbitrary, and imposes a tax where there is manifestly no benefit, or one which is manifestly in excess of the benefit conferred, such assessment ordinance is said to be void as being unreasonable.⁷ Accordingly the application of this doctrine prevents special taxa-

³ *Borough of Greensburg v. Young*, 53 Pa. St. 280 [1866].

⁴ *City of Kansas to the Use of Adkins v. Richards*, 34 Mo. App. 521 [1889].

⁵ *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893].

⁶ *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893].

⁷ *Chicago Union Traction Company v. City of Chicago*, 208 Ill. 187, 70 N. E. 234 [1904]; *Gage v. City of Chicago*, 191 Ill. 210, 60 N. E. 896 [1901]; *Job v. City of Alton*, 189 Ill. 256, 81 Am. St. Rep. 448, 59 N.

E. 622 [1901]; *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096 [1900]; *Davis v. City of Litchfield*, 155 Ill. 384, 40 N. E. 354 [1895]; *Palmer v. City of Danville*, 154 Ill. 156, 38 N. E. 1067 [1894]; *City of Bloomington v. Chicago & Alton Railroad Company*, 134 Ill. 451, 26 N. E. 366 [1891]; *City of Springfield v. Green*, 120 Ill. 269, 11 N. E. 261; *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471 [1887]; *City of Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686 [1886]; *Enos v. City of Springfield*, 113 Ill. 65 [1886]; *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143 [1880].

tion from being unconstitutional as an exaction in excess of benefits.⁸ As has been said before,⁹ the city authorities have ordinarily been vested by the legislature with a wide discretion as to the type and nature of improvement for which they will make provision. Except in case of a clear and manifest abuse of such discretion, an improvement ordinance cannot be attacked as unreasonable on the ground that such improvement is unnecessary.¹⁰ This principle is a general one, being by no means confined to Illinois, but on the contrary recognized generally.¹¹ The council may provide for the improvement of several contiguous blocks, including a number of different streets.¹² The council may provide for paving a street through land which is chiefly open prairie, with but few houses, the occupants of which none of them keep vehicles, where it appears that but for such paving the street would be impassable during a considerable portion of the year.¹³ The council may provide that the entire width of the street shall be graded, but that a strip in the center thereof shall be sodded instead of graveled for traffic, and may provide for an assessment to pay the cost of such improvement.¹⁴ The council may, if exercising a reasonable discretion, determine the width of that part of a street which is to be used for a roadway, and the width thereof which is to be used for a sidewalk.¹⁵ An abuse of the discretion of the council may, however, render the assessment ordinance for paving unreasonable.¹⁶ Thus, a paving

⁸ *Job v. City of Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901].

⁹ See § 293.

¹⁰ *Washington Park Club v. City of Chicago*, 219 Ill. 323, 76 N. E. 383 [1906]; *Ton v. City of Chicago*, 216 Ill. 331, 74 N. E. 1044 [1905]; *Myers v. City of Chicago*, 196 Ill. 591, 63 N. E. 1037 [1902]; *Topliff v. City of Chicago*, 196 Ill. 215, 63 N. E. 692 [1902]; *Peyton v. Village of Morgan Park*, 172 Ill. 102, 49 N. E. 1003 [1898]; *Washington Ice Company v. City of Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378 [1894]; *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895 [1888].

¹¹ *Winter v. City Council of Montgomery*, 83 Ala. 589, 3 So. 235 [1887]; *James v. Pine Bluff*, 49 Ark. 199, 4 S. W. 760 [1887]; *Van Wagoner, Pros. v. Mayor and Aldermen of the City of Paterson* 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902].

¹² *Ton v. City of Chicago*, 216 Ill. 331, 74 N. E. 1044 [1905].

¹³ *Peyton v. Village of Morgan Park*, 172 Ill. 102, 49 N. E. 1003 [1898].

¹⁴ *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895 [1888].

¹⁵ *Topliff v. City of Chicago*, 196 Ill. 215, 63 N. E. 692 [1902].

¹⁶ *Chicago Union Traction Company v. City of Chicago*, 208 Ill. 187, 70 N. E. 234 [1904].

ordinance which provides for a second assessment of a street intersection for which an assessment has already been levied, is said to be unreasonable and oppressive, and therefore void.¹⁷ In such a case the ordinance as a whole is void. The court has no power to regard it as void, as far as it affects such intersections, and valid as to the rest of the improvement.¹⁸ Whether a paving ordinance is so oppressive and unreasonable as to be void, is said in Illinois to be a question of fact, to be determined by the tribunal by which such facts are to be adjudicated.¹⁹ Thus, a question whether a paving ordinance which required a new combined curb and gutter to be used instead of providing for making use of the old curbing which was in place, and in fair condition, was so unreasonable and oppressive as to be void, is a question of fact to be determined primarily by the county court on objections to the confirmation of the assessment for the improvement, and the finding of such court that such ordinance is not unreasonable will be sustained on appeal, unless contrary to the clear weight of the evidence.²⁰

§ 296. Unreasonable sidewalk improvement ordinances.

The power of a city to require specific types of sidewalk improvement has frequently been exercised in a manner which has been attacked by the persons upon whose property such improvement is charged, as unreasonable. Upon the question of the validity of such ordinances the courts have held that while a city must not exercise its power in a capricious, oppressive or unreasonable manner,¹ yet, on the other hand, the type of improvement which is necessary and desirable in the particular location, must be determined by the city, rather than by the court, and unless the improvement is clearly and manifestly an unreasonable one, the courts will not interfere nor attempt to overrule the city's exercise of discretionary power.² The ques-

¹⁷ *Chicago Union Traction Company v. City of Chicago*, 208 Ill. 187, 70 N. E. 234 [1904].

¹⁸ *Chicago Union Traction Company v. City of Chicago*, 208 Ill. 187, 70 N. E. 234 [1904]; (*distinguishing Noonan v. People ex rel. Raymond*, 183 Ill. 52, 55 N. E. 679 [1899]).

¹⁹ *Lamb v. City of Chicago*, 219 Ill. 229, 76 N. E. 343 [1906].

²⁰ *Lamb v. City of Chicago*, 219 Ill. 229, 76 N. E. 343 [1906].

¹ *Winter v. City Council of Montgomery*, 83 Ala. 589, 3 So. 235 [1887].

² *Winter v. City Council of Montgomery*, 83 Ala. 589, 3 So. 235 [1887]; *James v. Pine Bluff*, 49 Ark.

tion of what improvement is reasonable, depends largely upon the location of the improvement, the size and wealth of the city, and the general type of improvement, both public and private, of which the contemplated improvement is to form a part. An ordinance requiring a sidewalk to be constructed ten feet wide, and to be made of brick, with a curb, has been held to be reasonable on the theory that, in the absence of proof, it would be presumed that brick was necessary because the sidewalk was within the fire limits of the city.³ The determination of the authorities of a city to require a new sidewalk made of brick, to be constructed where an existing board sidewalk could be made to serve the purpose in an adequate manner, making moderate repairs, cannot be reviewed by the courts on the ground that such ordinance is unreasonable.⁴ An ordinance of the city of St. Louis requiring that sidewalks which become out of repair must be replaced by stone sidewalks is not unreasonable, although it requires a stone sidewalk to be constructed at a cost of three hundred dollars while the brick walk in existence could be repaired at a cost of seven dollars.⁵ However, an ordinance requiring a sidewalk to be constructed in an uninhabited portion of the city, not connected with any other walk, was held to be unreasonable.⁶ The extent of discretion vested in the authorities of a public corporation to provide for the construction of a sidewalk along the side of a street or to pave the entire width of the street, making no provision for a sidewalk is a question upon which there is some conflict of authority. In some jurisdictions an ordinance which makes no provision for a sidewalk is said to be unreasonable and void.⁷ Thus in a village in which

199, 4 S. W. 760 [1887]; *Seward v. Rheiner*, 2 Kan. App. 95, 43 Pac. 423 [1895]; *Skinker v. Heman*, 148 Mo. 349, 49 S. W. 1026 [1898]; (reversing *Skinker v. Heman*, 64 Mo. App. 441 [1895]); *City of Marionville to the Use of Grubaugh v. Henson*, 65 Mo. App. 397 [1895].

³ *James v. Pine Bluff*, 49 Ark. 199, 4 S. W. 760 [1887].

⁴ *City of Marionville to the Use of Grubaugh v. Henson*, 65 Mo. App. 397 [1895].

⁵ *Skinker v. Heman*, 148 Mo. 349, 49 S. W. 1026 [1898]; (reversing

Skinker v. Heman, 64 Mo. App. 441 [1895]).

⁶ *Corrigan v. Gage*, 68 Mo. 541 [1878].

⁷ *Carter v. City of Chicago*, 57 Ill. 283 [1870]; See also *Fischback v. People ex rel. Tetherington* 191 Ill. 171, 60 N. E. 887 [1901]; Such objection must, however, be raised in the proper way: If not interposed in the hearing upon the question of confirmation, it is too late to interpose on an application for a judgment of sale. *Fischback v. People ex rel. Tetherington*, 191 Ill. 171, 60 N. E. 887 [1901].

a general ordinance was in force providing for a sidewalk upon each side of the street, a special ordinance applicable to one street, and providing that there should be a sidewalk upon one side only, and that the paved portion of the street should extend up to the lot lines on the other side, was held to be an unreasonable ordinance.⁸ In some jurisdictions it is held that the question of the width, location and existence of a sidewalk is for the municipal authorities and that the courts cannot interfere with the exercise of their discretion.⁹ Thus in Michigan the common council of a city is said to have discretionary power to pave the entire width of the street, including those portions used before as a sidewalk, thus indirectly abolishing the sidewalk.¹⁰

§ 297. Other unreasonable and oppressive ordinances.

The doctrine that an unreasonable and oppressive ordinance is void finds application in other forms of improvement. The size and cost of a sewer is a matter peculiarly within the discretion of the municipal authorities of a city and if the city acts in compliance with its statutory authority, its exercise of discretion in determining the size and cost of such sewer cannot be attacked as unreasonable.¹ If the city, in providing for the construction of a sewer, requires that at the time of such construction connections be laid from the sewer to the lot lines, so as to prevent the subsequent necessity of tearing up the street, it has been held that such requirement is not unreasonable if the connections thus required are not of themselves unreasonably numerous or expensive.² Thus it has been held that a provision of a city ordi-

⁸ *Mills v. Village of Norwood*, 6 Ohio C. C. 305 [1892].

⁹ In Kentucky it is said to be a question for the determination of the city whether there shall be a space left on either or both sides of a street for a sidewalk. *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887].

¹⁰ *Brevoort v. City of Detroit*, 24 Mich. 322 [1872].

¹ *City of Kansas to the Use of Adkins v. Richards*, 34 Mo. App. 521 [1889].

² *Washington Park Club v. City of Chicago*, 219 Ill. 323, 76 N. E. 383 [1906]; *Van Wagoner, Pros. v. May-*

or and Aldermen of the City of Paterson 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902].

³ *City of East St. Louis v. Davis*, 233 Ill. 553, 84 N. E. 674 [1908]; *Washington Park Club v. City of Chicago*, 219 Ill. 323, 76 N. E. 383 [1906]; *Walker v. City of Chicago*, 202 Ill. 531, 67 N. E. 369 [1903]; *Duane v. City of Chicago*, 198 Ill. 471, 64 N. E. 1033 [1902]; *City of Chicago v. Corcoran*, 196 Ill. 146, 63 N. E. 690 [1902]; *Vandersyde v. People ex rel. Raymond*, 195 Ill. 200, 62 N. E. 806 [1902].

nance requiring sewer connections, known as house slants, every twenty-five feet, is not an unreasonable or arbitrary division of the property owner's land, and that such house slants may be constructed at the expense of such property owner.³ On the other hand, where the land was held in large tracts, used chiefly for agricultural purposes, and not for residence purposes,⁴ or the land was divided into lots of about fifty feet frontage each,⁵ it was held to be unreasonable to require house slants to be constructed every twenty feet. Similar considerations apply to assessments for the construction and extension of water pipes. Unless a clear abuse of discretion is shown, the courts will not attempt to review the action of a public corporation in determining the necessity and propriety of such improvement.⁶ Certain lots which were worth about two hundred and fifty dollars apiece were assessed eighteen dollars and fifty cents each for the cost of extending a water pipe. In the absence of evidence showing that the water pipes did not in fact confer an improvement upon such land, it was held that the court could not regard such ordinance as being void for unreasonableness.⁷

§ 298. Review of exercise of discretion.

The doctrine that the exercise of discretion by a public corporation is a finality is one ordinarily advanced in cases where the ordinance is not clearly unreasonable and where the transaction is apparently free from oppression and fraud. In a number of cases we find the rule laid down that if the discretion granted to the city is exercised in a reasonable and honest manner, the court will not review it,¹ but if the council is acting in a manner

³ Bickerdike v. City of Chicago, 185 Ill. 280, 56 N. E. 1096 [1900]; (distinguished in Vandersyde v. People ex rel. Raymond 195 Ill. 200, 62 N. E. 806 [1902]).

⁵ Gage v. City of Chicago, 191 Ill. 210, 60 N. E. 896 [1901].

⁶ Myers v. City of Chicago, 196 Ill. 591, 63 N. E. 1037 [1902].

⁷ Myers v. City of Chicago, 196 Ill. 591, 63 N. E. 1037 [1902].

¹ James v. Pine Bluff, 49 Ark. 199, 4 S. W. 760 [1887]; Ton v. City of Chicago, 216 Ill. 331, 74 N. E. 1044 [1905]; Walker v. City of Chicago,

202 Ill. 531, 67 N. E. 369 [1903]; Myers v. City of Chicago, 196 Ill. 591, 63 N. E. 1037 [1902]; Vane v. City of Evanston 150 Ill. 616, 37 N. E. 901 [1894]; English v. City of Danville, 150 Ill. 92, 36 N. E. 994 [1894]; McChesney v. City of Chicago, 171 Ill. 253, 49 N. E. 548 [1898]; Illinois Central Railroad Company v. City of Decatur, 154 Ill. 173, 38 N. E. 626 [1894]; English v. City of Danville, 150 Ill. 92, 36 N. E. 994 [1894]; Chicago, Burlington & Quincy Railroad Company v. City of Quincy, 139 Ill. 355, 28 N. E.

which is unreasonable and oppressive and for the purpose of evading the law, the courts will review the question.² As stated in another form the courts will review only in case of manifest abuse of such discretion.³ It is also suggested that the courts may review the determination of the city as to the necessity of the improvement in case of fraud.⁴ The decision of the city council is said to be "final and conclusive unless perhaps in case of fraud or mistake."⁵ "The necessity of making street improvements is said to be a matter for the exclusive determination of the municipal corporation invested with the power to make such improvements, and when it acts within the authority given, and its determination is fairly made; that is, without fraud or oppression, it cannot be interfered with by the court."⁶ These forms of stating the rule are probably not inconsistent with the general rule that the exercise of discretion by a public corporation is a finality and is not subject to review by the courts, with reference to its determination as to the necessity and propriety of the improvement. It may be confessed, however, that the obiter found in some of the cases which lay down the principle that the discretion of the public corporation is not subject to review are inconsistent with the obiter found in other cases, which hold that in case of fraud or oppression the courts may review the exercise of discretion by the public corporation. In some cases still less weight seems to be attached to the decision of the public corporation as to the necessity of the improvement. Thus it is said to be not conclusive but entitled to serious consideration.⁷ Under the last doctrine given, the necessity of the improvement seems to be subject to review in an action on the assessment as any other question of fact. In some jurisdictions the decision of the

1069 [1893]; *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. L. 128, 63 S. W. 964 [1901].

²*Kerfoot v. City of Chicago* 195 Ill. 229, 63 N. E. 101 [1902]; *Ligare v. City of Chicago*, 139 Ill. 46, 32 Am. St. Rep. 179, 28 N. E. 934; "The courts will look beyond the mere face of the ordinance to its effect and operation and judge it accordingly. *Ton v. City of Chicago*, 216 Ill. 331, 74 N. E. 1044 [1905].

³*Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887].

⁴*Louisville & Nashville Railroad Company v. City of East St. Louis*, 134 Ill. 656, 25 N. E. 962 [1891]; *Shimmons v. City of Saginaw*, 104 Mich. 511, 62 N. W. 725 [1895]; *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163 [1901].

⁵*Rogers v. City of St. Paul* 22 Minn. 494 [1876].

⁶*Dewey v. City of Des Moines*, 101 Ia. 416, 70 N. W. Rep. 605 [1897].

⁷*Philadelphia to use v. Monument Cemetery Co.*, 147 Pa. St. 170, 23 Atl. 400 [1892].

city may be reviewed before the improvement is constructed, but not after.⁸

§ 299. Conclusiveness of legislative determination in assessments for legal duty.

In assessments or charges levied upon the owner of property, to reimburse the public for the performance of some duty which rested primarily upon the owner of such property, the question of the finality of the determination of the legislature that such legal duty does rest upon the owner of property is one upon which the courts are not in harmony, either as to the general principles involved or as to the specific results reached in applying such principles. On the one hand it seems to be settled by the weight of authority that the legislature may impose certain duties upon the owner or occupant of property, over and above those which rested upon him at common law. On the other hand the power of the legislature to impose legal duties upon the owner or occupant of realty, is by no means unlimited. The legislature cannot impose upon private persons duties which primarily and essentially devolve upon the state, or one of the public corporations thereof. It is practically impossible to state an abstract rule which will indicate, however, just how far this discretion of the legislature extends, other than to say that there are certain duties not existing at common law which the legislature may by statute devolve upon the owner or occupant of realty.¹

§ 300. Conclusiveness of legislative determination in assessments for goods sold.

In determining for what purpose goods may be furnished to the owner or occupant of property at his request the legislature has undoubtedly a wide range of discretion. If the purpose is one which is so public in its character that the municipal corporation, or other public corporation, may be authorized to undertake it, there seems to be no question that the legislature may authorize charges to be made upon persons who having the option to make use of such goods, or to decline such use, see fit to accept the goods and use them. The questions as to the power of the legislature or public corporation which arise in this connection.

are generally questions involving the right of a public corporation to furnish to some property of the sort which it furnishes to others. If the purpose were not one which the city could be authorized to undertake, but if the city did in fact furnish them, the property owner who voluntarily accepted such goods under the understanding that he was to pay therefor, would undoubtedly be liable, either in contract, or quasi-contract.¹

C.—SPECIFIC EXAMPLES OF ORIGINAL IMPROVEMENTS.

§ 301. Streets.

In a community which is thickly settled, such as an ordinary city or village, a public street makes it possible for the public at large to travel, to transport goods, and to communicate freely both within the community itself and with the outside world. A public street is therefore undoubtedly a public improvement of the most unquestionable type. Municipal corporations are almost without exception given ample power to establish and construct such streets. In the absence of specific constitutional restraint the legislature may confer upon municipal corporations the power to pay for the cost of public streets by general taxation. In most instances, a public street, furthermore, confers a special and peculiar advantage upon the property situated upon it or near to, over and above the advantages conferred upon the community at large. Such abutting or adjacent property is by means of such public streets given a facility of access which makes it, if suitable either for business or for residence purposes, much more available therefor. Indeed, without public streets, land of the size of the ordinary city lot could scarcely be used at all. With the increased facility of access and increased utility comes, in most cases, a great increase in market value. For these reasons, it is held that in the absence of specific constitutional restrictions, local assessments may be levied upon the property especially benefited by public streets to pay for the cost of opening and constructing them.¹ This rule is so thoroughly recognized

¹ See §§ 332, 353, 354.

¹ *Hibben v. Smith*, 191 U. S. 310, 48 L. 195, 24 S. 88 [1903]; (affirming *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1901]); *King v. Port-*

land City, 184 U. S. 61, 46 L. 431, 22 S. 290 [1902]; (affirming *King v. City of Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]); *French v. Barber Asphalt Paving Co.*,

that in few of the cases which apply is there any discussion of the subject. The rule is assumed without discussion and the questions actually considered by the courts involve the validity

- 181 U. S. 324, 45 L. 879, 21 S. 625 [1901]; (affirming Barber Asphalt Paving Co. v. French, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]); Walston v. Nevin, 128 U. S. 578, 32 L. 544, 9 S. 192 [1888]; (affirming Nevin v. Roach, 86 Ky. 492, 5 S. W. 546 [1887]); Mattingly v. District of Columbia, 97 U. S. 687, 24 L. 1098 [1878]; Brown v. Drain, 112 Fed. 582 [1901]; White v. City of Tacoma, 109 Fed. 32 [1901]; Zehnder v. Barber Asphalt Paving Co., 108 Fed. 570 [1901]; City of Galveston v. Guaranty Trust Co. of New York, 107 Fed. 325, 46 C. C. A. 319 [1901]; Farson v. City of Sioux City, 106 Fed. 278 [1901]; Burlington Savings Bank v. City of Clinton, Iowa, 106 Fed. 269 [1901]; Denny v. City of Spokane, 79 Fed. 719, 25 C. C. A. 164, 48 U. S. App. 282 [1897]; Harton v. Town of Avondale, 147 Ala. 458, 41 So. 934 [1906]; Irwin v. Mayor, etc., of Mobile, 57 Ala. 6 [1876]; English v. Territory, — Ariz. —, 89 Pac. 561 [1907]; Main v. Ft. Smith, 49 Ark. 480, 5 E. W. 801 [1887]; Lambert v. Bates, 148 Cal. 146, 82 Pac. 767 [1905]; Chase v. Trout, 146 Cal. 350, 80 Pac. 81 [1905]; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661 [1904]; Cummings v. Kearney 141 Cal. 156, 74 Pac. 759 [1903]; Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290 [1903]; City Street Improvement Company v. Laird, 138 Cal. 27, 70 Pac. 916 [1902]; Pacific Paving Company v. Sullivan Estate Company, 137 Cal. 261, 70 Pac. 86 [1902]; Crane v. Cummings, 137 Cal. 201, 69 Pac. 984 [1902]; Petaluma Paving Company v. Singley, 136 Cal. 616, 69 Pac. 426 [1902]; Chapman v. Ames, 135 Cal. 246, 67 Pac. 1125 [1901]; Blanchard v. Ladd, 135 Cal. 214, 67 Pac. 131 [1901]; Cotton v. Watson, 134 Cal. 422, 66 Pac. 490 [1901]; Belser v. Allman, 134 Cal. 399, 66 Pac. 492 [1901]; Reid v. Clay, 134 Cal. 207, 66 Pac. 262 [1901]; Greenwood v. Chandon, 130 Cal. 467, 62 Pac. 736 [1900]; Hadley v. Dague, 130 Cal. 207, 62 Pac. 500 [1900]; Warren & Malley v. Russell, 129 Cal. 381, 62 Pac. 75 [1900]; California Improvement Company v. Moran 128 Cal. 373, 60 Pac. 969 [1900]; Moffitt v. Jordan, 127 Cal. 622, 60 Pac. 173 [1900]; Williams v. Bergin, 127 Cal. 578, 60 Pac. 164 [1900]; Pacific Paving Company v. Mowbray, 127 Cal. 1, 59 Pac. 205 [1899]; Remish v. Hartwell, 126 Cal. 443, 58 Pac. 920 [1899]; Wilson v. California Bank, 121 Cal. 630, 54 Pac. 119 [1898]; Girvin v. Simon, 116 Cal. 604, 48 Pac. 720 [1897]; Buckman v. Landers 111 Cal. 347, 43 Pac. 1125 [1896]; Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283 [1895]; San Francisco Paving Company v. Bates, 134 Cal. 39, 66 Pac. 2 [1901]; Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081 [1894]; Warren v. Postel, 99 Cal. 294, 33 Pac. 930 [1893]; Bonnet v. City and County of San Francisco, 65 Cal. 230, 3 Pac. 815 [1884]; Harney v. Heller, 47 Cal. 15, [1873]; Himmelman v. Woolrich, 45 Cal. 249 [1873]; Himmelman v. Hoadley 44 Cal. 213 [1872]; Lucas Turner & Co. v. San Francisco, 7 Cal. 462 [1856]; San Francisco Paving Company v. Dubois, 2 Cal. App. 42, 83 Pac. 72 [1905]; People ex rel. Russell v. Brown, 218 Ill. 375, 75 N. E. 989 [1905]; Connecticut Mutual Life Insurance Company v. City of Chicago, 217 Ill. 352, 75 N. E. 365 [1905]; Gage v. People ex rel. Hanberg, 213 Ill. 457, 72 N. E. 1099 [1905]; Nelson v. City of Chicago, 196 Ill. 390, 63 N. E. 738 [1902]; Thomson v.

of the steps taken in levying the assessment, the right to assess the specific tract in question, and the like, all based on the assumption that the purpose is undoubtedly one for which a

People ex rel. Foote, 184 Ill. 17 50 N. E. 383 [1900]; Chicago Rock Island & Pacific Railroad Company v. City of Chicago, 139 Ill. 573, 28 N. E. 1108 [1893]; New York C. & St. Louis Ry. Co. v. City of Hammond, — Ind. —, 83 N. E. 244 [1908]; Daly v. Gubbins, — Ind. —, 82 N. E. 659 [1907]; Pittsburgh C. C. & St. Louis Ry. Co. v. Taber, 168 Ind. 419, 77 N. E. 741 [1906]; Low v. Dallas, 165 Ind. 392, 75 N. E. 822 [1905]; Scott v. Hayes, 162 Ind. 548, 70 N. E. 879 [1903]; McKee v. Town of Pendleton 162 Ind. 667, 69 N. E. 997 [1904]; Brown v. Central Bermudez Company, 162 Ind. 542, 69 N. E. 150 [1903]; Deane v. Indiana Macadam & Construction Company, 161 Ind. 371, 68 N. E. 686 [1903]; Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fish, 158 Ind. 525, 63 N. E. 454 [1901]; Leeds v. Defrees, 157 Ind. 392, 61 N. E. 930 [1901]; Cason v. City of Lebanon, 153 Ind. 567, 55 N. E. 768 [1899]; Van Sickle v. Belknap, 129 Ind. 558, 28 N. E. 305 [1891]; Quill v. City of Indianapolis 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890]; Law v. Johnston, 118 Ind. 261, 20 N. E. 745 [1888]; Garvin v. Dussman, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826 [1887]; Taber v. Ferguson, 109 Ind. 227, 9 N. E. 723 [1886]; Ray v. City of Jeffersonville, 90 Ind. 567 [1883]; Chamberlain v. City of Evansville, 77 Ind. 542 [1881]; Peru & Indianapolis Railroad Co. v. Hanna, 68 Ind. 562 [1879]; Martindale v. Palmer, 52 Ind. 411 [1875]; Indianapolis, Peru & Chicago Railroad Company v. Ross, 47 Ind. 25 [1874]; Ball v. Balfie 41 Ind. 221 [1872]; City of Evansville v. Pfisterer, 34 Ind. 36, 7 Am. Rep. 214 [1870]; City of Greensburg v. Zoller, 28 Ind. App. 126 60 N. E. 1007

[1901]; Fralich v. Barlow, 25 Ind. App. 383, 58 N. E. 271 [1906]; Lewis v. Albertson, 23 Ind. App. 147, 53 N. E. 1071 [1899]; Bozarth v. McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042 [1897]; Dugger v. Hicks, 11 Ind. App. 374, 36 N. E. 1085 [1894]; Mock v. City of Muncie, 9 Ind. App. 536 37 N. E. 281 [1893]; Higman v. City of Sioux City, 129 Ia. 291, 105 N. W. 524 [1906]; Ft. Dodge Electric Light & Power Company v. City of Ft. Dodge, 115 Ia. 568, 89 N. W. 7 [1902]; Allen v. City of Davenport, 107 Ia. 90, 77 N. W. 532 [1898]; Smith v. City of Des Moines, 106 Ia. 590, 76 N. W. 836 [1898]; City of Burlington v. Quick, 47 Ia. 222 [1877]; Morrison v. Hershire, 32 Ia. 271 [1871]; Union Pacific R. Co. v. Kansas City, 73 Kan. 571, 85 Pac. 603 [1906]; Board of Commissioners of Franklin County v. City of Ottawa, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788 [1892]; Barron v. City of Lexington, — Ky. —, 105 S. W. 395 [1907]; Moxley v. Lawler, — Ky. —, 97 S. W. 365 [1906]; Lindsey v. Brawner, — Ky. —, 97 S. W. 1 [1906]; Morton v. Sullivan, — Ky. —, 96 S. W. 807 [1906]; Otter v. Barber Asphalt Co., — Ky. —, 96 S. W. 862 [1906]; Cabell v. City of Henderson, — Ky. —, 88 S. W. 1095, 28 Ky. L. R. 89 [1905]; Lindenberger Land Co. v. R. B. Park & Co., — Ky. —, 85 S. W. 213, 27 Ky. L. Rep. 437 [1905]; Orth v. Park & Co., 117 Ky. 779, 80 S. W. 1108, 26 Ky. L. Rep. 184 [1904]; denying rehearing of 79 S. W. 206; (decree modified 26 Ky. L. R. 342, 81 S. W. 251); Duker v. Barber Asphalt Paving Co., — Ky. —, 74 S. W. 744, 25 Ky. L. Rep. 135 [1903]; Barber Asphalt Paving Co. v. Gaar, 115 Ky. 334, 73

local assessment may be levied. The different elements which enter into a street improvement require separate discussion, since in some jurisdictions at least such different elements are referred

S. W. 1106, 24 Ky. L. Rep. 2227 [1903]; *Preston v. Rudd*, 84 Ky. 150 [1886]; *City of Ludlow v. Trustees of the Cincinnati Southern Railway Co.*, 78 Ky. 357 [1880]; *Preston v. Roberts*, 12 Bush. (75 Ky.) 570 [1877]; *Bradley v. McAtee*, 7 Bush. (70 Ky.) 667, 3 Am. Rep. 309 [1870]; *City of Louisville v. Hyatt*, 2 B. Mon. (41 Ky.) 177, 36 Am. Dec. 594 [1841]; *City of Lexington v. McQuillan's Heirs*, 9 Dana (39 Ky.) 513, 35 Am. Dec. 159 [1840]; *Grand Rapids School Furniture Company v. City of Grand Rapids*, 92 Mich. 564, 52 N. W. 1028 [1892]; *Cuming v. City of Grand Rapids*, 46 Mich. 150, 9 N. W. 141 [1881]; *State v. District Court of Blue Earth County*, 102 Minn. 482, 113 N. W. 697, 114 N. W. 654 [1907]; *Morey v. City of Duluth*, 75 Minn. 221, 77 N. W. 829 [1899]; *Edwards House Co. v. City of Jackson* — Miss. —, 45 So. 14 [1907]; *Asphalt & Granitoid Const. Co. v. Hauessler*, 201 Mo. 400, 100 S. W. 14 [1907]; (*Affirming, Asphalt & Granitoid Const. Co. v. Hauessler*, — Mo. App. —, 80 S. W. 5 [1904]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *Seaboard National Bank of New York v. Woesten*, 176 Mo. 49, 75 S. W. 464 [1903]; *City of St. Charles ex rel. Budd v. Deemar*, 174 Mo. 122, 73 S. W. 469 [1902]; *City of Clinton to use of Thornton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893]; *City of St. Louis to use of McGrath v. Clemens*, 49 Mo. 552 [1872]; *City of Excelsior Springs, to Use of McCormick v. Ettenson*, 120 Mo. App. 215, 96 S. W. 701 [1906]; *City of Sedalia ex rel. Gilsonite Construction Company v. Montgomery*, 109 Mo. App. 197, 88 S. W. 1014 [1904]; *Brick & Terra Cotta Com-*

pany v. Hull, 49 Mo. App. 433 [1892]; *McMillan v. City of Butte*, 30 Mont. 220, 76 Pac. 203 [1904]; *Shaler v. McAleese*, — N. J. Eq. —, 68 Atl. 416 [1907]; *Durrell v. City of Woodbury*, 74 N. J. L. (45 Vr.) 206, 65 Atl. 198 [1906]; *State, Pudney, Pros. v. Village of Passaic*, 37 N. J. L. (8 Vr.) 65 [1874]; *Town of Albuquerque v. Zeiger*, 5 N. M. 674, 27 Pac. 315 [1891]; *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104 [1891]; *People ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; *Town of Albuquerque v. Zeiger*, 5 N. M. 674, 27 Pac. 315 [1891]; *Alvey v. City of Asheville*, — N. C. —, 59 S. E. 999 [1907]; *Hilliard v. City of Asheville*, 118 N. C. 845, 24 S. E. 738 [1896]; *Lima v. Cemetery Association*, 42 O. S. 128, 51 Am. Rep. 809 [1884]; *Hubbard v. Norton*, 28 O. S. 116 [1875]; *Creighton v. Scott*, 14 O. S. 438 [1863]; *Maloy v. City of Marietta*, 11 O. S. 636 [1860]; *Northern Indiana Railroad Company v. Connelly*, 10 O. S. 160 [1859]; *Oliver v. City of Newberg*, — Or. —, 91 Pac. 470 [1907]; *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]; *Wilson v. City of Salem*, 24 Or. 504, 34 Pac. 9, 691 [1893]; *King v. City of Portland*, 2 Or. 146 [1865]; *In re Beechwood Avenue, Appeal of O'Mara*, 194 Pa. St. 86, 45 Atl. 127 [1899]; *In the Matter of College Street*, 8 R. I. 474 [1867]; *In the Matter of Dorrance Street*, 4 R. I. 230 [1856]; *Winona & St. P. R. Co. v. City of Watertown*, 1 S. D. 46, 44 N. W. 1072 [1890]; *County of Harris v. Boyd*, 70 Tex. 237, 7 S. W. 713 [1888]; *Taylor v. Boyd*, 63 Tex. 533 [1885]; *Bennison v. City of Galveston*, 18 Tex. Civ. App. 20, 44 S. W. 613 [1898]; *Lovenberg v. City of*

to different theories of governmental power and results are reached for certain of these elements differing widely from the results reached for others. Furthermore, specific constitutional provisions are applicable to certain of these elements but not to others. They will accordingly be considered in detail.

§ 302. Doctrine in South Carolina.

The construction which the Supreme Court of South Carolina has placed upon the constitutional provision protecting persons from being deprived of property except by the law of the land has made it impossible for the legislature to authorize valid assessments for opening or constructing streets. The constitution of 1790 provided in Article nine, section two: "No freeman of this state shall be . . . disseized of his freehold . . . or in any manner despoiled of his life, liberty or property, but by the judgment of his peers or by the law of the land." Under this provision a statute authorizing an assessment on lots on the south side of a street to pay for the cost of a strip of land along the north side of such street, bought for the purpose of widening the street, was held to be unconstitutional.¹ In the constitution of

Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024 [1897]; *Violett v. City of Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896]; *Davis v. City of Lynchburg*, 84 Va. 861, 6 S. E. 230 [1888]; *In re City of Seattle*, — Wash. —, 91 Pac. 548 [1907]; *Northern Pacific Ry. Co. v. City of Seattle*, — Wash. —, 91 Pac. 244; *City of Spokane v. Security Savings Society*, — Wash. —, 89 Pac. 466 [1907]; *Lister v. City of Tacoma*, 44 Wash. 222, 87 Pac. 126 [1906]; *Lester v. City of Seattle*, 42 Wash. 539, 85 Pac. 14 [1906]; *State of Washington on the Relation of the Barber Asphalt Paving Company v. City of Seattle*, 42 Wash. 370, 85 Pac. 11 [1906]; *Frye v. Town of Mount Vernon*, 42 Wash. 268, 84 Pac. 864 [1906]; *Johnson v. City of Tacoma*, 41 Wash. 51, 82 Pac. 1092 [1905]; *In the Matter of Westlake Avenue, Seattle*, 40 Wash. 144, 82 Pac. 279 [1905]; *City of Aberdeen v. Lucas*,

37 Wash. 190, 79 Pac. 632 [1905]; *McNamee v. City of Tacoma*, 24 Wash. 591, 64 Pac. 791 [1901]; *City of New Whatcom v. Bellingham Bay Improvement Company*, 18 Wash. 181, 51 Pac. 360 [1897]; *City of New Whatcom v. Bellingham Bay Improvement Company*, 16 Wash. 131, 47 Pac. 236 [1896]; *Abernethy v. Town of Medical Lake*, 9 Wash. 112, 37 Pac. 306 [1894]; *Austin v. City of Seattle*, 2 Wash. 667, 27 Pac. 557 [1891]; *Schintgen v. City of La Crosse*, 117 Wis. 158, 94 N. W. 84 [1903]; *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983 [1898]; *Wells v. Western Paving & Supply Company*, 96 Wis. 116, 70 N. W. 1071 [1897]; *Chicago, Milwaukee & St. Paul Railway Company v. City of Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417 [1895].

¹ *State ex rel. Horlbeck v. City Council of Charleston*, 12 Rich. (S. C.) 702 [1860].

1868 a similar clause was enacted in Article one, section fourteen, which provided: "No person shall be . . . despoiled or dispossessed of his property . . . or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land." Under this clause it was held that as it substantially re-enacted the former provision, it must receive the same construction, even in opposition to the great weight of authority; and that, therefore, a statute authorizing an assessment based on benefits received from a street improvement was unconstitutional.² Under this construction of the constitution not only street assessments but all assessments for purposes not referable to the police power are held invalid.³ Even this concession to the traditional power of assessment was subsequently withdrawn; and it was held that local assessments could not be levied for any purposes.⁴

§ 303. Constitutional restriction in Virginia.

The constitution of Virginia, which went into effect June 10, 1902, provides in Article thirteen, section one hundred and seventy: "No city or town shall impose any tax or assessment upon abutting land owners for street or other public local improvements, except for making and improving the walkways upon the existing streets, and improving and paving then existing alleys, and for either the construction, or for the use of sewers; and the same, when imposed, shall not be in excess of the peculiar benefits resulting therefrom to such abutting land owners. Except in cities and towns, no such taxes or assessments, for local improvements, shall be imposed on abutting land owners." Under this section it has been held that an assessment for a street improvement made after the constitution took effect was invalid, even though section one hundred and seventeen of the same constitution provides that municipal charters in force at the time of the adoption of the constitution shall be retained except in so far as they may be amended or repealed by the General Assembly, since the same section, one hundred and seventeen, expressly amends all such charters so as to make them conform to the limitations and powers contained in the constitution.¹

² *Mauldin v. City Council of Greenville*, 42 S. C. 293, 46 Am. St. Rep. 723, 27 L. R. A. 284, 20 S. E. 842 [1893].

³ See § 118, § 159.

⁴ *Mauldin v. City Council of Greenville*, 53 S. C. 285, 69 Am. St. Rep. 855, 43 L. R. A. 101, 31 S. E. 252 [1898].

¹ *Hicks v. City of Bristol*, 102 Va. 861, 47 S. E. 1001 [1904].

§ 304. Thoroughfares.

A question of a different sort is presented when the street which is to be improved is a great thoroughfare, whose improvement is necessary for the convenience of the general public, while the extent and cost of the improvement is much greater than is necessary for the benefit of the adjoining property. It is undoubtedly fair, as has been pointed out by the courts, that part or all of the expense of such an improvement undertaken for the benefit of the general public primarily should be paid for, in part or in whole, by general taxation.¹ The difficult question, however, is presented when an attempt is made to levy a local assessment to pay for part or all of such an improvement. In Iowa an assessment was levied on abutting property to pay for paving a street which was the thoroughfare from the city to the state fair grounds, and which, up to that time, had been a dirt road. The assessment was attacked by the abutting property owners as fraudulent; not that any actual fraud on the part of the public officials was claimed, but on the ground that to assess the abutting property for an improvement, which was intended primarily for the benefit of the people of the whole city, or of the state at large, was constructively fraudulent. The Supreme Court upheld such assessment on the ground that such an improvement of a street was "a public object which will support such an assessment regardless of whether or not it is a benefit to the abutting property."² On this point this case was not affected by its reversal by the Supreme Court of the United States,³ since it was reversed solely on the ground of the personal liability of the property owner for the amount of the assessment, the Iowa court holding that personal liability could be imposed upon any owners on constructive notice, while the Supreme Court of the United States held that such liability could not be imposed upon a non-resident owner domiciled in another state upon constructive notice merely.⁴ But the ground upon which the holding is placed is rather extreme, since the weight of authority holds that the amount of the assessment must be limited to the benefits conferred upon the property by the improvement.

¹ Frantz, Jr. v. Jacob, 88 Ky. 525, 11 S. W. 654 [1889]; Maybin v. City of Biloxi, 77 Miss. 673, 28 So. 566 [1900].

² Dewey v. City of Des Moines, 101 Ia. 416, 423, 70 N. W. 605 [1897].

³ Dewey v. Des Moines, 173 U. S. 193, 43 L. 665, 19 S. 379 [1899].

⁴ See § 1046.

In Kentucky a statute which provided for assessing abutting property for the expense of constructing a great public highway was, by reason of its peculiar provisions, unconstitutional.⁵ The holding of the court in this case was not, however, placed upon the ground that property could not be assessed for such an improvement, but on the ground that while the statute required a petition of the abutting property owners in case of the improvement of every other street in the city of Covington, it provided that this street could be improved at the cost of the abutting property owners without any petition from them upon the unanimous vote of the city council; and was therefore lacking in uniformity and oppressive in its application. In Pennsylvania a street running through land partly rural in character was widened and paved. In an action to recover the amount of the assessment evidence was offered by a property owner tending to show that the street was widened, not for any local benefit but solely as a public improvement, to keep a grand avenue of a uniform width through the entire city. This evidence was rejected by the trial court, which ruling the Supreme Court held to be error.⁶ The reconstruction of Broad street in the city of Philadelphia raised a question of this sort which was, however, settled by the adoption of what ultimately developed into a much wider principle. In that case an existing street in good condition, paved with cobblestones, was destroyed to lay out a wide pleasure drive for the general use of the public. It was held that local assessments could not be levied for such new improvement.⁷ The theory on

⁵ *Howell v. Bristol*, 8 Bush. (71 Ky.) 493 [1871].

⁶ *Craig v. City of Philadelphia*, 89 Pa. St. 265 [1879].

⁷ *Hammet v. Philadelphia*, 65 Pa. St. (15 P. F. Smith) 146, 3 Am. Rep. 615 [1870]; "The object of this improvement is not to bring or keep Broad street as all the other streets within the built-up portions of the city are kept, for the advantage and comfort of those who live upon it, and for ordinary business and travel, but to make a great public drive—a pleasure ground—along which elegant equipages may disport of an afternoon. We need look no further than the preamble of the act author-

izing the improving of Broad street, passed March 23rd, 1866, (Pamph. L. 299), for evidence that it is for the general public good, not for mere local benefit. It states it to be 'for the uses and purposes of the public, and the benefits and advantages which will inure to them by making and forever maintaining Broad street in the city of Philadelphia for its entire length, as the same is now opened, or may hereafter be opened, the principle avenue of the said city.' Thus, we have special taxation authorized, for an object, avowed on the face of the act to be general and not local, which relieves the case of all difficulty as to the fact. We

which this case was decided has, however, been developed in Pennsylvania into the broad principle that assessments cannot be levied for a second improvement unless the improvement is one of the class referable to the police power.⁸ It will be seen, therefore, that while the question has been discussed to some extent by the courts there is but little specific adjudication upon the point. The true rule, under the theory of assessments, held by the majority of states, seems to be that such an improvement is one for which an assessment may be levied upon adjacent property, but that the amount of such assessments must be limited to the benefits conferred upon such property by such improvement, leaving the residue, if any, to be raised by general taxation and paid out of the public treasury.⁹ Assessments of this sort do not seem to be invalidated by the fact that the assessment is levied to make a great thoroughfare.¹⁰ It was said to be unfair to lay upon abutting property owners the cost of enlarging and increasing the width of a street in order to benefit Fulton market.¹¹ The court expressed the opinion that such increased cost should be borne by general taxation and not by local assessment. A thoroughfare is a "local improvement" within the meaning of constitutional and statutory provisions.¹²

have only to advance the project a few steps farther, to see how preposterous is the idea of paying for such an improvement by assessments. In the natural course of things, we may expect that it will be proposed to adorn this principal avenue with monuments, statuary and fountains. Will their cost be provided for in the same way? How much does this plan differ from a proposition to erect new public buildings on Independence Square, and assess the cost on the lots situated on the neighboring streets? On the same principle, lots on the public square could be assessed to pay for any new project to beautify and adorn them, no matter how great the expense. It might be argued with equal plausibility that their value was increased by the improvement. We must say at some time to this tide of special taxation,

'thus far shalt thou go and no farther.' To our own decisions, as far as they have gone, we mean to adhere, but we are now asked to take a step much in advance of them. This we would not be justified by the principles of the constitution in doing." *Hammett v. Philadelphia*, 65 Pa. St. (15 P. F. Smith) 146, 156, 157, 3 Am. Rep. 615 [1870].

⁸ See § 382 *et seq.*

⁹ See Chapter XIII.

¹⁰ *Appeal of North Beach & Mission R. R. Co. in the Matter of Widening Kearney Street*, 32 Cal. 500 [1867]; *Rogers v. City of St. Paul*, 22 Minn. 494 [1876].

¹¹ *Matter of the Petition of the Mayor of New York*, 20 Johns (N. Y.) 269 [1822].

¹² *Rogers v. City of St. Paul*, 22 Minn. 494 [1876].

§ 305. **Boulevards.**

A question somewhat different from that presented in the case of the ordinary street occurs when the legislature provides for a street improvement which is intended to be beautiful as well as useful, and which by reason of its beauty is more costly than one constructed for mere utility. The right of the legislature to authorize a local assessment to pay for the cost of establishing a public park undoubtedly exists, and is discussed elsewhere.¹ Since the greater includes the less, it follows that the legislature has power to provide for the construction of a street, which is not only a means of transportation but is also an ornament and a thing of beauty. Accordingly, the legislature may authorize an assessment for constructing a boulevard.² "It is the contention of appellant that the powers given by the statute we have cited have reference only to such improvements as tend to make the street a better or more available avenue of public travel and do not authorize improvements which are merely ornamental or beautiful. The facts presented by the record before us do not seem to necessitate a consideration of this question. It may be said, however, that the authority here expressly provided for the 'parking' of streets and avenues can scarcely be reconciled with the proposition that all street improvements must be limited by the single consideration of the convenience or safety of the traveling public. The term 'parking' is incapable of any plausible definition which does not involve the idea of beautifying those portions of the street not necessarily occupied by walks and roadways. To what extent this power may be exercised at the expense of abutting property we need not now determine. The improvement here objected to goes no farther than to provide that the paved roadway and the

¹ See § 356.

² *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898]; *Thorn v. West Chicago Park Commissioners*, 130 Ill. 594, 22 N. E. 520 [1890]; *Chicago and Northwestern Railway v. People*, 120 Ill. 104, 11 N. E. 418 [1889]; *Kedzie v. West Chicago Park Commissioners*, 114 Ill. 280, 2 N. E. 182 [1886]; *People, ex rel. McCrea v. Atehison*, 95 Ill. 452 [1880]; *Andrews v. People ex rel. Rumsey*, 83 Ill. 529

[1876]; *Downing v. City of Des Moines*, 124 Ia. 289, 99 N. W. 1066 [1904]; *Bell v. City of Newton*, 183 Mass. 481, 67 N. E. 599 [1903]; *Jones v. Metropolitan Park Commissioners*, 181 Mass. 494, 64 N. E. 76 [1902]; *In re Spring Valley Park in Kansas City*, 208 Mo. 674, 106 S. W. 531 [1907]; *Hart v. City of Omaha*, 74 Neb. 836, 105 N. W. 546 [1905]; *Murphy v. City of Long Branch*, — N. J. L. —, 61 Atl. 593 [1905].

space reserved for parking shall be separated by a line of curbing, and to authorize this action it is not necessary for the city to draw upon its power, if any it has, to improve and ornament such park. Counsel for appellants, directing their vision toward the future, see the park thus provided for, resplendent with trees, shrubs, flowers and statuary created and maintained at the expense of the abutting property and very naturally conclude from the lot owner's point of view, that 'a thing of beauty' is not necessarily and under all circumstances 'a joy forever.' In our judgment these prophetic fears cannot be well grounded upon the circumstances of this case, nor upon the assertion of municipal authority here upheld. The work sought to be enjoined comes well within appellant's own definition of the city's authority to make such improvements as directly tend to the betterment of the street as a public highway and not a mere matter of ornamentation."³ There is danger of injustice in assessments of this sort. The cost of such a boulevard may greatly exceed the cost of a suitable and proper street of the ordinary type. However, it should not be the cost of the improvement but the benefit which it confers which measures the amount of the assessment.⁴ Any departure from this principle may work injustice, but the fault is in the apportionment, not in the improvement. Another danger of injustice lies in the fact that the benefits conferred may be so great that the property owners, unable to pay for them, may be improved out of their property. If the benefits do exist, however, questions of what type of improvement is advisable are peculiarly within the discretion of the legislature, a discretion which may be conferred upon the city or other public corporation.⁵ The right to levy an assessment for the construction of a boulevard has been recognized though the particular assessment has been held invalid,⁶ as because it was divided into installments without statutory authority,⁷ or because a prior assessment equal to the full amount of the benefits had already been levied,⁸ or because the improvement is not com-

³ *Downing v. City of Des Moines*, 124 Ia. 289, 291, 292, 99 N. W. 1066 [1904].

⁴ See Chapter XIII.

⁵ See § 290 *et seq.*

⁶ In the Matter of the Petition of Robbins to Vacate an Assessment, 82 N. Y. 131 [1880].

⁷ *Culver v. People ex rel. Köcher-sperger*, 161 Ill. 89, 43 N. E. 812 [1896].

⁸ *West Chicago Park Commissioners v. Metropolitan West Side Elevated Railroad Co.*, 182 Ill. 246 55 N. E. 344 [1899].

pleted as required by statute.⁹ A common form of such an improvement consists in two or more paved roadways in the street, separated by an intervening parkway. Such an improvement is held so to combine both public utility and private benefit that a local assessment may be levied therefor.¹⁰ Such an assessment has been upheld even if it is not shown that the parkway confers a benefit upon abutting property, where the paving of the entire width of the street would cost more than the cost of the street constructed with such parking.¹¹ In some of these cases the assessment has been levied for such expenses as sodding the parkway,¹² or constructing a grass plat,¹³ which do not facilitate the use of the street for travel, but are primarily for beauty and ornament. In other cases the improvement is of a sort tending directly to facilitate travel upon the street, such as curbing the parkway.¹⁴ In Kansas the power of levying local assessments has been carried somewhat farther. An assessment for the purpose of planting maintaining and protecting shade trees along the public streets was authorized by the statute of that state, and was held to be within its power.¹⁵ In this case, however, the validity of the assessment was not directly involved. The city let a contract for planting shade trees, to be paid for by assessments on the abutting property. After the trees were planted, in performance of such contract, the city repudiated the contract and refused to levy assessments in payment thereof, or to take any other steps toward raising a special fund to pay the price stipulated for in the contract. Suit was then brought against the city by the contractor to recover the contract price. It was held that the city was empowered to enter into such contract and to levy such assessments, and that by its refusal to levy assessments it became personally liable to the contractor for the contract price. While it has been held in Indiana that a street improvement resolution, which

⁹ *Jones v. Metropolitan Park Commissioners*, 181 Mass. 494, 64 N. E. 76 [1902].

¹⁰ *Thompson v. City of Highland Park*, 187 Ill. 265, 58 N. E. 328 [1900]; *Cummings v. West Chicago Park Commissioners*, 181 Ill. 136, 54 N. E. 941 [1899]; *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895 [1888]; *Downing v. City of Des Moines*, 124 Ia. 289, 99 N. W. 1066 [1904].

¹¹ *Downing v. City of Des Moines*, 124 Ia. 289, 99 N. W. 1066 [1904].

¹² *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895 [1888].

¹³ *People ex rel. Raymond v. Field*, 197 Ill. 568, 64 N. E. 544 [1902].

¹⁴ *Downing v. City of Des Moines*, 124 Ia. 289, 99 N. W. 1066 [1904].

¹⁵ *Heller v. City of Garden City*, 58 Kan. 263, 48 Pac. 841 [1898].

requires the space between the sidewalk and the curb to be graded with rich dirt and to be sodded at the expense of the abutting property owners, is unlawful, and that no assessment can be based thereon, the decision in that case was not based on the lack of power in the legislature to authorize such an assessment, but on the fact that the statute gave power only to grade and pave at the expense of the abutting property owners, and that such an assessment was therefore not authorized by statute.¹⁶ In Michigan a similar improvement was recognized as one for which an assessment might have been levied except for the fact that in the particular instance the improvement was a repavement, and by statute payable out of the repaving fund and not by local assessment.¹⁷

§ 306. Street in which street railway is located.

Permission is often given to railway or to street railway companies to lay their railway tracks in public streets, and to run their cars thereon. Such permission is often given under a contract requiring the railway company to pave a certain portion of the street thus used by it. The effect of such contract upon the liability of the street railway company for paving is discussed elsewhere;¹ as is the right of the property owner to insist that he shall not be required to bear any part of the burden which, under such contract, should be borne by the street railway company.² The fact that such a contract is entered into, however, does not deprive the city of the power to improve such street, and to levy assessments therefor upon the abutting property owners. Even though street-car tracks are constructed in the street, it still affords means of transportation to the public, and means of access to the abutting property which makes it proper for the legislature to authorize the levy of local assessments for its improvement.³ Thus a contract entered into between a city and a railway company, by which the railway company agrees to re-grade and gravel the street occupied by its tracks, and keep the same in good repair.

¹⁶ *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899].

¹⁷ *Dickinson v. City of Detroit*, 111 Mich. 480, 69 N. W. 728 [1897].

¹ See § 60, § 599 *et seq.*

² See § 604.

³ *Chicago, Burlington and Quincy Railroad Company v. City of Quincy*, 139 Ill. 355, 28 N. E. 1069 [1893];

Cason v. City of Lebanon, 153 Ind. 567, 55 N. E. 768 [1899]; *Parker v. City of Atchison*, 48 Kan. 574, 30 Pac. 20; *Bagg v. City of Detroit*, 5 Mich. 336 [1858]; *State v. New Brunswick*, 34 N. J. L. (5 Vr.) 395; *State. Felix, Pros. v. City Council of Atlantic City*, 34 N. J. L. (5 Vr.) 99 [1869]; *Richards v. City of Cincinnati*, 31 O. S. 506 [1877].

does not deprive the city of the power to levy a local assessment upon abutting property for the improvement of such street.⁴

§ 307. Streets, driveways and boulevards in parks.

Since assessments may be levied for constructing public parks,¹ and for streets² and boulevards,³ it follows that a street which is in a public park,⁴ or which is constructed as a part of the park system of the city,⁵ may be an improvement possessing public utility and conferring private benefit for which local assessments may be levied. The same principle applies to a driveway in a public park.⁶

§ 308. Opening street.

The power of the legislature to authorize a municipal corporation to open a street, to appropriate land therefor by eminent domain and to levy a local assessment upon property which is peculiarly and especially benefited thereby has often been questioned. The weight of modern authority is that in the absence of specific constitutional provisions, local assessments may be authorized by the legislature to pay for the expense of opening a street, including both the value of the land taken and the damage, if any, done to the abutting realty by opening such street.¹ Such an as-

⁴ *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768 [1899].

¹ See § 356.

² See § 301.

³ See § 305.

⁴ *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898]; *New England Hospital for Women and Children v. Street Commissioners of the City of Boston*, 188 Mass. 88, 74 N. E. 294 [1905].

⁵ *In re Beechwood Avenue*. Appeal of O'Mara, 194 Pa. St. 86, 45 Atl. 127 [1899].

⁶ *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894].

¹ *Goodrich v. Detroit*, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902]; (affirming *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]); *Voigt v. Detroit City*, 184 U. S. 115, 46 L. 459, 22 S. 337 [1902]; (affirming *Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]); *Bauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; (reversing *District of Columbia v. Armes*, 8 App.

D. C. 393 [1896]; *Bauman v. Ross*, 9 App. D. C. 260 [1896]; *Abbott v. Ross*, 9 App. D. C. 289 [1896]); *Hannewinkle v. Georgetown*, 15 Wall. (82 U. S.) 547, 21 L. 231 [1872]; *Cohen v. City of Alameda*, 124 Cal. 504, 57 Pac. 377 [1899]; *Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771 [1890]; *Fenwick Hall Company v. Town of Old Saybrooke*, 69 Conn. 32, 36 Atl. 1068 [1897]; *Terry v. City of Hartford*, 39 Conn. 286 [1872]; *Trinity College v. City of Hartford*, 32 Conn. 452 [1865]; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636 [1854]; *Fulton v. Town of Dover*, 8 Houst. (Del.) 78, 6 Atl. 633, 12 Atl. 394, 31 Atl. 974 [1888] *Edgerton v. Mayor and Aldermen of the Town of Green Cove Springs*, 19 Fla. 140 [1882]; *Chicago Terminal Transfer Railroad Company v. City of Chicago*, 217 Ill. 343, 75 N. E. 499 [1905]; *Bass v. People ex rel. Raymond*, 203 Ill. 206, 67 N. E. 806 [1903]; *Shurtleff v. City of Chicago*, 190 Ill. 473, 60 N. E. 870

assessment was said to be "an ordinary exercise of legislative

[1901]; *Fabnestock v. City of Peoria*, 171 Ill. 454, 49 N. E. 496 [1898]; *Aldis v. South Park Commissioners*, 171 Ill. 424, 49 N. E. 565 [1898]; *Culver v. City of Chicago*, 171 Ill. 399, 49 N. E. 573 [1898]; *Philadelphia and Reading Coal and Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894]; *Gage v. City of Chicago*, 146 Ill. 499, 34 N. E. 1034 [1893]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]; *Village of Hyde Park v. Corwith*, 122 Ill. 441, 12 N. E. 238 [1889]; *People ex rel. Carroll v. Gary*, 105 Ill. 332 [1883]; *Andrews v. People ex rel. Ramsey*, 83 Ill. 529 [1876]; *Hemingway v. City of Chicago*, 60 Ill. 324 [1871]; *Higgins v. City of Chicago*, 18 Ill. 276 [1857]; *Trustees of the Illinois and Michigan Canal v. City of Chicago*, 12 Ill. 403 [1851]. (In *City of Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1893], a special tax was laid and it was held that since the special tax was not restricted to benefits or apportioned according to benefits, the owner of land taken could not be paid therefor by a tax laid on his remaining land. This case was distinguished in *Waggonman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895], where it was held constitutional to pay part of the value of land condemned for a street by setting off against such value the special benefits received by the property from which such strip of land was taken); *Corwith v. Village of Hyde Park*, 14 Brad. (Ill.) 635 [1884]; *Holden v. City of Crawfordville*, 143 Ind. 558, 41 N. E. 370 [1895]; *City of Burlington v. Quick*, 47 Ia. 222 (1877); *Kansas City v. Napieeck*. — Kan. — 92 Pac. 827 [1907]; *City of Covington v. Worthington*, 88 Ky. 206, 10 S. W. 790; 11 S. W. 1038 [1889]; *City of Lexington v. McQuillan's Heirs*, 9 Dana (39 Ky.) 513, 35 Am. Dec. 159 [1840]; *City of New Orleans praying*

for opening of Casacaloo and Moreau streets, 20 La. Ann. 497 [1868]; *City of New Orleans praying for the opening of Philip and other streets*, 10 La. Ann. 313 [1855]; *Municipality Number Two for the opening of Rollignac street*, 7 La. Ann. 76 [1852]; *Blanchet v. Municipality No. Two*, 13 La. 322 [1839]; *Philadelphia. Wilmington and Baltimore Railroad Company v. Shipley*, 72 Md. 88, 19 Atl. 1 [1890]; *Zion Church of the City of Baltimore v. Mayor and City Council of Baltimore*, 71 Md. 524, 18 Atl. 895 [1889]; *Mayor and City Council of Baltimore v. Little Sisters of the Poor*, 56 Md. 400 [1881]; *Hawley v. Mayor and City Council of Baltimore*, 33 Md. 270 [1870]; *Benton v. Inhabitants of Brookline*, 151 Mass. 250, 23 N. E. 846 [1890]; *Chapin v. Worcester*, 124 Mass. 464; *Boston Seamen's Friend Society v. Boston*, 116 Mass. 181, 17 Am. Rep. 153; *Bancroft v. City of Boston*, 115 Mass. 377 [1874]; *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870]; *Dorgan v. City of Boston*, 12 All. (Mass.) 223 [1866]; *Power v. City of Detroit*, 139 Mich. 30, 102 N. W. 288 [1905]; *Smith v. City of Detroit*, 120 Mich. 572, 79 N. W. 808 [1899]; *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]; *Trowbridge v. City of Detroit*, 99 Mich. 443, 58 N. W. 368 [1894]; *Beecher v. City of Detroit*, 92 Mich. 268, 52 N. W. 731 [1892]; *State ex rel. Stees v. Otis*, 53 Minn. 318, 55 N. W. 143 [1893]; *Fairchild v. City of St. Paul*, 46 Minn. 540, 49 N. W. 325 [1891]; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508 [1854]; *City of St. Louis v. Annex Realty Company*, 175 Mo. 63, 74 S. W. 961 [1903]; *Hook v. Chicago & Alton Railroad Company*, 133 Mo. 313, 34 S. W. 549 [1895]; *Kansas City v. Smart*, 128 Mo. 272, 30 S. W. 773 [1895]; *Bryant v. Russell*, 127 Mo. 422, 30 S. W. 107; *State ex rel. Chicago, Burlington & Quincy Railroad Company v.*

power.”² So assessments to pay for land taken for a boulevard³

City of Kansas, 89 Mo. 34, 14 S. W. 515 [1886]; Jackson County v. Waldo, 85 Mo. 637; State ex rel. Holden v. Gill, 84 Mo. 248 [1884]; City of Kansas v. Hill, 80 Mo. 523 [1883]; City of St. Louis v. Riche-son, 76 Mo. 470 [1882]; City of St. Louis v. Speck, 67 Mo. 403 [1878]; Leslie v. City of St. Louis, 47 Mo. 474 [1871]; Garrett v. City of St. Louis, 25 Mo. 505, 69 Am. Dec. 475 [1857]; Kuhns v. City of Omaha, 55 Neb. 183, 75 N. W. 562 [1898]; McCormick v. City of Omaha, 37 Neb. 829, 56 N. W. 626 [1893]; State, Buess, Pros. v. Town of West Hoboken, 51 N. J. L. (22 Vr.) 267, 17 Atl. 110 [1889]; State, Brown, Pros. v. Village of South Orange, 49 N. J. L. (20 Vr.) 104, 6 Atl. 312 [1886]; State, White, Pros. v. Mayor and Council of the City of Bayonne, 49 N. J. L. (20 Vr.) 311, 8 Atl. 295 [1887]; State, Rettinger, Pros. v. City of Passaic, 45 N. J. L. (16 Vr.) 146 [1883]; Lowerree v. City of New-ark, 38 N. J. L. (9 Vr.) 151 [1875]; State, Simmons, Pros. v. City of Pas-saic, 38 N. J. L. (9 Vr.) 60 [1875]; State, Gregory, Pros. v. Mayor and Aldermen of Jersey City, 34 N. J. L. (5 Vr.) 390 [1871]; State, Peters, Pros. v. Mayor and Common Council of the City of Newark, 31 N. J. L. (2 Vr.) 360 [1865] Harriman v. City of Yonkers, 181 N. Y. 24, 73 N. E. 493, affirming 81 N. Y. S. 823, 82 App. Div. 408 [1903]; Mayer v. Mayor, Aldermen and Commonalty of the City of New York, 101 N. Y. 284, 4 N. E. 336 [1886]; Genet v. City of Brooklyn, 99 N. Y. 296, 1 N. E. 777 [1885]; In the Matter of the Application of Church for the Appointment of Commissioners, etc., 92 N. Y. 1 [1883]; Astor v. Mayor, Aldermen and Commonalty of City of New York 62 N. Y. 580 [1875]; People ex rel. Griffin v. Mayor, etc., of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; In the Matter of the Application of the Board of Street Opening and Improvement of the

City of New York to acquire title to Forest Avenue, 64 Hun. (N. Y.) 59, 18 N. Y. Supp. 727 [1892]; In the Matter of the Application of the Commissioners of Public Parks, etc., relative to opening Railroad Avenue, East, 47 Hun. (N. Y.) 302 [1888]; Lowerree v. Mayor, Aldermen and Commonalty of the City of New York, 46 Hun. (N. Y.) 253 [1887]; Elwood v. City of Rochester, 43 Hun. (N. Y.) 102 [1887]; In the Matter of the Taking of Lands, etc., for widening Carlton Street between Main and Jefferson Streets in the City of Buffalo, 16 Hun. 497 [1879]; In the Matter of the Petition of Farniss to vacate an assessment (no opinion), 4 Hun. 624 [1875]; Gaston v. Portland, 41 Or. 373, 69 Pac. 34, 445 [1902]; Wilmington Avenue, 213 Pa. St. 238, 62 Atl. 848 [1906]; Cummings v. City of Williamsport, 84 Pa. St. 472 [1877]; Chestnut Avenue, 68 Pa. St. (18 P. F. Smith), 81 [1871]; Stroud v. Philadelphia, 61 Pa. St. (11 P. F. Smith) 255; Commonwealth for use, etc., v. Woods, 44 Pa. St. (8 Wright), 113 [1862]; Schenley v. City of Allegheny, 25 Pa. St. (1 Casey) 128 [1854]; Fenelon's Petition, 7 Pa. St. (7 Barr.) 173 [1847]; M'Masters v. Commonwealth, 3 Watts (Pa.) 292 [1834]; Second Universalist Society in Providence v. City of Providence, 6 R. I. 235 [1859]; City of San Antonio v. Sullivan, 23 Tex. Civ. App. 658, 57 S. W. 45 [1900]; *In re* How-ard Avenue, North, in City of Seattle, 44 Wash. 62, 86 Pac. 1117 [1906]; State of Washington, on the Relation of Bock v. Case, 42 Wash. 658, 85 Pac. 420 [1906]; In the Matter of Westlake Avenue, Seattle, 40 Wash. 144, 82 Pac. 279 [1905]; Koller v. City of La Crosse, 106 Wis. 369, 82 N. W. 341 [1900].

² M'Masters v. Commonwealth, 3 Watts (Pa.) 292 [1834].

³ Vanderbeek v. City of Rochester, 46 Hun. 87 [1887].

or for an alley ⁴ may be authorized by the legislature. No different principle should apply where a street is opened through the land of a given owner, and after he is compensated for the value of his land thus taken his remaining property is assessed for the special benefits conferred upon it by opening such street. In the absence of special constitutional provision the property owner, after receiving compensation for the property taken, stands in the same relation to the public as if he had not owned the property taken; and his remaining property is as liable to assessment in the one case as in the other.⁵ Accordingly it has been held that the amount paid to the owner for his property taken for the street may be assessed back upon him as compensation by him for the benefits thus conferred upon him.⁶ So after a judicial determination that land remaining after the land for the street is taken has not been damaged by such taking, it is proper to assess such remaining land for the cost of the land so taken.⁷ This principle has been so applied that the owner whose land is taken has been obliged to pay not only the amount which he has received for his land but also the costs and expenses of the proceeding in eminent domain.⁸ In some jurisdictions assessments to pay for opening a street have been held invalid, but on grounds which leave it possible to provide for valid assessments in such jurisdictions under existing constitutional provisions. Thus, since the assessment must, in most jurisdictions, be restricted to the amount of the benefits especially conferred upon the realty assessed, a statute which provides arbitrarily that one-half of the cost of opening the street,⁹ or that the entire cost of opening the street ¹⁰ shall be apportioned upon the property benefited by such improvement has been held invalid

⁴ *Paul v. City of Detroit*, 32 Mich. 108 [1875].

⁵ *City of Covington v. Worthington*, 88 Ky. 206, 11 S. W. 1038, 10 S. W. 790 [1889].

⁶ *Hannewinkle v. Georgetown*, 82 U. S. (15 Wall.) 547, 21 L. 231 [1872].

⁷ *Quirk v. City of Seattle*, 38 Wash. 25, 80 Pac. 207 [1905].

⁸ *Rogers v. St. Charles*, 54 Mo. 229 [1873]; *City of Cleveland v. Wick*, 18 O. S. 303 [1868]. (For the later Ohio doctrine see § 113; and *post* this section.

⁹ *City of Detroit v. Judge of Recorder's Court*, 112 Mich. 588; (*City of Detroit v. Chapin*, 42 L. R. A. 638, 71 N. W. 149 [1897]); *City of Detroit v. Daly*, 68 Mich. 503, 37 N. W. 11 [1888].

¹⁰ *Norwood v. Baker*, 172 U. S. 269, 43 L. 443, 19 S. 187 [1898]; (affirming 74 Fed. 997 [1896]); *Scott v. City of Toledo*, 36 Fed. 385, 1 L. R. A. 688. See, also, *McKusick v. Stillwater*, 44 Minn. 373, 46 N. W. 769 [1890].

since it ignores the question of benefits. So if land is taken under a statute which provides for setting off benefits to the remaining land against damages sustained by such taking, benefits to the strip taken cannot be so set off;¹¹ nor under such statute can an assessment be made against one whose land is not taken for a street opening.¹² So under a constitution requiring taxation by state, county and corporate bodies to be uniform according to value, it is held that an assessment by the front foot to pay the cost of land taken to open a street is invalid.¹³ These questions, however, involve principles subsequently disensed,¹⁴ and do not involve the power of the legislature to provide for an assessment for opening a street. The present constitution of Ohio provides that if private property is taken for public use compensation therefor shall be made in money. "and such compensation shall be assessed by a jury without deduction for benefits to any owner of the property."¹⁵ Under this constitutional provision it was at first held that the legislature might provide for taking property by eminent domain and assessing the amount paid for such land taken and for damages to the residue upon the owners of the abutting property, even if some or all of them were originally owners of the land taken for such street.¹⁶ The general principle thus laid down was followed in several subsequent cases,¹⁷ even where for special

¹¹ *City of St. Joseph v. Crowther*, 142 Mo. 155, 43 S. W. 786 [1897].

¹² *City of St. Louis v. Speck*, 4 Mo. App. 244 [1877].

¹³ *City of Norfolk v. Chamberlain*, 89 Va. 196, 16 S. E. 730 [1892].

¹⁴ See Chapter XIII.

¹⁵ Constitution of Ohio, Article I., § 19.

¹⁶ *City of Cleveland v. Wick*, 18 O. S. 303 [1868]. In this case the court said, on page 310, with reference to the constitutional provision above quoted: "It simply guarantees to the owner of the land condemned a full price. When that is paid he stands on a perfect equality with all other owners of adjoining lands, equally liable, as he ought to be, to be taxed on his other land with them. He has the full price of his land in his pocket and is an equal participant with them in benefits to adjoining lands. To throw the whole burden

upon the others in such a case would be to do them the precise injustice which was done to him under the old constitution. To do so would be to avoid one evil only to run into another. It would be to avoid the evil of withholding from him a full and fair price for his lands only to run into the equivalent evil of paying him two prices for it, the second price being at the expense of his neighbors."

¹⁷ *Caldwell v. Village of Carthage*, 49 O. S. 334, 31 N. E. 602 [1892]; *Raymond v. Cleveland*, 42 O. S. 522 [1885]; *Village of Norwood v. Ogden*, 18 Ohio C. C. 869, 15 Ohio C. C. 539, 8 Ohio C. D. 383 [1898]; *Dixon v. City of Cincinnati*, 11 Ohio C. C. 629 [1894]. The unreported case of *Henkel v. City of Cincinnati*, 58 O. S. 726, 51 N. E. 1098, was disposed of on the authority of *City of Cleveland v. Wick*, 18 O. S. 303 [1868].

reasons the assessment in question was held to be involved.¹⁸ In a subsequent case¹⁹ a similar assessment was held invalid, but on the ground that the statute authorizing the assessment was not complied with in levying the assessment. In this case the statute required the amount to be assessed to be apportioned according to benefits. The court, after discussing the constitutional principles applicable, held that these principles were carried into the statute,²⁰ but that the assessment was not limited to the amount of special benefits, nor was it apportioned to the property according to special benefits; nor did it purport to be so apportioned. The Circuit Court held in a case presenting some facts like those in *Chamberlain v. City of Cleveland*,²¹ that an assessment by which the value of the land taken and the costs and expenses of the condemnation suit were assessed back on the abutting property without any attempt to ascertain the amount of benefit, or whether the benefits exceeded the total amount thus assessed, and without any attempt to apportion the amount of the assessment according to the benefits received by each piece of property benefited, was invalid.²² The authority of *City of Cleveland v. Wick*,²³ was recognized, though the case at bar was distinguished therefrom. *Norwood v. Baker*,²⁴ was a case arising from an assessment on abutting property owners to pay for the cost of condemning land for a street and the amount paid for such realty. An abutting property owner, through whose tract of land such street had been opened, resisted the assessment. The court disclaimed any intention of ignoring the doctrine of *city of Cleveland v. Wick*,²⁵ but held that the assessment in this case ignored special benefits, both in total amount and in apportionment, and that it was therefore a case of deprivation of private property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. The general principle actually involved in this case was, therefore, consistent with that of *Chamberlain v. City of Cleveland*.²⁶ The doctrine, as laid down by the Supreme Court

¹⁸ *Spangler v. City of Cleveland*, 35 O. S. 469 [1880].

¹⁹ *Chamberlain v. City of Cleveland*, 34 O. S. 551 [1878].

²⁰ See opinion of court p. 564.

²¹ 34 O. S. 551 [1878].

²² *Rhoades v. City of Toledo*, 6 Ohio C. C. 9 [1890].

²³ 18 O. S. 303 [1868].

²⁴ 172 U. S. 269, 43 L. 443, 19 S. 187 [1898]; affirming 74 Fed. 997 [1896].

²⁵ See opinion page 288 *et seq.* of *Norwood v. Baker*, 172 U. S. 269, 43 L. 443; 19 S. 187 [1898].

²⁶ 34 O. S. 551 [1878].

of the United States in *Norwood v. Baker*,²⁷ was followed by the Circuit Court of Ohio;²⁸ and it was there held that it was in violation both of the state constitution and of the Federal Constitution to assess upon the abutting land owners the cost of their land taken for widening a street, without any reference to any special benefit which they might sustain. Subsequently the whole question was reconsidered by the Supreme Court of Ohio.²⁹ In this case a right of way for a street some twenty or thirty feet over railway tracks was appropriated by eminent domain, and the railway company was awarded one dollar as damages. Thereafter an assessment was made to re-imburse the city for the amount paid for such street, and the railway company as an abutting property owner was assessed in the sum of over five hundred dollars. The court agreed that such assessment could not be upheld. The majority of the court concurred in an opinion expressly overruling *City of Cleveland v. Wick*,³⁰ and held that "compensation paid to a land-owner for lands taken by appropriation proceedings to open a street cannot be assessed back upon the lands of the owner remaining after such taking. Neither can the costs and expenses incurred in such proceeding be so assessed."³¹ Minshall, J., concurred in the reversal, but solely on the ground that it was "physically impossible for the property of the railway company to be benefited by the construction of the overhead bridge as property 'abutting' on the improvement."³² The question still remained whether an assessment to pay for land appropriated for a street by proceedings in eminent domain could be levied on land belonging to abutting property owners whose lands had not been appropriated for such street. The dilemma suggested by the court in *City of Cleveland v. Wick*,³³ was apparent. If it was impossible to assess those whose lands had been taken and paid for, it was clearly unfair to assess other owners whose lands were not taken. When

²⁷ 172 U. S. 269, 43 L. 443, 19 S. 187 [1898]; affirming 74 Fed. 997 [1896].

²⁸ *Dodsworth v. City of Cincinnati*, 18 Ohio C. C. 288, 10 Ohio C. D. 177 [1899].

²⁹ *Cincinnati, Lebanon and Northern Ry. Co. v. City of Cincinnati*, 62 O. S. 465, 49 L. R. A. 566, 57 N. E. 229 [1900].

³⁰ 18 O. S. 303 [1868].

³¹ *Cincinnati, Lebanon and Northern Ry. Co. v. City of Cincinnati*, 62 O. S. 465, 49 L. R. A. 566, 57 N. E. 229 [1900], second syllabus.

³² *Cincinnati, Lebanon and Northern Ry.*, *supra*, p. 485.

³³ See *ante*, note 16.

the question was presented, it was accordingly held that no local assessment could be authorized by the legislature to pay for land taken in opening a street, even upon owners of property no part of which was taken for such street.³⁴ This doctrine was expressly limited to assessments to pay for the land taken for the street and the expenses of the proceedings in eminent domain; and it was stated that it did not apply to improvements of other character.

§ 309. Widening a street.

Widening a street is an improvement which confers an additional benefit upon the public and also upon the abutting property owners. It is therefore an improvement for which the legislature may authorize a local assessment to be levied, in the absence of specific constitutional restrictions, according to the great weight of authority.¹ Thus where the constitution spe-

³⁴ *City of Dayton v. Bauman*, 66 O. S. 379, 64 N. E. 433 [1902]; see to the same effect *Carlisle v. City of Cincinnati*, 29 Ohio C. C. 81 [1906].

¹ *Lent v. Tillson*, 140 U. S. 316, 35 L. 419, 11 S. 825 [1891]; (affirming *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]); *Brooks v. City of San Luis Obispo*, 109 Cal. 50, 41 Pac. 791 [1895]; *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]; *Bucknell v. Story*, 46 Cal. 589, 13 Am. Rep. 220 [1873]; *Reese's Appeal in the Matter of Widening Kearney Street*, 32 Cal. 568 [1867]; *Piper's Appeal in the Matter of Widening Kearney Street*, 32 Cal. 530 [1867]; *Appeal of North Beach and Mission R. R. Co. in the Matter of Widening Kearney Street*, 32 Cal. 500 [1867]; *South Chicago City Railway Company v. City of Chicago*, 196 Ill. 490, 63 N. E. 1046 [1902]; *Chicago City Railway Co. v. City of Chicago*, 90 Ill. 573, 32 Am. Rep. 54 [1878]; *Bigelow v. City of Chicago*, 90 Ill. 49 [1878]; *Parmalee v. City of Chicago*, 60 Ill. 267 (1871); *Hays v. City of Vincennes*, 82 Ind. 178 [1882]; *Blanchet v. Municipality No. Two*, 13 La. 322 [1839]; *Friedenwald v. Mayor and City Council of*

Baltimore, 74 Md. 116, 21 Atl. 555 [1891]; *Central Savings Bank of Baltimore v. Mayor and City Council of Baltimore*, 71 Md. 515, 18 Atl. 809, 20 Atl. 283 [1889]; *New England Hospital for Women and Children v. Street Commissioners of the City of Boston*, 188 Mass. 88, 74 N. E. 294 [1905]; *Sears v. Street Commissioners of the City of Boston*, 180 Mass. 274, 62 L. R. A. 144, 62 N. E. 397 [1902]; *Masonic Building Association v. Bromwell*, 164 Mass. 306, 41 N. E. 306 [1895]; *Abbott v. Inhabitants of Cottage City*, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325 [1887]; *Blackie v. Hudson*, 117 Mass. 181 [1875]; *Bancroft v. City of Boston*, 115 Mass. 377 [1874]; *Prince v. City of Boston*, 111 Mass. 226 [1872]; *Crandell v. City of Taunton*, 110 Mass. 421 [1872]; *Dorgan v. City of Boston*, 12 All. (94 Mass.) 223 [1866]; *Cook v. Slocum*, 27 Minn. 509, 8 N. W. 755 [1881]; *City of St. Louis v. Excelsior Brewing Company*, 96 Mo. 677, 10 S. W. 477 [1888]; *City of St. Louis v. Ranken*, 95 Mo. 189, 8 S. W. 249 [1888]; *Mayor, etc., of City of Lexington v. Long*, 31 Mo. 369 [1861]; *State, Boice, Pros. v.*

cifically authorizes local assessments to pay for local improvements, widening and straightening a street is held to be a local improvement.² The cost of the land thus taken to widen such street is a proper item for assessment.³ Where benefits are set off against damages sustained by taking private property for public use, benefits received by widening a public street may be set off against damages sustained by the persons part of whose land is taken.⁴ If the owner of realty holds under a deed in which is a provision restricting the grantee from building within twenty feet of the traveled part of the street, the condemnation of a strip twenty feet wide along the length of a street for the purpose of beautifying it was held to confer a benefit upon the

City of Plainfield, 41 N. J. L. (12 Vr.) 138 [1879]; State, Boice, Pros. v. Inhabitants of the City of Plainfield, 38 N. J. L. (9 Vr.) 95 [1875]; Genet v. City of Brooklyn, 99 N. Y. 296, 1 N. E. 777 [1885]; In the Matter of the Application of Woolsey, 95 N. Y. 135 [1884]; Sage v. City of Brooklyn, 89 N. Y. 189 [1882]; In the Matter of the Confirmation of the Report of the Commissioners of Assessment for Grading, Paving and Otherwise Improving Sackett, Douglas and DeGraw Streets in the City of Brooklyn, 74 N. Y. 95 [1878]; People ex rel. Kilmer v. McDonald, 69 N. Y. 362 [1877]; Astor v. Mayor, Aldermen and Commonalty of City of New York, 62 N. Y. 580 [1875]; In the Matter of the Petition of Ward to Vacate Certain Assessments, 52 N. Y. 395 [1873]; People of the State of New York ex rel. Gage v. Lohnas, 54 Hun. 604, 8 N. Y. Supp. 104 [1889]; Mayer v. Mayor, Aldermen and Commonalty of the City of New York, 28 Hun. 587 [1883]; *In re* City of New York, 94 N. Y. S. 146 [1905]; Cincinnati v. Batsche, 52 O. S. 324, 27 L. R. A. 536, 40 N. E. 21 [1895]; Coates v. Village of Norwood, 16 Ohio C. C. 196 [1898]; Dixon v. City of Cincinnati, 11 Ohio C. C. 629 [1894]; Huntington v. City of Cincinnati, 2 Ohio N.

P. 35 [1895]; Wilmington Avenue, 213 Pa. St. 238, 62 Atl. 848 [1906]; In the Matter of Pike Street, Seattle, 42 Wash. 551, 85 Pac. 45 [1906].

² Cook v. Slocum, 27 Minn. 509, 8 N. W. 755 [1881].

³ Whiting v. Mayor and Aldermen of the City of Boston, 106 Mass. 89 [1870]; Hendrickson v. Borough of Point Pleasant, 65 N. J. L. (36 Vr.) 535, 47 Atl. 465 [1900]; Cincinnati v. Batsche, 52 O. S. 324, 27 L. R. A. 536, 40 N. E. 21 [1895]; Coates v. Village of Norwood, 16 Ohio C. C. 196 [1898]. In Ohio the present rule as to the validity of assessments to pay for appropriating land for use as a street (see § 308) would probably be inconsistent with the rule laid down in City of Cincinnati v. Batsche, 52 O. S. 324, 27 L. R. A. 536, 40 N. E. 21 [1895], and this case must, therefore, be regarded as overruled. In Dodsworth v. City of Cincinnati, 18 Ohio C. C. 288 [1899], an assessment upon abutting property without reference to special benefits, to pay the cost of land taken to widen a street was held to be in violation of both state and United States constitutions.

⁴ Abbott v. Inhabitants of Cottage City, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325 [1887].

owner of such realty.⁵ In jurisdictions in which local assessments cannot be levied for street improvements in general, assessments cannot be levied for the purpose of widening a street.⁶ The propriety of an assessment for the purpose of widening a street is upheld in cases in which because of the method of apportioning benefits or levying the assessment the specific assessment is held to be invalid.⁷

§ 310. Extension of street.

The further extension of a street already laid out is such an improvement that as in the case of the construction of a street *de novo*, a local assessment may be levied to pay for such improvement.¹ This includes assessments to pay for the cost of the land taken,² as well as for the expenses of the surface improvement.³

⁵ *In re City of New York*, 106 App. Div. 31, 94 N. Y. Sup. 146 [1905]; affirmed *In re Clinton Avenue in City of New York*, 185 N. Y. 601, 78 N. E. 1101, 106 App. Div. 31 [1906].

⁶ *State ex rel. Horlbeck v. City Council of Charleston*, 12 Rich. (S. C.) 702 [1860]. See § 118, § 302. In Virginia, before the present constitution, an assessment by the front foot for land taken for opening a street was held to violate a constitutional provision to the effect that taxation must be uniform in proportion to value. *City of Norfolk v. Chamberlain*, 89 Va. 196, 16 S. E. 730 [1892]. Under the present constitution of Virginia, street improvement assessments cannot be levied. See § 303.

⁷ *Berdel v. City of Chicago*, 217 Ill. 429, 75 N. E. 386 [1905]; *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104 [1891].

¹ *Wight v. Davidson*, 181 U. S. 371, 45 L. 900, 21 S. 616 [1901]; (reversing *Davidson v. Wright*, 16 App. D. C. 371 [1900]); *Cohen v. City of Alameda*, 124 Cal. 504, 57 Pac. 377 [1899]; *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150 [1899]; *Pearson v. City of Chicago*, 162 Ill. 383, 44 N. E. 739 [1896]; *City of Chicago v. Ward*, 36 Ill. 9 [1864]; *Central Savings Bank of*

Baltimore v. Mayor and City Council of Baltimore, 71 Md. 515, 18 Atl. 809, 20 Atl. 283 [1889]; *New England Hospital for Women and Children v. Street Commissioners of the City of Boston*, 188 Mass. 88, 74 N. E. 294 [1905] *Vrana v. City of St. Louis*, 164 Mo. 146, 64 S. W. 180 [1901]; *Matter of the Extension of Church Street from Fulton Street to Morris Street, in the City of New York*, 49 Barb. (N. Y.) 455 [1867].

² *Wilkinson v. District of Columbia*, 22 App. D. C. 289 [1903] *Meissner v. City of Toledo*, 31 O. S. 387 [1877]; *Extension of Hancock Street*, 18 Pa. St. (6 Harr.) 26 [1851]. In Ohio the doctrine laid down in recent cases (see § 308) is undoubtedly in conflict with the case of *Meissner v. Toledo*, 31 O. S. 387, in which it was held that an assessment could be levied for land taken to extend a street, and this case must, therefore, be regarded as overruled. In *Rhodes v. City of Toledo*, 6 Ohio C. C. 9 [1890], an assessment for land taken for the extension of a street was held to be invalid because it was arbitrarily assessed upon the abutting land owners without any regard to the special benefits to them.

³ See cases cited, *ante*, note 1.

§ 311. Appropriation of land in which public has easement.

An attempt is occasionally made to levy an assessment for the purpose of acquiring an easement for a public use in land which already belongs to the public, or in which the public already has an easement of such a character that it may use such land for the same purpose as that for which it is now seeking to acquire it. It is evident in such a case that neither the public nor the adjacent property acquires any benefit as a result of such proceeding, since the right to devote the property in question to such public use already existed. Accordingly unless the property owner is in some way precluded from showing the true state of facts, no local assessment can be levied for such purpose.¹ Thus where land between the line of the levee and the stream was by law devoted to the public use for general purposes, no assessment can be levied for acquiring the right to open a street on such land; but if the levee has been advanced by public authority so as to include such land, and the public use has thus been extinguished, an assessment may be levied for opening a street on such land.² If land has been dedicated to a public use, other than that of a street, or if it has been appropriated therefor by proceedings in eminent domain, and in either case a street is subsequently constructed on such land, abutting property owners who are assessed therefor, cannot resist payment of such assessment, on the ground that the municipal corporation has not acquired the right to use such land as a street; since the original owners of such land may recover damages for such change in use, but cannot recover the land itself and exclude either the public or the abutting property owners from its use as a street.³ Thus land was granted to the state for canal purposes. Subsequently, the state granted to the city the right to construct a street upon part of such land, on condition that the plan of the improvement was first approved by the board of public works. Subsequently the board of public works approved the general features of the improvement, but did not pass upon the details of the plan in so far as they affected the interests of the lessees of the water power of such canal. It was held, that the abutting

¹ *Rusk v. Berlin*, 173 Ill. 634, 50 N. E. 1071 [1898]: Municipality Number Two for the opening of Roffignac Street, 7 La. Ann. 76 [1852].

² Municipality Number Two for the opening of Roffignac Street, 7 La. Ann. 76 [1852].

³ *Richards v. City of Cincinnati*, 31 O. S. 506 [1877].

property owners could not resist an assessment for the improvement of such street, either on the ground that the public had not acquired the right to make use of such property for a street, nor upon the ground that the board of public works had not approved the details of such plan.⁴) However, if it is desired to extinguish any right of the owner of the realty in which the city has an easement, the cost of the extinguishment of such right is a proper charge for assessment.⁵ A statute which provides that land owned by a city for purposes other than a street or an alley may be condemned for a public street or alley, and which provides for assessing the cost of the land so taken as if the city were the private owner of property so taken, is valid.⁶ If the objection that the land sought to be condemned for a street is already subject to a public easement is not made until after a judgment of confirmation of the assessment has been entered, such objection is barred by such judgment, and cannot be made in the supplemental proceeding to levy an assessment.⁷ Neither can such objection be made at confirmation.⁸ If the court in which proceedings to appropriate the land for public use was had, has decided that such land is private property and proceeds to condemn it for a public use, such judgment is conclusive if the court has jurisdiction, and cannot be attacked collaterally.⁹ If the court goes into the question of the public easement prior to condemnation and the evidence shows that such land had not been previously dedicated, it is proper for the court finally to refuse to submit the question to a jury.¹⁰

§ 312. Abandonment of easement.

Whether the abandonment of an easement in a pre-existing street or road confers a special benefit for which a local assess-

⁴ Richards v. City of Cincinnati, 31 O. S. 506 [1877].

⁵ Page v. Mayor and City Council of Baltimore, 34 Md. 558 [1871].

⁶ State ex rel. Gotzian v. District Court of Ramsey County, 77 Minn. 248, 79 N. W. 971 [1899].

⁷ South Chicago City Railway Company v. City of Chicago, 196 Ill. 490, 63 N. E. 1046 [1902].

⁸ Gage v. City of Chicago, 146 Ill. 499, 34 N. E. 1034 [1893].

⁹ South Chicago City Railway Company v. Chicago, 196 Ill. 490, 63 N.

E. 1046 [1902]; Gage v. People ex rel. Kochersperger, 163 Ill. 39, 44 N. E. 819 [1896]; Newman v. City of Chicago, 153 Ill. 469, 38 N. E. 1053 [1894]; Gage v. City of Chicago, 146 Ill. 499, 34 N. E. 1034 [1893]; 146 Ill. 499, 34 N. E. 1034 [1893]; Buddecke v. Ziegenheim, 122 Mo. 239, 26 S. W. 696 [1894]; Michael v. City of St. Louis, 112 Mo. 610; 20 S. W. 666 [1892].

¹⁰ Gage v. City of Chicago, 146 Ill. 499, 34 N. E. 1034 [1893].

ment may be levied is a question upon which there is some conflict of opinion.¹ A railroad had the right to use steam power within the city limits and to use a tunnel, which had made it necessary to raise the grade of the street. Subsequently the railroad agreed to give up the right to use steam power within the city limits and to substitute horse power therefor; while the tunnel was to be closed and the street restored to its original grade. It was held that this was an improvement of a public nature and at the same time conferring a local benefit, so that a local assessment might be levied therefor upon the property benefited thereby.² If a public sewer is so constructed as to free certain land from the maintenance of an ancient sewer for the convenience of adjoining estates, the release of such easement is a benefit which may be set off against the damages caused by the construction of such sewer.³

§ 313. Grading.

Grading is in ordinary cases essential to the improvement of a street, and indispensable to its use as a thoroughfare and means of travel. Accordingly it is an improvement of such a type that local assessments may be levied therefor.¹ An assessment may

¹ See § 320.

² *People ex rel. Crowell v. Lawrence*, 36 Barb. (N. Y.) 178 [1862].

³ *French v. City of Lowell*, 117 Mass. 363 [1875].

¹ *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020 [1904]; *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986 [1895]; *Smith v. Hazard*, 110 Cal. 145, 42 Pac. 465 [1895]; *Warren v. Riddell*, 106 Cal. 352, 39 Pac. 781 [1895]; *Spaulding v. North San Francisco Homestead and Railroad Association*, 87 Cal. 40, 24 Pac. 600, 25 Pac. 249 [1890]; *Spaulding v. Wesson*, 84 Cal. 141, 24 Pac. 377 [1890]; *Fanning v. Bohme*, 76 Cal. 149, 18 Pac. 158 [1888]; *Dyer v. North*, 44 Cal. 157 [1872]; *Hewes v. Reis*, 40 Cal. 255 [1870]; *Emery v. San Francisco Gas Co.*, 28 Cal. 346 [1865]; *Gross v. People ex rel. Kochersperger*, 172 Ill. 571, 50 N. E. 334 [1898]; *Shirk v. Hupp*, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490

[1906]; *Casey v. City of Leavenworth*, 17 Kan. 189 [1876]; *Gallaher v. City of Jefferson*, 123 Ia. 324, 101 N. W. 124 [1904]; *Morton v. Sullivan*, — Ky. —, 96 S. W. 807 [1906]; *State of Minnesota ex rel. Chapin v. District Court of Ramsey County*, 40 Minn. 5, 41 N. W. 235 [1889]; *State of Minnesota ex rel. Cunningham v. Board of Public Works of the City of St. Paul*, 27 Minn. 442, 8 N. W. 161 [1881]; *Stinson v. Smith*, 8 Minn. 366 [1863]; *Nash v. City of St. Paul*, 8 Minn. 172 [1863]; *McComb v. Bell*, 2 Minn. 295 [1858]; *City of Omaha v. Schaller*, 26 Neb. 522, 42 N. W. 721 [1889]; *State, Pardee Works, Pros. v. City of Perth Amboy*, 59 N. J. L. (30 Vr.) 335, 36 Atl. 666 [1896]; *Davis v. City of Newark*, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891]; *Village of Passaic v. State, Delaware, Lackawanna and Western Railroad Company, Pros.*, 37 N. J. L. (8 Vr.)

include grubbing as a necessary part of grading, in preparing the surface of the street for further improvement.² If the location of a suitable grade for the street makes it necessary to fill so as to raise the grade from the natural elevation of the soil to that established by proper authority, the expense of such filling may be one of the items of the assessment, according to the weight of authority.³ If compensation for damages caused by the change of grade of a public street can be recovered by owners of property injured by such change, it is held that a local assessment to pay for such compensation in damages may be levied upon the land especially benefited by such street.⁴ Where special benefits are to be set off against damages sustained by adjoining and abutting property owners by reason of a street improvement, benefits arising out of the change of grade may be

538 [1875]; *State, Graham, Pros. v. Mayor, etc., of Paterson*, 37 N. J. L. (8 Vr.) 380 [1875]; *State, Gregory, Pros. v. Mayor and Aldermen of Jersey City*, 34 N. J. L. (5 Vr.) 390 [1871]; *State, Mann, Pros. v. Mayor and Common Council of Jersey City*, 24 N. J. L. (4 Zab.) 662 [1855]; *Buffalo Cemetery Association v. City of Buffalo*, 118 N. Y. 61, 22 N. E. 962 [1889]; *In the Matter of the Petition of Deering to Vacate an Assessment*, 93 N. Y. 361 [1883]; *In the Matter of the Petition of Upson to Vacate an Assessment*, 89 N. Y. 67 [1882]; *Matter of Appeal of Gardner from the Assessment for Grading of Scovell Street in the City of Lockport, and from the order confirming the same*, 41 How. (N. Y.) 255 [1871]; *Creighton v. Scott*, 14 O. S. 438 [1863]; *Butler v. City of Toledo*, 5 O. S. 225 [1855]; *Jessing v. City of Columbus*, 1 Ohio C. C. 90 [1885]; (affirmed 22 W. L. B. 453); *Davis v. Silvertown*, 47 Or. 171, 82 Pac. 16 [1905]; *McKeesport Borough, to Use of McKeesport City v. Busch*, 166 Pa. St. 46, 31 Atl. 49 [1895]; *Scranton City v. Bush*, 160 Pa. St. 499, 28 Atl. 926 [1894]; *Mason v. City of Sioux Falls*, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770 [1892]; *State v. Moss*, 44

Wash. 91, 86 Pac. 1129 [1906]; *Green v. Tidball*, 26 Wash. 338, 55 L. R. A. 879, 67 Pac. 84 [1901]; *Findley v. Hull*, 13 Wash. 236, 43 Pac. 28 [1895]; *Town of Elma v. Carney*, 9 Wash. 466, 37 Pac. 707 [1894]; *City of Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26 [1894]; *Town of Elma v. Carney*, 4 Wash. 318, 30 Pac. 732 [1892]; *McNair v. Ostrander*, 1 Wash. 110, 23 Pac. 414 [1890].

²*City of Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26 [1894].

³*Levy v. City of Chicago*, 113 Ill. 650 [1886]; *Cram v. City of Chicago*, 139 Ill. 265, 28 N. E. 758 [1893]; *State, Mann, Pros. v. Mayor and Common Council of Jersey City*, 24 N. J. L. (4 Zab.) 662 [1855].

⁴*Rogge v. City of Elizabeth*, 64 N. J. L. (35 Vr.) 491, 46 Atl. 164 [1900]; *Clark v. City of Elizabeth*, 61 N. J. L. (32 Vr.) 565, 40 Atl. 616, 737 [1898]; *State, Stewart, Pros. v. Mayor and Common Council of the City of Hoboken*, 57 N. J. L. (28 Vr.) 330, 31 Atl. 278 [1894]; *Davis v. City of Newark*, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891]; *State, Aldridge, Pros. v. Essex Public Road Board*, 46 N. J. L. (17 Vr.) 126 [1884]; *Wray v. Mayor, etc., of Pittsburg for use, etc.*, 46 Pa. St. 365 [1863].

set off against damages caused thereby.⁵ It has been held that the cost of grading may be assessed upon abutting lot owners, and that the amount thus payable may be recovered by the lot owner from the city as part of the damages sustained by him if a previously established grade has been changed.⁶ This seems to be inconsistent with the general theory of assessments, which regards the assessment as an equivalent for the benefits conferred upon the property by the improvement for which the assessment is levied;⁷ and which, therefore, declines to recognize liability to an assessment for benefits as an element of damage.⁸ In some of the cases which recognize this doctrine, the particular assessment has been held invalid because of failure to comply with the statute authorizing the assessment. Thus in Missouri a local assessment can be levied for grading only when the city council declares by ordinance that the revenues of the city are not sufficient to justify paying the cost of bringing a street to the established grade out of the public treasury. Under such statute an assessment for grading is invalid unless such declaration has been made;⁹ but in the cases so holding the propriety of an assessment for such purpose is recognized. The propriety of levying an assessment for grading has been recognized where the statute did not authorize such assessment.¹⁰ On the other hand, where the statute has been held not to authorize local assessment to pay for damages caused by a change of grade, the justice of such assessments has been severely criticized, in terms which really question the constitutionality of such assessments.¹¹ "It would be highly absurd," said the Supreme Court of Nebraska, "to denominate the mere formality of handing a sum of money to a lot owner as damages and at once recovering it from him by

⁵ *City of Seattle v. Board of Home Missions of Methodist Protestant Church*, 138 Fed. 307, 70 C. C. A. 597 [1905]; *Cook v. City of Ansonia*, 66 Conn. 413, 34 Atl. 183 [1895]; *Davis v. Mayor and Common Council of the City of Newark*, 54 N. J. L. (25 Vr.) 595, 25 Atl. 336 [1892].

⁶ *Stowell v. Milwaukee*, 31 Wis. 523 [1872].

⁷ See § 11.

⁸ See Chapter XIII.

⁹ *Field v. Barber Asphalt Paving Co.*, 117 Fed. 925 [1902]; *Wheeler*

v. City of Poplar Bluff, 149 Mo. 36, 49 S. W. 1088 [1898]; *City of Sedalia to the Use of Taylor v. Abell*, 103 Mo. App. 431, 76 S. W. 497 [1903]; *City of Carthage ex rel. Carthage National Bank v. Badgley*, 73 Mo. App. 123 [1897].

¹⁰ *Little Rock v. Fitzgerald*, 59 Ark. 494, 28 L. R. A. 496, 28 S. W. 32 [1894]; *Keys v. City of Neodesha*, 64 Kan. 681, 68 Pac. 625 [1902].

¹¹ *Goodrich v. City of Omaha*, 10 Neb. 98, 4 N. W. 424 [1880].

means of a special assessment upon his damaged property, a payment."¹² Under the recent decisions in Ohio as to the power to levy local assessments for the cost of condemning land for use as a street, and for the amount of damages awarded to the abutting owners for injury to their land not taken for such street, it is held that an assessment cannot be levied to pay for the damages awarded to abutting property owners by reason of a change of the previously established grade of a street.¹³ If the grade of a street is established in order to bring the street under the grade of a railway which crosses it, and an extensive excavation is necessary for that purpose, the additional cost of such excavation cannot be imposed upon the abutting property owners.¹⁴

§ 314. Paving.

Paving a street which has already been acquired for the use of the public is an improvement for which local assessments may be levied,¹ since it facilitates public travel upon such street, makes it easier, pleasanter and more economical, and gives better access to the adjoining and abutting property, and accordingly

¹² *Goodrich v. City of Omaha*, 10 Neb. 98, 4 N. W. 424 [1880].

¹³ *McGlynn v. City of Toledo*, 22 Ohio C. C. 34, 12 Ohio C. D. 15 [1901]; affirmed without report in *Toledo v. McGlynn*, 67 O. S. 498, 67 N. E. 1103.

¹⁴ *Louisville Steam Forge Co. v. Mehler*, 112 Ky. 438, 64 S. W. 396, 652, 23 Ky. L. R. 1335 [1901]. This expense is said to be "within the purview of the statute."

¹ *Chadwick v. Kelly*, 187 U. S. 540, 47 L. 293, 23 S. 175 [1903]; (affirming *Kelly v. Chadwick*, 104 La. 719, 29 So. 295 [1901]); *Cass Farm Co. v. Detroit*, 181 U. S. 396, 45 L. 914, 21 S. 644, 645 [1901]; (affirming *Cass Farm Co. v. City of Detroit*, 124 Mich. 433, 88 N. W. 108 [1900]); *French v. Barber Asphalt Co.*, 181 U. S. 324, 45 L. 879, 21 S. 625 [1901]; (affirming *Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]); *Farrell v. West Chicago Park Commissioners*, 181 U. S. 404, 45 L. 924,

21 S. 609; 645 [1901]; (affirming *Farrell v. West Chicago Park Commissioners*, 182 Ill. 250, 55 N. E. 325 [1899]); *Lombard v. West Chicago Park Commissioners*, 181 U. S. 33, 45 L. 731, 21 S. 507 [1901]; (affirming *Cummings v. West Chicago Park Commissioners*, 181 Ill. 136, 54 N. E. 941 [1899]); *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. 444, 18 S. 98 [1897]; (modifying *Armstrong v. Ogden City*, 12 Utah, 476; 43 Pac. 119 [1895]); *City of Davenport v. Allen*, 120 Fed. 172 [1903]; *Field v. Barber Asphalt Co.*, 117 Fed. 925 [1902]; *Bidwell v. Huff*, 103 Fed. 362 [1900]; *City Council of Montgomery v. Moore*, 140 Ala. 638, 37 So. 291 [1903]; *Inge v. Board of Public Works of Mobile*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678 [1902]; *Fitzgerald v. Walker*, 55 Ark. 148, 17 S. W. 702 [1891]; *Peay v. City of Little Rock*, 32 Ark. 31 [1877]; *Warren and Malley v. Russell*, 129 Cal. 381, 62 Pac. 75 [1900]; *Santa Cruz Rock Paving Co. v. Heaton*, 105

it confers both a general benefit to the public at large and a

- Cal. 162, 38 Pac. 693 [1894]; *N. P. Perine Contracting and Paving Company v. Quackenbush*, 104 Cal. 684, 38 Pac. 533 [1894]; *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904]; *Fair Haven and Westville Railroad Company v. City of New Haven*, 75 Conn. 442, 53 Atl. 960 [1903]; *Mayor and Aldermen of Savannah v. Weed*, 96 Ga. 670, 23 S. E. 900 [1895]; *Wardens, etc., of St. Mark's Church v. Mayor, etc., of Brunswick*, 78 Ga. 541, 3 S. E. 561 [1887]; *People ex rel. Price v. Bridgeman*, 218 Ill. 568, 75 N. E. 1057 [1905]; *City of Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 396 [1904]; *Chicago Union Traction Company v. City of Chicago*, 207 Ill. 544, 69 N. E. 849 [1904]; *Chicago Union Paving Company v. City of Chicago*, 202 Ill. 576, 67 N. E. 383 [1903]; *Young v. People ex rel. Raymond*, 196 Ill. 603, 63 N. E. 1075 [1902]; *McVey v. City of Danville*, 188 Ill. 428, 58 N. E. 955 [1900]; *Thompson v. City of Highland Park*, 187 Ill. 265, 58 N. E. 328 [1900]; *Cramer v. City of Charleston*, 176 Ill. 507, 52 N. E. 73 [1898]; *Galt v. City of Chicago*, 174 Ill. 605, 51 N. E. 653 [1898]; *Peyton v. Village of Morgan Park*, 172 Ill. 102, 49 N. E. 1003 [1898]; *Parker v. Village of La Grange*, 171 Ill. 344, 49 N. E. 550 [1898]; *Chicago & Northwestern Railroad Company v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437 [1897]; *Harrison Brothers v. City of Chicago*, 163 Ill. 129, 44 N. E. 395 [1896]; *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895]; *Haley v. City of Alton*, 152 Ill. 113, 38 N. E. 750 [1894]; *Chicago, Burlington & Quincy Railroad Co. v. City of Quincy*, 136 Ill. 563, 29 Am. St. Rep. 334, 27 N. E. 192 [1892]; *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]; *City of Chicago v. Baer*, 41 Ill. 306 [1866]; *Shank v. Smith*, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932 [1901]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; *Corey v. City of Ft. Dodge*, 133 Iowa 666, 111 N. W. 6 [1907]; *Owens v. City of Marion, Iowa*, 127 Ia. 469, 103 N. W. 381 [1905]; *Hackworth v. City of Ottumwa*, 114 Ia. 467, 87 N. W. 424 [1901]; *Talcott Brothers v. Noel*, 107 Ia. 470, 78 N. W. 39 [1899]; *Eagle Manufacturing Company v. City of Davenport*, 101 Ia. 493, 38 L. R. A. 480, 70 N. W. 707 [1897]; *Tuttle v. Polk & Hubble*, 92 Ia. 433, 60 N. W. 733 [1894]; *Coggeshall v. City of Des Moines*, 78 Ia. 235, 41 N. W. 617, 42 N. W. 650 [1889]; *McGrew v. City of Kansas City*, 64 Kan. 61, 67 Pac. 438 [1902]; *Moore v. City of Paola*, 63 Kan. 867, 66 Pac. 1040 [1901]; *Louisville Steam Forge Co. v. Mehler*, 112 Ky. 438, 64 S. W. 396, 652, 23 Ky. L. R. 1335 [1901]; *Gleason v. Barnett*, 106 Ky. 125, 50 S. W. 67 [1899]; *Bacas v. Adler*, 112 La. 806, 36 So. 739 [1904]; *City of Shreveport v. Prescott*, 51 La. Ann. 1895, 46 L. R. A. 193, 26 So. 664 [1899]; *Barber Asphalt Paving Company v. Watt*, 51 La. Ann. 1345, 26 So. 70 [1899]; *Rosetta Gravel Paving & Improvement Co. v. Kennedy*, 51 La. Ann. 1535, 26 So. 468; *Barber Asphalt Paving Company v. Gogreve*, 41 La. Ann. 251, 5 So. 848 [1889]; *City of New Orleans for the Use of Nicholson & Co. v. Stewart*, 18 La. Ann. 710 [1866]; *Surgi v. Snetchman*, 11 La. Ann. 387 [1856]; *Mayor and Council of Hagerstown v. Startzman*, 93 Md. 606, 49 Atl. 838 [1901]; *Gould v. Mayor and City Council of Baltimore*, 59 Md. 378 [1882]; *Dashiell v. Mayor and City Council of Baltimore*, use of Hax, 45 Md. 615 [1876]; *Clemens v. Mayor and City Council of Baltimore*, use of Volkmar, 16 Md. 208 [1860]; *Henderson v. Mayor and City Council of Baltimore*, use of Eschbach, 8 Md. 352 [1855]; *Auditor General v. Hoffman*, 132

special benefit to the adjoining and abutting property owner.

- Mich. 198, 93 N. W. 259 [1903]; Cass Farm Co. v. City of Detroit, 124 Mich. 433, 83 N. W. 108 [1900]; (affirmed 181 U. S. 396, 45 L. 914, 21 S. 644 [1901]); Goodwillie v. City of Detroit, 103 Mich. 283, 61 N. W. 526 [1894]; Lake Shore & Michigan Southern Railway Company v. City of Grand Rapids, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767 [1894]; Powers v. City of Grand Rapids, 98 Mich. 393, 57 N. W. 250 [1894]; Beniteau v. City of Detroit, 41 Mich. 116, 1 N. W. 899 [1879]; Attorney General on the Relation of Cook v. City of Detroit, 26 Mich. 263 [1872]; Brevoort v. City of Detroit, 24 Mich. 322 [1872]; Lefevre v. Mayor, etc., of Detroit, 2 Mich. 586 [1853]; Diamond v. City of Mankato, 89 Minn. 48, 61 L. R. A. 448, 93 N. W. 911 [1903]; State ex rel. Wheeler v. District Court of Ramsey County, 80 Minn. 293, 83 N. W. 183 [1900]; Barber Asphalt Paving Co. v. City of St. Joseph, 183 Mo. 451, 82 S. W. 64 [1904]; State ex rel. Barber Asphalt Paving Co. v. City of St. Louis, 183 Mo. 230, 81 S. W. 1104 [1904]; Ross v. Gates, 183 Mo. 338, 81 S. W. 1107 [1904]; Collier Estate v. Western Paving & Supply Company, 180 Mo. 362, 79 S. W. 947 [1904]; Morse v. City of West Port, 110 Mo. 502, 18 S. W. 831 [1892]; Estes v. Owen, 90 Mo. 113, 2 S. W. 133 [1886]; Morley v. Weakley, 86 Mo. 451; Neenan v. Smith, 60 Mo. 292 [1875]; Inhabitants of Town of Palmyra v. Morton, 25 Mo. 593 [1857]; State of Nebraska ex rel. City of Omaha v. Birkhauser, 37 Neb. 521, 56 N. W. 303 [1893]; Cassitt Land Co. v. Neuscheler, — N. J. —, 60 Atl. 1128 [1905]; Hayday, Pros. v. Borough of Ocean City, 69 N. J. L. (40 Vr.) 22, 54 Atl. 813 [1903]; State, Johnston, Pros. v. Inhabitants of the City of Trenton, 43 N. J. L. (14 Vr.) 166 [1881]; Voght v. City of Buffalo, 133 N. Y. 463, 31 N. E. 340 [1892]; O'Reilly v. City of Kingston, 114 N. Y. 439, 21 N. E. 1004 [1889]; People ex rel. Thompson v. Mayor, etc., of the City of Syracuse, 6 Hun. 652 [1876]; Webster v. City of Fargo, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]; (affirmed Webster v. Fargo, 181 U. S. 394, 45 L. 912, 21 S. 623, 645 [1901]); Rolph v. City of Fargo, 7 N. D. 640; 42 L. R. A. 646, 76 N. W. 242 [1898]; Shoemaker v. City of Cincinnati, 68 O. S. 603, 68 N. E. 1 [1903]; Schroder v. Overman, 61 O. S. 1, 47 L. R. A. 156, 55 N. E. 158 [1899]; Parsons v. City of Columbus, 50 O. S. 460, 34 N. E. 677 [1893]; Northern Indiana Railroad Company v. Connelly, 10 O. S. 160 [1859]; Jessing v. City of Columbus, 1 Ohio C. C. 90 [1885]; (affirmed 22 W. L. B. 453). Franklin v. Hancock, 204 Pa. St. 110, 53 Atl. 644 [1902]; City of Harrisburg v. Shepler, 190 Pa. St. 374, 42 Atl. 893 [1899]; City of Philadelphia to Use of Mack v. Gorges, 180 Pa. St. 296, 36 Atl. 868 [1897]; Fell v. Philadelphia, to the use of Cunningham, 81 Pa. St. (31 P. F. Smith) 58 [1876]; Soullier v. Kern, 69 Pa. St. (19 P. F. Smith) 16 [1871]; Spring Garden v. Wistar, 18 Pa. St. (6 Harr.) 195 [1852]; Storrie v. Houston City Street Railway Company, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898]; Adams v. Fisher, 63 Tex. 651 [1885]; McCrowell v. City of Bristol, 89 Va. 652, 20 L. R. A. 653, 16 S. E. 867 [1893]; Davis v. City of Lynchburg, 84 Va. 861, 6 S. E. 230 [1888]; Sands v. City of Richmond, 72 Va. (31 Gratt.) 571, 31 Am. Rep. 742 [1879]; Norfolk City v. Ellis, 67 Va. (26 Gratt.) 224 [1875]; Mayor and Commonalty of Alexandria v. Hunter, 16 Va. (2 Munf.) 228 [1811]; Dancor v. Town of Mannington, 50 W. Va. 322, 40 S. E. 475 [1901]; Young v. City of Tacoma, 31 Wash. 153, 71 Pac. 742 [1903]; McNair v. Ostrander, 1 Wash. 110, 23 Pac. 414 [1890]; Meg-

The statute may provide for paving a cartway² as well as a street. Even in jurisdictions in which it is held that local assessments cannot be levied for opening streets, to pay for the cost of the land taken, it is nevertheless held that such surface improvements as paving may be paid for by local assessments.³ Cases are found, however, in which the purpose of paving the street in question was not to facilitate public travel or to give to the abutting property a better access, but for some other purpose not enuring to the benefit of the abutting property. Thus a street was paved in order to prevent debris and sediment from washing down into the harbor and filling it up, thus rendering navigation impossible. It was held that such an improvement was not intended to benefit the adjoining or abutting property and that a local assessment could not be levied therefor.⁴ Local assessments for paving have also been upheld on the theory that paving was a benefit to the public and local health. Thus it has been held that if the health of the locality is endangered by the condition of the street a local assessment can be levied therefor.⁵ In this case it was further said that if the health of the whole city was endangered by the condition of the street a local assessment based on the theory of the protection of health could not be sustained.

§ 315. Curbing and guttering.

Such improvements as guttering and curbing are essential parts of a street improvement, though not always regarded as indispensable. Accordingly, under the general doctrine that a street improvement may be paid for by local assessments, both

gett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566 [1892]; Dean v. Borchsenius, 30 Wis. 236 [1872];

² Philadelphia to use v. Pemberton, 208 Pa. St. 214, 57 Atl. 516 [1904]; Philadelphia v. Pemberton, 25 Pa. Super. Ct. 323 [1904].

³ In Cincinnati, Lebanon & Northern Ry. Co. v. City of Cincinnati, 62 O. S. 465, 49 L. R. A. 566, 57 N. E. 229 [1900] see opinion of the court on pp. 481 and 482, holding that the doctrine therein stated, that the cost of taking land for a street cannot be assessed upon abutting property, has

no application to prior cases which involved the power to levy assessments for surface improvements, and that such cases are not affected by the case at bar. See also in City of Dayton v. Bauman, 66 O. S. 379, 64 N. E. 433 [1902], the opinion of the court on p. 393, recognizing the right to assess for surface improvements.

⁴ Mayor, etc., of Baltimore v. Moore, 6 H. & J. (Md.) 375 [1825].

⁵ Mayor and City Council of Baltimore v. Hughes' Adm'r., 1 G. & J. (Md.) 480, 19 Am. Dec. 243 [1829].

curbing¹ and guttering² are improvements so combining public utility and especial benefit to local property that local assessments may be levied therefor. The propriety of an assessment for such purpose is recognized in some cases in which the specific assessment is held to be invalid.³ In Colorado it was once held that a local assessment could not be levied for curbstones and gutters.⁴ This, however, was on the theory once in force there that assessments could not be levied for benefits under the taxing power, but only to secure the performance of a legal duty under the police power.⁵ Under this theory an assessment could be levied for a sidewalk as under the police power, but not under the taxing power, and curbing and guttering was regarded as part of the street and not as part of the sidewalk.⁶ This entire theory has been abandoned in Colorado;⁷ and assessments for benefits under the taxing power are held to be valid,⁸ including assessments for curbing and guttering.⁹ In South Carolina an assessment for curbing was held invalid, in part on the ground that the city had no power conferred by statute, and in part on the ground that no ordinance authorized the proceedings in question.¹⁰ Under the view now held in that state, such assessments would undoubtedly be held invalid.¹¹

¹ *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432 [1899]; *King v. Lamb*, 117 Cal. 401, 49 Pac. 561 [1897]; *Lamb v. City of Chicago*, 219 Ill. 229, 76 N. E. 343 [1906]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; *Owens v. City of Marion, Iowa*, 127 Ia. 469, 103 N. W. 381 [1905]; *Farwell v. Des Moines Brick Manufacturing Company*, 97 Ia. 286, 35 L. R. A. 63, 66 N. W. 176 [1896]; *Howe v. City of Cambridge*, 114 Mass. 388 [1874]; *Gibson v. Kayser's Executor*, 16 Mo. App. 404 [1885]; *City of Omaha v. Gsanter*, 4 Neb. Unoff. 52, 93 N. W. 407 [1903]; *In the Matter of the Petition of Burmeister to Vacate an Assessment*, 76 N. Y. 174 [1879]; *Schenley v. Commonwealth for the Use of the City of Allegheny*, 36 Pa. St. (12 Casey) 29, 78 Am. Dec. 359 [1859].

² *Lambert v. Marcuse*, 137 Cal. 44, 69 Pac. 620 [1902]; *Owens v. City of Marion, Iowa*, 127 Ia. 469, 103 N. W.

381 [1905]; *Kendig v. Knight*, 60 Ia. 29, 14 N. W. 78 [1882]; *Manley v. Emen*, 46 Kan. 655, 27 Pac. 844 [1891]; *City of Omaha v. Gsanter*, 4 Neb. Unoff. 52, 93 N. W. 407 [1903].

³ *City Street Improvement Company v. Taylor*, 138 Cal. 364, 71 Pac. 446 [1903].

⁴ *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889].

⁵ See § 152.

⁶ *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889].

⁷ *City of Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041 [1892].

⁸ See § 152.

⁹ *City of Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 50 Pac. 1041 [1892]; (overruling *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889]).

¹⁰ *Corporation of Columbia v. Hunt*, 5 Rich. (S. C.) 550 [1852].

¹¹ See § 118, § 159.

§ 316. Retaining walls.

Whether a retaining wall built in connection with a street improvement can be paid for by local assessments or not depends upon whether it confers any especial local benefit to the property assessed. If the wall is built in front of a tract of realty to furnish lateral support thereto in place of the natural soil removed by the city in grading the street, and the owner of such realty has as against the city the right to have his land supported laterally an assessment cannot be levied upon such realty for the cost of constructing such retaining wall.¹ So where a street was divided longitudinally by a retaining wall for one hundred thirty feet and the two halves of the street were graded at different grades in order to give access to private property not adjoining or abutting upon such street it was held that local assessments could not be levied upon the abutting property to pay the cost of such retaining wall.² On the other hand it was held that the cost of a retaining wall built between a street and a canal for the purpose of supporting the bank of the canal and of keeping it from bursting and flooding the street was an item that could be included in a local assessment levied for the expense of constructing such street, on the theory that such wall was necessary for the proper protection of the street.³ If a street is built on a hillside and a retaining wall is necessary for supporting one side of the street at the established grade, the expense of constructing such wall may be included in the amount of a local assessment.⁴ It has been held that property owners who had constructed retaining walls prior to the improvement of the street are entitled to credit therefor.⁵

§ 317. Intersections.

Street intersections do not lie in front of the property of private individuals. At the same time it is not necessary that the

¹ *Armstrong v. City of St. Paul*, 30 Minn. 299, 15 N. W. 174 [1883].

² *In re Grading, Paving and Curbing Wick Street*, Appeal of the City of Pittsburg, 184 Pa. St. 93, 39 Atl. 3 [1898].

³ *Longworth v. City of Cincinnati*, 34 O. S. 101 [1877]; (One judge dissented in this case on the ground that the wall was really a part of the im-

provement of the canal, and an expense which should be borne by the city and the state.)

⁴ *Perryssville Avenue*, Marshall's Appeal, 210 Pa. St. 537, 60 Atl. 160 [1904]; *Johnson v. City of Tacoma*, 41 Wash. 51, 82 Pac. 1092 [1905].

⁵ *Johnson v. City of Tacoma*, 41 Wash. 51, 82 Pac. 1092 [1905].

improvement for which the assessment is levied should be in front of or immediately next to the realty assessed.¹ Further, street intersections form a part of the intersecting streets as they do of the street which is intersected. Nevertheless a street the intersections of which were unpaved would be less useful in many ways than an unpaved street. The improvement is an entirety and is to be used as such. Accordingly if the statute provides that the cost of intersections is to be included in the cost of the work, and an assessment therefor levied upon the property benefited by such improvement, such statute is valid if the assessment is not in excess of the benefits conferred by such improvement.² If the intersecting streets are paved with different materials, the intersections can form a continuous pavement with only one of them, and the city council may be empowered to determine which street this shall be.³ Furthermore, the city council may be empowered to determine whether the cost of intersections shall be apportioned among the owners of property abutting upon each of the intersecting streets or whether it shall be apportioned upon the owners of the property abutting upon one of such streets only, and if so, upon which.⁴ The legislature may authorize assessments for the intersections of sidewalks,⁵ while it withholds power to assess for street intersections.⁶ Intersections cannot be assessed for twice.⁷ However, two assessment ordinances for the same intersections, the second of which repeals the first, do not provide for double assessment.⁸

¹ See § 619.

² *Noonan v. People ex rel. Raymond*, 183 Ill. 52, 55 N. E. 679 [1899]; *Wolf v. City of Keokuk*, 48 Ia. 129 [1878]; *Motz v. City of Detroit*, 18 Mich. 494 [1869]; *State ex rel. Wheeler v. District Court of Ramsey County*, 80 Minn. 293, 83 N. W. 183 [1900]; *City of Sedalia v. Coleman*, 82 Mo. App. 560 [1899]; *Gibson v. Kayser's Executor*, 16 Mo. App. 404 [1885]; *In the Matter of the Petition of Murphy, to Vacate or Reduce Assessments*, 20 Hun. (N. Y.) 346 [1880]; *Creighton v. Scott*, 14 O. S. 438 [1864]; *Ridenour v. Saffin*, 1 Handy (Ohio) 464 [1855]; *King v. City of Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900].

³ *Noonan v. People ex rel. Raymond*, 183 Ill. 52, 55 N. E. 679 [1899].

⁴ *Creighton v. Scott*, 14 O. S. 438 [1864].

⁵ *Gage v. City of Chicago*, 203 Ill. 26, 67 N. E. 477 [1903]; *Gage v. City of Chicago*, 192 Ill. 586, 61 N. E. 849 [1901]; *Heman Construction Company v. McManus*, 102 Mo. App. 649, 77 S. W. 310 [1903].

⁶ *Gage v. City of Chicago*, 203 Ill. 26, 67 N. E. 477 [1903].

⁷ *Chicago Union Traction Company v. City of Chicago*, 208 Ill. 187, 70 N. E. 234 [1904].

⁸ *Noonan v. People ex rel. Raymond*, 183 Ill. 52, 55 N. E. 679 [1899].

§ 318. Crossings.

A crossing, though not in front of the property assessed, is essential to the use of the street as a whole, forming as it does a continuous improvement to be used as an entirety. Accordingly in connection with paving a street an assessment may be levied for the expense of laying crossings.¹

§ 319. Culverts.

A culvert may be constructed as a part of another improvement, such as a street or a drain. As an independent improvement, it is not a common one, but its validity has been upheld.¹ However, an ordinance requiring persons who wish to construct an irrigation ditch across a street to construct covered flumes for such purpose has been held invalid.²

§ 320. Vacation of streets.

If a municipal corporation acting under authority of law vacates an existing street, such vacation must be a benefit to the public at large or the order of vacation would not have been made.¹ If, then, an especial local benefit enures from such vacation to the adjoining property a local assessment may be levied upon the property thus benefited to pay the expenses of such vacation.²

§ 321. Alleys.

An alley confers some benefit upon the public in general, of the same general kind of benefit as a public street, though less in degree; while it confers a special and peculiar benefit upon

¹City Street Improvement Company v. Rontet, 140 Cal. 55, 73 Pac. 729 [1903]; Bates v. Twist, 138 Cal. 52, 70 Pac. 1023 [1902]; In Parker v. Peay, 76 Cal. 103, 18 Pac. 124 [1888] this was recognized as a valid purpose for levying an assessment though the assessment was invalid as levied on property not within the assessment district.

¹Shannon v. Village of Hinsdale, 180 Ill. 202, 54 N. E. 181 [1899].

²Bountiful City v. Lee, 27 Utah 183, 75 Pac. 368 [1904].

¹Property owners who are injured by such vacation are entitled to com-

pensation. Blackwell E. & S. Ry. Co. v. Gist, 18 Okl. 516, 90 Pac. 889 [1907]; In re Ruscomb Street, 33 Pa. Super. Ct. 148 [1907].

²Matter of the Mayor of New York City, 157 N. Y. 409, 52 N. E. 1126; In the Matter of the Petition of Barclay, to Vacate an Assessment, 91 N. Y. 430 [1883]; Matter of New York, 28 N. Y. App. D. 143; Vacation of Howard Street, Philadelphia, 142 Pa. St. 601, 21 Atl. 974 [1891]; In re Vacation of Center Street, 115 Pa. St. 247, 8 Atl. 56 [1886].

the abutting or adjoining property. Accordingly such an improvement is held to be one for which a local assessment may be levied upon the property especially benefited thereby.¹ An assessment may be levied for opening,² grading³ or paving⁴ an alley. The propriety of an assessment for such purposes has been recognized even where the specific assessment has been held to be invalid, as where notice was not given as required by statute before the levy was made.⁵

§ 322. Roads.

A public road in the country where the houses are far apart and the need of ready access is less felt than in a city is intended more for the benefit of the general public in affording a means of communication and transportation between one city or village and another and less for the benefit of the abutting property than is a street in a thickly settled municipal corporation. Accordingly there is greater divergence of authority as to whether the abutting owners can be assessed for any part of the cost of such improvement. In most cases such roads are paid for by taxation, and there is no doubt that such a purpose is a public one and that general taxation may be levied therefor.¹ The difficulty in justifying local assessments of this kind rests in the comparative absence of local benefit therefrom. Where provi-

¹ *Martin v. District of Columbia*, 205 U. S. 135, 27 S. 440 [1907]; (reversing 26 App. D. C. 140, 146 [1905]); *Jones v. City of Chicago*, 213 Ill. 92, 72 N. E. 798 [1904]; *Hemingway v. City of Chicago*, 60 Ill. 324 [1871]; *Holt v. Figg*, — Ky. —, 94 S. W. 34, 29 Ky. Law Rep. 613 [1906]; *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163 [1902]; *Lansing v. City of Lincoln*, 32 Neb. 457, 49 N. W. 650 [1891]; *Cincinnati v. Davis*, 58 O. S. 225, 50 N. E. 918 [1898]; *Kersten v. City of Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 1103, 948 [1900]; The term 'alley' has a definite meaning in law. *Paul v. Detroit*, 32 Mich. 108 [1875].

² *Hemingway v. City of Chicago*, 60 Ill. 324 [1871].

³ *Kersten v. City of Milwaukee*, 106

Wis. 200, 48 L. R. A. 851, 81 N. W. 1103, 948 [1900].

⁴ *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163 [1902]; *Lansing v. City of Lincoln*, 32 Neb. 457, 49 N. W. 650 [1891]; *Cincinnati v. Davis*, 58 O. S. 225, 50 N. E. 918 [1898]; *Kersten v. City of Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 1103, 948 [1900].

⁵ *Jones v. District of Columbia*, 3 App. D. C. 26 [1894].

¹ *Chicago, Indianapolis & St. Louis Short Line Co. v. People ex rel. McCormick*, 225 Ill. 519, 80 N. E. 336 [1907]; *Toledo, St. Louis and Western Railroad v. People ex rel. Brown*, 225 Ill. 425, 80 N. E. 283 [1907]; *Litchfield & Madison Railway Company v. People, ex rel. McCormick*, 225 Ill. 301, 80 N. E. 335 [1907].

sion is made for special assessments to pay the cost of such improvement the weight of authority is that in the absence of special constitutional provisions such assessments may be levied,² and as far as the application of the principle of local assessment is concerned streets and highways are of similar nature.³ Where such view prevails a local assessment to pay for land taken for use as a public highway is valid,⁴ though the statute which authorizes such assessment must, of course, be complied with sub-

²Spaulding v. Mott, 167 Ind. 58, 76 N. E. 620 [1906]; Bowlin v. Cochran, 161 Ind. 486, 69 N. E. 153; Sefton v. Board of Commissioners of Howard County, 160 Ind. 357, 66 N. E. 891 [1903]; Smyth v. State ex rel. Braun, 158 Ind. 332, 62 N. E. 449 [1901]; Goodwin v. Board of Commissioners of Warren County, 146 Ind. 164, 44 N. E. 1110 [1896]; Bowen v. Hester, 143 Ind. 511, 41 N. E. 330 [1895]; Manor v. Board of Commissioners of Jay County, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893]; Thompson v. Goldthwait, 132 Ind. 20, 31 N. E. 451 [1892]; Loesnitz v. Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890]; Hobbs v. Board of Commissioners of Tipton County, 116 Ind. 376, 19 N. E. 186 [1888]; White v. Fleming, 114 Ind. 560, 16 N. E. 487 [1887]; Board of Commissioners of Montgomery County v. Fullen, 111 Ind. 410, 12 N. E. 298 [1887]; Neptune v. Taylor, 108 Ind. 459, 8 N. E. 566 [1886]; Brown v. Eagle Creek and Little White Lick Gravel Road Company, 78 Ind. 421 [1881]; Hendricks v. Gilchrist, 76 Ind. 369 [1881]; State ex rel. Monroe Gravel Road Co. v. Stout, 61 Ind. 143 [1878]; Turpin v. Eagle Creek Gravel Road Co., 48 Ind. 45; Fall Creek and Warren Township Gravel Road Co. v. Wallace, 39 Ind. 435 [1872]; Turner v. Thorntown & Mechanicsburg Gravel Road Company, 33 Ind. 317 [1870]; State on the Relation of Lingenfelter v. Danville & North Salem Gravel Road Company, 33 Ind. 133 [1870];

Center & Warren Gravel Road Co. v. Black, 32 Ind. 468 [1870]; Law v. Madison, Smyrna & Graham Turnpike Company, 30 Ind. 77 [1868]; Williams v. Little White Lick Gravel Road Company, Wilson's Sup. Ct. (Ind.) 7 [1871]; Barrow v. Helper, 34 La. Ann. 362 [1882]; Janvriu v. Poole, 181 Mass. 463, 63 N. E. 1066 [1902]; Anderson v. Cortelyou, — N. J. —, 68 Atl. 118 [1907]; (reversing Cortelyou v. Anderson, 73 N. J. L. 427, 63 Atl. 1095 [1906]; Erisman v. Board of Chosen Freeholders of the County of Burlington, 64 N. J. L. (35 Vr.) 516, 45 Atl. 998 [1900]; State, Bergen County Savings Bank, Pros. v. Inhabitants of the Township of Union in the County of Bergen, 44 N. J. L. (15 Vr.) 599 [1882]; State, King, Pros. v. Reed, 43 N. J. L. (14 Vr.) 186 [1881]; Jones v. Town of Tonawanda, 158 N. Y. 438, 53 N. E. 280 [1899]; Rounds v. Whatcom County, 22 Wash. 106, 60 Pac. 139 [1900]; Seanor v. Board of County Commissioners, 13 Wash. 48, 42 Pac. 552 [1895]; Johnson v. City of Milwaukee, 40 Wis. 315 [1876]; Halton v. City of Milwaukee, 31 Wis. 27 [1872]; Hale v. Kenosha, 29 Wis. 599; Soens v. City of Racine, 10 Wis. 271 [1860].

³Law v. Madison, Smyrna & Graham Turnpike Company, 30 Ind. 77 [1868].

⁴City of Bridgeport v. New York & New Haven Railroad Company, 36 Conn. 255, 4 Am. Rep. 63 [1869]; Wilcox v. City of Meriden, 57 Conn. 120, 17 Atl. 366 [1889].

stantially.⁵ Special taxes for highways, levied upon small districts near such highways have been upheld,⁶ but in some jurisdictions these are regarded as general taxes levied on a taxing district of small area, and not as local assessments, because they are apportioned according to value.⁷ In other jurisdictions, however, it is held that a public road in the country is not a local improvement,⁸ and that an assessment therefor is unconstitutional.⁹ The Pennsylvania courts hold that such assessment cannot be levied.¹⁰ This holding, however, is involved with the doctrine that improvements, even though consisting of city streets, cannot be levied on rural property if apportioned by the front foot rule,¹¹ and is consistent with the theory that local assessments might be levied for the construction of county roads, if the assessment were apportioned on the basis of benefits *co nomine*.

§ 323. Sidewalks.

A sidewalk is an improvement which combines the two essential elements of general benefit to the public at large and special benefit to the abutting property owner. It is, therefore, such an improvement as might be made the subject of local assessment even in jurisdictions in which the power of local assess-

⁵ *City of St. Louis v. Koch*, 169 Mo. 587, 70 S. W. 143 [1902].

⁶ *Carlisle v. Hetherington*, 47 O. S. 235, 24 N. E. 488 [1890]; *Thompson v. Love*, 42 O. S. 61 [1884]; *Commissioners of Union County v. Greene*, 40 O. S. 318 [1883]; *State v. Commissioners*, 37 O. S. 526 [1882]; *Commissioners of Putnam County v. Young*, 36 O. S. 288 [1880]; *Craig v. Heis*, 30 O. S. 550 [1876]; *Dreake v. Beasley*, 26 O. S. 315 [1875]; *Foster v. Commissioners of Wood County*, 9 O. S. 540 [1859]; And see as recognizing the same doctrine, *Lewis v. Laylin*, 46 O. S. 663, 23 N. E. 288 [1889].

⁷ See § 38.

⁸ *Sperry v. Flygare*, 80 Minn. 325, 81 Am. St. Rep. 261, 49 L. R. A. 757, 83 N. W. 177 [1900].

⁹ *Conger v. Graham*. — Ky. —, 11 S. W. 467, 11 Ky. L. R. 12 [1889];

Conger v. Bergman. — Ky. —, 11 S. W. 84, 10 Ky. L. R. 899 [1889]; *Graham v. Conger*, 85 Ky. 582, 4 S. W. 327, 9 Ky. L. R. 133; (However, in *Malehus v. District of Highlands*, 67 Ky. (4 Bush.) 547 [1869] an assessment according to acreage for grading and paving a road in a suburban community was held to be constitutional; but the method of apportionment was the feature of this legislation which was most fiercely attacked.) *Sperry v. Flygare*, 80 Minn. 325, 81 Am. St. Rep. 261, 49 L. R. A. 757, 83 N. W. 177 [1900].

¹⁰ *City of Scranton v. Pennsylvania Coal Co.*, 105 Pa. St. 445 [1884]; *Seely v. City of Pittsburgh*, 82 Pa. St. (1 Norris) 360, 22 Am. Rep. 760 [1876]; *Washington Avenue*, 69 Pa. St. (19 P. F. Smith) 352, 8 Am. Rep. 255 [1871].

¹¹ See § 610, § 706.

ment is referred primarily to the power of taxation.¹ Furthermore, a sidewalk is one of the improvements the burden of which is traditionally cast upon the abutting property owner; and one the right to levy local assessments for which is in several jurisdictions referred to the police power.² From these considerations it follows that in the jurisdictions in which it is held that the improvement of a street may be paid for by local assessments,³ the improvement of a sidewalk may also be paid for in the same way.⁴ In South Carolina the court when deciding

¹ See § 96.

² See § 96.

³ See § 301.

⁴ *City Council of Montgomery v. Foster*, 133 Ala. 587, 32 So. 610 [1901]; *Mayor and Aldermen of Birmingham v. Klein*, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386 [1889]; (*overruling Mayor, Aldermen, etc., of Mobile v. Dargan*, 45 Ala. 316 [1871]; and *Mayor, Aldermen, etc., of Mobile v. Royal Street Railroad Company*, 45 Ala. 322 [1871]); *Winter v. City Council of Montgomery*, 83 Ala. 589, 3 So. 235 [1887]; *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373 [1888]; *Palmer v. Way*, 6 Colo. 106 [1881]; *District of Columbia v. Wormley*, 15 App. D. C. 58 [1899]; *Allman v. District of Columbia*, 3 App. D. C. 8 [1894]; *Huff v. City of Jacksonville*, 39 Fla. 1, 21 So. 776 [1897]; *Speer v. Mayor and Common Council of Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890]; *Marshall v. People ex rel. Smith*, 219 Ill. 99, 76 N. E. 70 [1905]; *Harris v. People ex rel. Knight*, 218 Ill. 439, 75 N. E. 1012 [1905]; *City of Chicago v. Wilson*, 195 Ill. 19, 57 L. R. A. 127, 62 N. E. 843 [1902]; *Ronan v. People ex rel. Shafter*, 193 Ill. 631, 61 N. E. 1042 [1901]; *Gage v. City of Chicago*, 192 Ill. 586, 61 N. E. 849 [1901]; *Job v. City of Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901]; *Hyman v. City of Chicago*, 188 Ill. 462, 59 N. E. 10 [1900]; *Walker v. Village of Morgan Park*, 175 Ill. 570, 51 N. E. 636;

Adecock v. City of Chicago, 172 Ill. 24, 49 N. E. 1008 [1898]; *People ex rel. Gleason v. Yancey*, 167 Ill. 255, 47 N. E. 521 [1897]; *Boynton v. People ex rel. Kern*, 159 Ill. 553, 42 N. E. 842 [1896]; *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; *Watson v. City of Chicago*, 115 Ill. 78, 3 N. E. 430 [1886]; *Enos v. City of Springfield*, 113 Ill. 65 [1886]; *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143 [1880]; *White v. People ex rel. City of Bloomington*, 94 Ill. 604 [1880]; *Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624 [1906]; *Town of Greendale v. Smit*, 163 Ind. 282, 71 N. E. 658 [1904]; *Dooley v. Town of Sullivan*, 112 Ind. 451, 2 Am. St. Rep. 209, 14 N. E. 566; *Taber v. Grafmiller*, 109 Ind. 206, 9 N. E. 721 [1886]; *Darnell v. Keller*, 18 Ind. App. 103, 45 N. E. 676 [1897]; *City of Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112 [1895]; *Cemausky v. Fitch*, 121 Ia. 186, 96 N. W. 754 [1903]; *Royce v. Town of Aplington*, 90 Ia. 352, 57 N. W. 868; *Risdon v. Shank*, 37 Ia. 82 [1873]; *Warren v. Henly*, 31 Ia. 31 [1870]; *Buell v. Ball*, 20 Ia. 282 [1866]; *McGrew v. Stewart*, 51 Kan. 185, 32 Pac. 896 [1893]; *Manley v. Emlen*, 46 Kan. 655, 27 Pac. 844 [1891]; *City of Lawrence v. Killiam*, 11 Kan. 499 [1873]; *Langan v. Bitzer*, — Ky. —, 82 S. W. 280, 26 Ky. L. Rep. 579 [1904]; *Dumesnil v. Louisville Artificial Stone Co.*, 109 Ky. 1, 58 S. W. 371 [1900]; *Chesapeake & Ohio*

that local assessments could not be levied for street improvements held that such assessments could nevertheless be levied for such improvement as could, like sidewalks, be referred to the

- Railway Company v. Mullins, 94 Ky. 355, 22 S. W. 558 [1893]; Hood v. Trustees of the Town of Lebanon, 15 S. W. (Ky.) 516, 12 Ky. L. R. 813 [1891]; Hydes v. Joyes, 67 Ky. (4 Bush.) 464, 96 Am. Dec. 311 [1868]; Fayssoux v. Denis, 48 La. Ann. 850, 19 So. 760 [1896]; Connell v. Hill, 30 La. Ann. 251 [1878]; Webber v. Gottschalk, 15 La. Ann. 376 [1860]; O'Leary v. Sloo, 7 La. Ann. 25 [1852]; Tournier v. Municipality No. 1, 5 La. Ann. 298 [1850]; Oakey v. Mayor, 1 La. 1 [1830]; Henderson v. Mayor and City Council of Baltimore, Use of Eschbach, 8 Md. 352 [1855]; Dickinson v. City Council of Worcester, 138 Mass. 555 [1885]; Howe v. City of Cambridge, 114 Mass. 388 [1874]; Goddard, Petitioner, 33 Mass. (16 Pick.) 504, 28 Am. Dec. 259; Lowell v. Hadley, 49 Mass. (8 Met.) 180; Woodbridge v. City of Detroit, 8 Mich. 274 [1860]; State of Minnesota v. Armstrong, 54 Minn. 457, 56 N. W. 97 [1893]; Scott County v. Hinds, 50 Minn. 204, 52 N. W. 523 [1892]; Griggs v. City of St. Paul, 11 Minn. 308 [1866]; Wilzinski v. City of Greenville, 85 Miss. 393, 37 So. 807 [1905]; Nugent v. City of Jackson, 72 Miss. 1040, 18 So. 493 [1895]; Town of Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451 [1879]; Haag v. Ward, 186 Mo. 325, 85 S. W. 391 [1904]; City of Louisiana v. Miller, 66 Mo. 467 [1877]; Weber v. Schergens, 59 Mo. 389 [1875]; City of Joplin ex rel. Carthage Dimension & Flag Stone Co. v. Hollingshead, 123 Mo. App. 602, 100 S. W. 506 [1907]; State v. Several Parcels of Land, — Neb. —, 107 N. W. 566 [1906]; State, Kirkpatrick, Pros. v. Commissioners of Streets and Sewers in the City of New Brunswick, 42 N. J. L. (13 Vr.) 510 [1880]; State, Agens. Pros. v. Mayor and Common Council of Newark, 37 N. J. L. (8 Vr.) 415, 18 Am. Rep. 729 [1874]; State, Van Lassel, Pros. v. Mayor and Aldermen of Jersey City, 37 N. J. L. (8 Vr.) 128 [1874]; State, Wilson, Pros. v. Mayor and Common Council of the City of Hudson, 32 N. J. L. (3 Vr.) 365 [1867]; In the Matter of the Petition of the Mutual Life Insurance Company of New York to Vacate an Assessment, 89 N. Y. 530 [1882]; Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 506 [1871]; City of Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178 [1893]; Wilhelm v. City of Defiance, 58 O. S. 56, 65 Am. St. Rep. 745, 40 L. R. A. 294, 50 N. E. 18 [1898]; Bonsall v. Lebanon, 19 Ohio 418; Meanor v. Goldsmith, 216 Pa. St. 489, 10 L. R. A. (N. S.) 342, 65 Atl. 1084 [1907]; Amberson Avenue, Appeal of Childs, 179 Pa. St. 634, 36 Atl. 354 [1897]; Philadelphia to use v. Meighan, 159 Pa. St. 495, 28 Atl. 304 [1894]; Whitney v. City of Pittsburgh, 147 Pa. St. 351, 30 Am. St. Rep. 740, 23 Atl. 395 [1892]; Philadelphia v. Pennsylvania Hospital, 143 Pa. St. 367, 22 Atl. 744 [1891]; Wilkinsburg Borough v. Home for Aged Women, 131 Pa. St. 109, 6 L. R. A. 531, 18 Atl. 937 [1890]; Findlay v. City of Pittsburg (Pa.) 11 Atl. 678; Deblois v. Barker, 4 R. I. 445; In the Matter of Dorrance Street, 4 R. I. 230 [1856]; Rounds v. Mumford, 2 R. I. 154 [1852]; Tripp v. City of Yankton, 10 S. D. 516, 74 N. W. 447 [1898]; Lentz v. City of Dallas, 96 Tex. 258, 72 S. W. 59 [1903]; Lufkin v. City of Galveston, 58 Tex. 545 [1883]; Highland v. City of Galveston, 54 Tex. 527 [1881]; City of Galveston v. Heard, 54 Tex. 420 [1881]; Sands v. City of Richmond, 72 Va. (31 Gratt.) 571, 31 Am. Rep. 742 [1879]; Wilson v. Town of Philippi, 39 W. Va. 75, 19 S. E. 553 [1894]; Douglass v. Town of Harrisville, 9

doctrine of the police power.⁵ At a subsequent hearing of this case the Supreme Court reversed itself in part by overruling in part the opinion just cited and holding that no local assessments could be levied for sidewalks, there being no power to subdivide a city into tax districts.⁶ In Tennessee, at a time when ordinary assessments for benefits were held invalid,⁷ assessments for sidewalks were regarded as valid as being under the police power.⁸ While the present holding of the Tennessee courts recognizes the validity of ordinary assessments for benefits,⁹ and while it is no longer necessary to invoke the police power as a basis for sidewalk assessments, the validity of such assessments would undoubtedly be recognized. In the law of assessments the construction of a sidewalk includes grading,¹⁰ or grading and laying,¹¹ or laying with any proper material, such as flagstones,¹² cement concrete,¹³ cement¹⁴ and planks or boards,¹⁵ but not a railing thereto.¹⁶ This power extends to ordering the construction of a sidewalk along a public highway¹⁷ or along the side of a turnpike¹⁸ situated within the limits of the city ordering such improvement, since the public and the abutting property owner

W. Va. 162, 27 Am. Rep. 548 [1876]; *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983 [1898]; *State ex rel. Christopher v. City of Portage*, 12 Wis. 562 [1860]; *Weeks v. City of Milwaukee*, 10 Wis. 242.

⁵ *Mauldin v. City Council of Greenville*, 42 S. C. 293, 46 Am. St. Rep. 723, 27 L. R. A. 284, 20 S. E. 842 [1893].

⁶ *Mauldin v. City Council of Greenville*, 53 S. C. 285, 69 Am. St. Rep. 855, 43 L. R. A. 101, 31 S. E. 252 [1898].

⁷ See § 160.

⁸ *Nashville v. Berry*, 2 Shan. Cas. (Tenn.) 561; *Whyte v. Mayor and Aldermen of Nashville*, 32 Tenn. (2 Swan.) 364 [1852]; *Washington v. Mayor and Aldermen of Nashville*, 31 Tenn. (1 Swan) 177 [1851]; *Mayor and Aldermen v. Maberry*, 25 Tenn. (6 Humph.) 368, 44 Am. Dec. 315 [1845].

⁹ See § 160.

¹⁰ *Lewis v. City of New Britain*, 52 Conn. 568 [1885].

The legislature may of course require the municipality to grade the street full width at the proper grade before the abutting owner can be compelled to construct his sidewalk or to pay therefor. *President and Fellows of Yale College v. New Haven*, 57 Conn. 1, 17 Atl. 139 [1889].

¹¹ *Schrum v. Town of Salem*, 13 Ind. App. 115, 39 N. E. 1050 [1895].

¹² *Peek v. Sherwood*, 56 N. Y. 615 [1874].

¹³ *Gage v. City of Chicago*, 196 Ill. 512, 63 N. E. 1031 [1902].

¹⁴ *City of Chicago v. Wilson*, 195 Ill. 19, 57 L. R. A. 127, 62 N. E. 843 [1902].

¹⁵ *Kalbrier v. Leonard*, 34 Ind. 497 [1870]; *Borough of Beltzhoover v. Maple*, 130 Pa. St. 335, 18 Atl. 650 [1889].

¹⁶ *Williams v. Brace*, 5 Conn. 190 [1824].

¹⁷ *McGrew v. Stewart*, 51 Kan. 185, 32 Pac. 896 [1893].

¹⁸ *Elmendorf v. City of Albany*, 17 Hun. (N. Y.) 81 [1879].

each have an easement in such land. A statute which requires the sidewalk to be constructed before the street is paved is valid.¹⁹ On the other hand the council may, unless restrained by statute, pave the entire width of the street, leaving no part thereof for foot passengers.²⁰ Statutes in some states requiring the repair of sidewalks to be made at the expense of the adjoining property owners are held to be valid.²¹ However, a statute requiring the abutting property owner to keep the sidewalk in front of his lot in repair under penalty of a fine, has been held to be invalid.²²

§ 324. Sewers.

A sewer is a "drain or passage to convey off water and filth underground."¹ A sewer is very clearly a public improvement, absolutely essential to the health and well-being of every thickly settled urban community. A modern city simply could not exist without a proper and adequate system of sewers. Nor is there any serious question that a sewer may confer a great benefit upon the land which is drained thereby, rendering it inhabitable under modern conditions of civilized life and thereby benefiting it over and above the general benefit received by the community by reason of better conditions of general health. For these reasons it is generally held that a statute is a valid one which

¹⁹ *Challis v. Parker*, 11 Kan. 384 [1873]; *Parker v. Challis*, 9 Kan. 155 [1872].

²⁰ *Brevoort v. City of Detroit*, 24 Mich. 322 [1872]; *contra*, *Carter v. City of Chicago*, 57 Ill. 283 [1870]. See § 296.

²¹ *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331 [1905]; *Manley v. Emlen*, 46 Kan. 655, 27 Pac. 844 [1891]; *State ex rel. City of St. Paul v. District Court Ramsey County*, 89 Minn. 292, 94 N. W. 870 [1903]; *Young v. Village of Waterville*, 39 Minn. 196, 39 N. W. 97 [1888]; *City of Pleasant Hill v. Dasher*, 120 Mo. 675, 25 S. W. 566 [1893]; *Elmendorf v. City of Albany*, 17 Hun. (N. Y.) 81 [1879]; *Borough of Beltzhoover v. Maple*, 130 Pa. St. 335, 18 Atl. 650 [1889]; *Smith v. King-ton Borough*,

120 Pa. St. 357, 14 Atl. 170 [1888]. See § 713, § 717.

²² *City of Chicago v. Crosby*, 111 Ill. 538 [1885]; The invalidity of such fine rests on two reasons (1) that non-payment even of a valid assessment cannot be punished by fines; and (2) that such statute in requiring each owner to keep in repair the sidewalk in front of his house ignores the question of benefits.

¹ *Drexel v. Town of Lake*, 127 Ill. 54, 57, 20 N. E. 38 [1890]; (quoting Webster's Dictionary. Similar definitions are given in *City of Valparaiso v. Parker*, 148 Ind. 379, 47 N. E. 330 [1897]; *Clay v. City of Grand Rapids*, 60 Mich. 451, 27 N. W. 596 [1886]; and *Fuchs v. St. Louis*, 167 Mo. 620, 57 L. R. A. 136, 67 S. W. 610.)

provides for the construction of a sewer and for assessing the expense thereof upon property which is especially benefited thereby.² The fact that the land does not receive as great a benefit

²Shumate v. Heman, 181 U. S. 402, 45 L. 922, 21 S. 645 [1901]; (affirming Heman v. Allen, 156 Mo. 534, 54 S. W. 559 [1900]); Paulsen v. Portland, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]; affirming Paulson v. City of Portland, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]); Mattingly v. District of Columbia, 97 U. S. 687, 24 L. 1098 [1878]; Minnesota & M. Land & Improvement Co. v. City of Billings, 111 Fed. 972, 50 C. C. A. 70 [1901]; Kramer v. City of Los Angeles, 147 Cal. 668, 82 Pac. 334 [1905]; Haughwout v. Hubbard, 131 Cal. 675, 63 Pac. 1078 [1901]; Fitzhugh v. Ashworth, 119 Cal. 393, 51 Pac. 635 [1897]; Harney v. Benson, 113 Cal. 314, 45 Pac. 687 [1896]; Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337 [1895]; Fletcher v. Prather, 102 Cal. 413, 36 Pac. 658 [1894]; Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266 [1892]; Boyle v. Tibbey, 82 Cal. 11, 22 Pac. 1128 [1889]; City of Highlands v. Johnson, 24 Colo. 371, 51 Pac. 1004 [1897]; City of Pueblo v. Robinson, 12 Colo. 593, 21 Pac. 899 [1889]; Wolff v. City of Denver, 20 Colo. App. 135, 77 Pac. 364 [1904]; Bassett v. City of New Haven, 76 Conn. 70, 55 Atl. 579 [1903]; Sargent & Company v. City of New Haven, 62 Conn. 510, 26 Atl. 1057 [1893]; Ferguson v. Borough of Stamford, 60 Conn. 432, 22 Atl. 782 [1891]; New York, New Haven & Hartford Railroad Company v. City of New Britain, 49 Conn. 40 [1881]; Park Ecclesiastical Society v. City of Hartford, 47 Conn. 89 [1879]; Hungerford v. City of Hartford, 39 Conn. 279 [1872]; Clapp v. City of Hartford, 35 Conn. 66 [1868]; Cone v. City of Hartford, 28 Conn. 363 [1859]; English v. Mayor and Council of Wilmington, 2 Marv. (Del.) 63, 37 Atl. 158 [1896]; Gage v. Vil-

lage of Wilmette, 230 Ill. 428, 82 N. E. 656 [1907]; Cline v. People ex rel. Barlow, 224 Ill. 360, 79 N. E. 663 [1906]; Washington Park Club v. City of Chicago, 219 Ill. 323, 76 N. E. 383 [1906]; Connecticut Mutual Life Insurance Company v. City of Chicago, 217 Ill. 352, 75 N. E. 365 [1905]; Close v. City of Chicago, 217 Ill. 216, 75 N. E. 479 [1905]; People ex rel. Merriman v. Illinois Central Railroad Company, 213 Ill. 367, 72 N. E. 1069 [1904]; Fisher v. City of Chicago, 213 Ill. 268, 72 N. E. 680 [1904]; Walker v. City of Chicago, 202 Ill. 531, 67 N. E. 369 [1903]; Smythe v. City of Chicago, 197 Ill. 311, 64 N. E. 361 [1902]; Vandersyde v. People ex rel. Raymond, 195 Ill. 200, 62 N. E. 806 [1902]; Peters v. City of Chicago, 192 Ill. 437, 61 N. E. 438; People ex rel. Raymond v. Church, 192 Ill. 302, 61 N. E. 496 [1901]; Village of Hinsdale v. Shannon, 182 Ill. 312, 55 N. E. 327 [1899]; Church v. People ex rel. Kochersperger, 179 Ill. 205, 53 N. E. 554 [1899]; Mason v. City of Chicago, 178 Ill. 499, 53 N. E. 354 [1899]; Hynes v. The City of Chicago, 175 Ill. 56, 51 N. E. 705 [1898]; Heinroth v. Kochersperger, 173 Ill. 205, 50 N. E. 171 [1898]; Walker v. People ex rel. Kochersperger, 166 Ill. 96, 46 N. E. 761 [1897]; Beach v. People ex rel. Kern, 157 Ill. 659, 41 N. E. 1117 [1895]; Barber v. City of Chicago, 152 Ill. 37, 38 N. E. 253 [1894]; Rich v. City of Chicago, 152 Ill. 18, 38 N. E. 255 [1894]; Rossiter v. City of Lake Forest, 151 Ill. 489, 38 N. E. 359 [1894]; Kelly v. City of Chicago, 148 Ill. 90, 35 N. E. 752 [1894]; Leitch v. La Grange, 138 Ill. 291, 27 N. E. 917 [1892]; City of Springfield v. Sale, 127 Ill. 359, 20 N. E. 86 [1890]; City of Springfield v. Mathus, 124 Ill. 88, 16 N. E. 92; City of

from a sewer, owing to the fact that the mains of the city water works have not been extended along the streets upon which some

Galesburg v. Searles, 114 Ill. 217, 29 N. E. 686 [1886]; Village of Hyde Park v. Borden, 94 Ill. 26 [1879]; Boyce v. Tuhey, 163 Ind. 202, 70 N. E. 531 [1904]; Gas Light & Coke Co. v. City of New Albany, 158 Ind. 268, 63 N. E. 458 [1901]; Wray v. Fry, 158 Ind. 92, 62 N. E. 1004 [1901]; Alley v. City of Lebanon, 146 Ind. 125, 44 N. E. 1003 [1896]; Kizer v. Town of Winchester, 141 Ind. 694, 40 N. E. 265 [1895]; Swain v. Fulmer, 135 Ind. 8, 34 N. E. 639 [1893]; Jackson v. Smith, 120 Ind. 520, 22 N. E. 431 [1889]; McGill v. Bruner, 65 Ind. 421 [1879]; Board of Commissioners of Allen County v. Silvers, 22 Ind. 491 [1864]; Norton v. Fisher, 33 Ind. App. 132, 71 N. E. 51 [1903]; O'Brien v. Bradley, 28 Ind. App. 487, 61 N. E. 942 [1901]; Spaulding v. Baxter, 25 Ind. App. 485, 58 N. E. 551 [1900]; Spades v. Phillips, 9 Ind. App. 487, 37 N. E. 297 [1893]; Lake Erie & Western Railroad Company v. Bowker, 9 Ind. App. 428, 36 N. E. 864 [1893]; Hardwick v. City of Independence, — Ia. —, 114 N. W. 14 [1907]; Comstock v. Eagle Grove City, 133 Iowa 589, 111 N. W. 51 [1907]; Minneapolis & St. Louis Ry. Co. v. Lindquist, 119 Ia. 144, 93 N. W. 103 [1903]; Grunewald v. City of Cedar Rapids, 118 Ia. 222, 91 N. W. 1059 [1902]; Dittoe v. City of Davenport, 74 Ia. 66, 36 N. W. 895 [1887]; Grimmell v. City of Des Moines, 57 Ia. 144, 10 N. W. 330 [1881]; City of Paola v. Russell, 75 Kan. 826, 89 Pac. 651 [1907]; City of Kansas City v. Gibson, 66 Kan. 501, 72 Pac. 222 [1903]; Gilmore v. Hentig, 33 Kan. 156, 5 Pac. 781 [1885]; Noland v. Mildenberger, — Ky. —, 97 S. W. 24 [1906]; City of Covington v. W. T. Noland, — Ky. —, 89 S. W. 216, 28 Ky. L. R. 314 [1905]; Dressman v. Simonin, 104 Ky. 693, 47 S. W. 767, 20 Ky. L. R. 868

[1898]; Holzhauer v. City of Newport, 94 Ky. 396, 22 S. W. 752 [1893]; S. D. Moody & Co. v. Spotorno, 112 La. 1008, 36 So. 836 [1904]; City of Auburn v. Paul, 84 Me. 212, 24 Atl. 817 [1892]; Taylor v. City of Haverhill, 192 Mass. 287, 78 N. E. 475 [1906]; Cheney v. City of Beverly, 188 Mass. 81, 74 N. E. 306 [1905]; Atkins v. City of Boston, 188 Mass. 77, 74 N. E. 292 [1905]; Smith v. Mayor and Aldermen of Worcester, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40 [1902]; Murphy v. Inhabitants of Clinton, 182 Mass. 198, 65 N. E. 34 [1902]; Weed v. Mayor and Aldermen of Boston, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204 [1898]; Smith v. Abington Savings Bank, 171 Mass. 178, 50 N. E. 545 [1898]; Inhabitants of Leominster v. Conant, 139 Mass. 384, 2 N. E. 690 [1885]; Snow v. City of Fitchburg, 136 Mass. 183 [1883]; Butler v. City of Worcester, 112 Mass. 541 [1873]; Brewer v. City of Springfield, 97 Mass. 152 [1867]; Parsons v. City of Grand Rapids, 141 Mich. 467, 104 N. W. 730 [1905]; Walker v. City of Detroit, 136 Mich. 6, 98 N. W. 744 [1904]; Gates v. City of Grand Rapids, 134 Mich. 96, 95 N. W. 998 [1903]; Corliss v. Village of Highland Park, 132 Mich. 152, 93 N. W. 254, 93 N. W. 610, 95 N. W. 416 [1903]; Warren v. City of Grand Haven, 30 Mich. 24 [1874]; City of Duluth v. Davidson, 97 Minn. 378, 107 N. W. 151 [1906]; City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. 1117 [1895]; Diekey v. Porter, 203 Mo. 1, 101 S. W. 586 [1907]; Curtice v. Schmidt, 202 Mo. 703, 101 S. W. 61 [1907]; South Highland Land & Improvement Company v. Kansas City, 172 Mo. 523, 72 S. W. 944 [1902]; Prior v. Buehler & Cooney Construction Company, 170 Mo. 439, 71 S. W. 205 [1902];

of the land which is to be assessed for such sewer is situated, as it would if such mains had been so extended, does not prevent

Hill v. Swingley, 159 Mo. 45, 60 S. W. 114 [1900]; Heman v. Allen, 156 Mo. 534, 57 S. W. 559 [1900]; Johnson v. Duer, 115 Mo. 366, 21 S. W. 800 [1892]; City of St. Louis v. Owen, 110 Mo. 445, 19 S. W. 713 [1892]; City of St. Joseph to Use of Gibson v. Farrell, 106 Mo. 437, 17 S. W. 497 [1891]; Eyerman v. Blaksley, 78 Mo. 145 [1883]; State of Missouri ex rel. Cavender v. City of St. Louis, 56 Mo. 277 [1874]; City to Use of Fox v. Schoenemann, 52 Mo. 348 [1873]; City of St. Louis to Use of Creamer v. Oeters, 36 Mo. 456 [1865]; Lockwood v. City of St. Louis, 24 Mo. 20 [1856]; Page v. City of St. Louis, 20 Mo. 136 [1854]; Barton v. Kansas City, 110 Mo. App. 31, 83 S. W. 1093 [1904]; Akers v. Kolkmeier & Company, 97 Mo. App. 520, 71 S. W. 536 [1902]; City of St. Joseph to the Use of the Saxton National Bank v. Landis, 54 Mo. App. 315 [1893]; City of Kansas to the Use of Adkins v. Richards, 34 Mo. App. 521 [1889]; Heman v. Wolf, 33 Mo. App. 200 [1888]; Eyermann Provenchere, 15 Mo. App. 256 [1884]; Sheehan v. Martin, 10 Mo. App. 285 [1881]; Creamer v. Allen, 3 Mo. App. 545 [1877]; Prendergast v. Richards, 2 Mo. App. 187 [1876]; Miller v. Anheuser, 2 Mo. App. 168 [1876]; Shannon v. City of Omaha, 73 Neb. 507, 103 N. W. 53, 106 N. W. 592 [1905]; Hanscom v. City of Omaha, 11 Neb. 37, 7 N. W. 739 [1881]; Van Cleve v. Passaic Valley Sewerage Commissioners, 71 N. J. L. 183, 58 Atl. 571 [1904]; Van Wagoner, Pros. v. Mayor and Aldermen of the City of Paterson, 67 N. J. L. (38 Vr.) 466, 51 Atl. 922 [1902]; Brown v. Town of Union, 65 N. J. L. (36 Vr.) 601, 48 Atl. 562 [1900]; State, Central New Jersey Land & Improvement Co. v. Mayor and Council of the City of Bayonne, 56 N. J. L. (27 Vr.) 297,

28 Atl. 713 [1893]; DeWitt v. City of Elizabeth, 56 N. J. L. (27 Vr.) 119, 27 Atl. 801 [1893]; State, Paterson and Hudson River Railroad Company, Pros. v. City of Passaic, 54 N. J. L. (25 Vr.) 340, 23 Atl. 945 [1892]; State, King, Pros. v. Reed, 43 N. J. L. (14 Vr.) 186 [1881]; State, Henderson, Pros. v. Mayor, etc., of Jersey City, 41 N. J. L. (12 Vr.) 489 [1879]; Jones v. Mayor and Common Council of the City of Newark, 11 N. J. Eq. (3 Stock.) 452 [1857]; People of the State of New York ex rel. Scott v. Pitt, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662 [1902]; Weston v. City of Syracuse, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899]; In the Matter of the Petition of the Trustees of the Leake & Watts Orphan Home in the City of New York to Vacate an Assessment, 92 N. Y. 116 [1883]; In the Matter of Lowden to Vacate an Assessment, 89 N. Y. 548 [1882]; In the Matter of the Petition of Merriam to Vacate an Assessment, 84 N. Y. 596 [1881]; Roosevelt Hospital v. Mayor and Aldermen of the Commonalty of the City of New York, 84 N. Y. 108 [1881]; In the Matter of the Petition of De Peyster to Vacate an Assessment, 80 N. Y. 565 [1880]; City of Watertown v. Fairbanks, 65 N. Y. 588 [1875]; In the Matter of the Petition of the New York Protestant Episcopal Public Schools to Vacate Certain Assessments, 47 N. Y. 506 [1872]; Meech v. City of Buffalo, 29 N. Y. 198 [1864]; In the Matter of the Petition of Williamson to Vacate an Assessment v. Mayor, etc., of New York City, 3 Hun. 65 [1874]; Ford v. City of Toledo, 64 O. S. 92, 59 N. E. 779 [1901], affirming City of Toledo v. Ford, 20 Ohio C. C. 290 [1900]; Wewell v. City of Cincinnati, 45 O. S. 407, 15 N. E. 196 [1887]; Hartwell v. Railroad Co.,

an assessment for such improvement if it, in fact, does confer a benefit.³ In South Carolina it was formerly held that a local assessment could be levied for the construction of a sewer,⁴ but under the view of the general invalidity of local assessments in force in that state, such purpose would not at present be one for which an assessment could be levied.⁵

§ 325. Storm and drainage sewers.

As can be inferred from the definition of a sewer already quoted, a sewer constructed for the purpose of carrying rain water off the public streets may be paid for by local assessments,¹

40 O. S. 155 [1883]; City of Cincinnati for use of Ashman v. Bickett, 26 O. S. 49 [1875]; Taylor v. Wapakoneta, 26 Ohio C. C. 285 [1904]; City of Toledo v. Ford, 20 Ohio C. C. 290 [1900]; (affirmed in Ford v. City of Toledo, 64 O. S. 92, 59 N. E. 779, [1901]); Conner v. City of Cincinnati, 11 Ohio C. C. 336 [1896]; (affirmed City of Cincinnati v. Conner, 55 O. S. 82, 44 N. E. 582 [1896]); Johnson v. Village of Avondale, 1 Ohio C. C. 229 [1885]; Wilson v. City of Cincinnati, 5 Ohio N. P. 68 [1897]; Jones v. Holzapfel, 11 Okl. 405, 68 Pac. 511 [1902]; Paulson v. City of Portland, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]; (affirmed as Paulsen v. Portland, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]); Beers v. Dallas City, 16 Or. 334, 18 Pac. 835 [1888]; Strowbridge v. City of Portland, 8 Or. 67 [1879]; Scranton Sewer, 213 Pa. St. 4, 62 Atl. 173 [1905]; *In re* Mill Creek Sewer, 196 Pa. St. 183, 46 Atl. 312 [1900]; City of Philadelphia v. Philadelphia and Reading Railroad Company, 177 Pa. St. 292, 34 L. R. A. 564, 35 Atl. 610 [1896]; Philadelphia to use of Yost v. Odd Fellows' Hall Association, 168 Pa. St. 105, 31 Atl. 917 [1895]; City of Scranton v. Arnt, 148 Pa. St. 210, 23 Atl. 1121 [1892]; Wolf v. City of Philadelphia, 105 Pa. St. 25 [1884]; Wahn's Heirs v. City of Philadelphia to use of Armstrong, 99 Pa. St. 330 [1882]; Commonwealth for use, etc., v. Woods, 44 Pa. St. (8

Wright) 113; Bishop v. Tripp, 15 R. I. 466, 8 Atl. 692 [1887]; Cleveland v. Tripp, 13 R. I. 50 [1880]; City of Spokane v. Preston, — Wash. —, 89 Pac. 406 [1907]; City of Parkersburg v. Tavenner, 42 W. Va. 486, 26 S. E. 179; State ex rel. Schintgen v. Mayor and Common Council of the City of La Crosse, 101 Wis. 208, 77 N. W. 167 [1898]; Hennessy v. Douglas County, 99 Wis. 129, 74 N. W. 983 [1898]; Meggett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566 [1892]; Robinson v. City of Milwaukee, 61 Wis. 585, 21 N. W. 610 [1884]; Massing v. Ames, 37 Wis. 645 [1875].

³ Walker v. City of Aurora, 140 Ill. 402, 29 N. E. 741 [1893].

⁴ Mauldin v. City Council of Greenville, 42 S. C. 293, 46 Am. St. Rep. 723, 27 L. R. A. 284, 20 S. E. 842 [1893].

⁵ See § 118, § 159.

¹ City of Denver v. Dumars, 33 Colo. 94, 80 Pac. 114 [1904]; Cone v. City of Hartford, 28 Conn. 363 [1859]; Northwestern University v. Village of Wilmette, 230 Ill. 80, 82 N. E. 615 [1907]; Kirkland v. Board of Public Works of the City of Indianapolis, 142 Ind. 123, 41 N. E. 374 [1895]; Minneapolis and St. Louis R. R. Co. v. Lindquist, 119 Ia. 144, 93 N. W. 103 [1903]; Parsons v. City of Grand Rapids, 141 Mich. 467, 104 N. W. 730 [1905]; Gates v. City of Grand Rapids, 134 Mich. 96, 95 N. W. 998 [1903].

as well as a sewer constructed for the purpose of draining buildings and removing house sewage. Even if there is an existing system of sewers, a storm sewer may be a proper improvement to be constructed on the assessment plan if the existing system is insufficient to carry off the surface water.²

§ 326. Use of natural stream as sewer.

If the natural topography is such that it is an appropriate method of constructing a sewer to cover over and wall in a natural water course and convert it into a sewer, an assessment for this purpose is as valid as one for the construction of a sewer in the ordinary way would be.¹

§ 327. Main sewers.

Assessments may be levied for the construction of a main sewer or trunk sewer; that is, a sewer intended to carry sewage from a large area of drainage. All property drained by such main sewer and by the lateral sewers connecting therewith is especially benefited by such main sewer and may be assessed therefor.¹ The difficulty of apportioning the cost of the main sewer, however, has not infrequently led the legislature to provide that the cost of the main sewer must be paid for out of the general funds of the municipality.² A similar result is reached by a statute providing that only the land abutting on the sewer can be assessed therefor.³ Under such statute if a larger sewer is constructed than is needed for local drainage, in order to serve

² *Northwestern University v. Village of Wilmette*, 230 Ill. 80, 82 N. E. 615 [1907].

¹ *Kramer v. City of Los Angeles*, 147 Cal. 668, 82 Pac. 334 [1905]; *Hungerford v. City of Hartford*, 39 Conn. 279 [1872]; *Quinn v. James*, 174 Mass. 23, 54 N. E. 343 [1899]; *Beals v. Inhabitants of Brookline*, 174 Mass. 1, 54 N. E. 339 [1899]; *Beals v. James*, 173 Mass. 591, 54 N. E. 245 [1899]; *Butler v. City of Worcester*, 112 Mass. 541 [1873]; *Clay v. City of Grand Rapids*, 60 Mich. 451, 27 N. W. 596 [1886]; *Hanscom v. City of Omaha*, 11 Neb. 37, 7 N. W. 739 [1881].

¹ *Bassett v. City of New Haven*, 76 Conn. 70, 55 Atl. 579 [1903]; *Alley v. City of Lebanon*, 146 Ind. 125, 44 N. E. 1003 [1896]; *South Highland Land and Improvement Company v. Kansas City*, 172 Mo. 523, 72 S. W. 944 [1902]; *City of Kansas to the use of Adkins v. Richards*, 34 Mo. App. 521 [1889]; *Hanscom v. City of Omaha*, 11 Neb. 37, 7 N. W. 739 [1881]; *City of Toledo v. Ford*, 20 Ohio C. C. 290 [1900]; (affirmed *Ford v. City of Toledo*, 64 O. S. 92, 59 N. E. 779 [1901]).

² *Heman v. Handlan*, 59 Mo. App. 490 [1894]. See § 663.

³ *Witman v. City of Reading*, 169 Pa. St. 375, 32 Atl. 576.

as a trunk sewer for another drainage section, the owner of realty drained thereby cannot be assessed for such increased cost.⁴ Questions arising under such statutes, as well as questions of apportionment of assessments among lands benefited by the improvement and questions as to what lands may be assessed for such improvements are discussed elsewhere.

§ 328. Lateral sewers.

Local assessments may also be levied for local or lateral sewers, that is, for sewers connecting the property to be drained, with a main sewer or a branch thereof, either directly or indirectly.¹ So assessments may be levied for openings from main sewers opposite different lots, so that connections with house drainage may be made thereafter.² This is recognized even in cases where the provisions for such lateral sewers or connections were invalid as being indefinite,³ or unreasonable.⁴

§ 329. Assessment for outlet.

A sewer without an outlet which can be used as of right is as useless a thing as can be imagined. The right to assess for a sewer, which has no outlet, involves the theory of public improvements on private property, and is discussed elsewhere.¹ A local assessment may be levied on land drained by a sewer to secure an outlet therefor;² and the fact that such outlet must be sought

⁴ *Park Avenue Sewers*, Appeal of Parker, 169 Pa. St. 433, 32 Atl. 574 [1895].

¹ *Payne v. Village of South Springfield*, 161 Ill. 285, 44 N. E. 105 [1896]; *Palmer v. City of Danville*, 154 Ill. 156, 38 N. E. 1067 [1894]; *People's National Bank of Brattleboro, Vermont, v. Ayer*, 24 Ind. App. 212, 56 N. E. 267 [1899]; *Byram v. Foley*, 17 Ind. App. 629, 47 N. E. 351 [1897]; *Coburn v. Bossert*, 13 Ind. App. 359, 40 N. E. 281 [1895]; *Coates v. Nugent*, — Kan. —, 92 Pac. 597 [1907].

² *Duane v. City of Chicago*, 198 Ill. 471, 64 N. E. 1033 [1902]; *Smythe v. City of Chicago*, 197 Ill. 311, 64 N. E. 361 [1902]; *City of Chicago v. Coreoran*, 196 Ill. 146, 63 N. E. 690 [1902]; *Gage v. City of Chicago*, 195 Ill. 490, 63 N. E. 184

[1902]; *Vandersyde v. People ex rel. Raymond*, 195 Ill. 200, 62 N. E. 806 [1902].

³ *Wetmore v. City of Chicago*, 206 Ill. 367, 69 N. E. 234 [1903]; *Van Wagoner, Pros. v. Mayor and Aldermen of the City of Paterson*, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902].

⁴ *Gage v. City of Chicago*, 191 Ill. 210, 60 N. E. 896 [1901]; *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096 [1900]; (distinguished in *Vandersyde v. People ex rel. Raymond*, 195 Ill. 200, 62 N. E. 806 [1902]).

¹ See § 401.

² *Board of Improvement District No. 5 of Texarkana v. Offenhauser*, 84 Ark. 257, 105 S. W. 265; *Gray v. Town of Cicero*, 177 Ill. 459, 53 N. E. 91 [1899]; *Atkins v. City*

outside the limits of the municipal corporation does not invalidate the assessment;³ although, ordinarily, property cannot be assessed for an improvement in another municipality or political district. The fact that the outlet of the sewer is carried to a point at which sewage could be discharged with the minimum injury to public health, and without polluting a stream, does not prevent the levy of local assessments therefor.⁴

§ 330. Pumping station.

Where the country is flat and level, sewage cannot always be made to flow off by the force of gravitation, as there may not be sufficient slope between the land to be drained and the outlet to secure a natural flow. Under such circumstances some additional force is necessary to secure a proper flow of sewage; and this additional force is very often sought in pumping stations to drive the sewage on in some way, either by propulsion or by lifting it to a greater height and thus securing a greater slope for the outlet sewer. Can the cost of such a pumping station be assessed upon the land drained by such sewers? In Illinois it is held that such a pumping station, under these conditions, is an essential part of a system of sewers; that its cost can be classed with the cost of the sewers themselves, especially with the cost of main or trunk sewers, and can be assessed upon the land which is benefited by such system of sewers. The leading case on this point is one involving a pumping station for a drainage system,¹ and it has been followed by a series of cases which uphold the validity of assessments for such pumping stations used in connection with sewers.² In these cases it is held that such a

of Boston, 188 Mass. 77, 74 N. E. 292 [1905]; *W. F. Stewart Co. v. City of Flint*, 147 Mich. 697, 111 N. W. 352 [1907]; *Prior v. Buehler and Cooney Construction Company*, 170 Mo. 439, 71 S. W. 205 [1902].

³ *Callon v. City of Jacksonville*, 147 Ill. 113, 35 N. E. 223 [1894]; *Maywood County v. Village of Maywood*, 140 Ill. 216, 29 N. E. 216, 29 N. E. 704 [1893]; *Cochran v. Village of Park Roads*, 138 Ill. 295, 27 N. E. 939 [1893]; *Shreve v. Town of Cicero*, 129 Ill. 226; *sub nomine Albertson v. Town of Cicero*, 21 N. E. 815 [1890].

⁴ *W. F. Stewart Co. v. City of Flint*, 147 Mich. 697, 111 N. W. 352 [1907].

¹ *Village of Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846 [1888].

² *Close v. City of Chicago*, 217 Ill. 216, 75 N. E. 479 [1905]; *Fisher v. City of Chicago*, 213 Ill. 268, 72 N. E. 680 [1904]; *McChesney v. Village of Hyde Park*, 151 Ill. 634, 37 N. E. 858 [1894]; *Drexel v. Town of Lake*, 127 Ill. 54, 20 N. E. 38 [1890]; *Pearce v. Village of Hyde Park*, 126 Ill. 287, 18 N. E. 824 [1890].

pumping station is of local utility and that, therefore, such assessments are valid; in distinction from cases of a general water-works plant, or a general plant for street lighting, which are said to be of general utility, and, therefore, improvements for which local assessments cannot be made. The force of the distinction is not easy to grasp. In each case the central plant is an essential part of the general system, and if the reasons assigned justify local assessments for one they should justify it for the others. Can the running expenses of such a pumping station be assessed upon the land drained by such sewerage system? It is held where such question has been raised that such expenses cannot be met by local assessment.³ In Illinois such result seems to depend on the provisions of the statute, and it is there held that repairs may be paid for by assessments.⁴ In New Jersey the statute expressly provided for a surface tax on land drained to defray the expense of running and maintaining a pumping station; and such statute was held to be unconstitutional.⁵

§ 331. Sewer without lateral connections.

A so-called sewer, constructed for sanitary purposes and for which council provides no connections, so as to afford a means of draining sewage from the land which it is sought to assess, is not a sewer within the meaning of the rule allowing local assessments for sewers.¹ The fact that later, and before tax-bills issued the park board ordered such connections was held not to render such assessments valid, the council, and not the park board, having authority to assess.²

§ 332. Charge for privilege of making sewer connection.

A statute which provides that if a sewer has been built, to be paid for by local assessments, and such assessments have been declared to be invalid, a property owner who has not paid such assessment cannot connect his premises with such sewer unless

³ *McChesney v. Village of Hyde Park*, 151 Ill. 634, 37 N. E. 858 [1894]; *State, M'Closkey, Pros. v. Chamberlin*, 37 N. J. L. (8 Vr.) 388 [1875].

⁴ *McChesney v. Village of Hyde Park*, 151 Ill. 634, 37 N. E. 858 [1894].

⁵ *State, M'Closkey, Pros. v. Chamberlin*, 37 N. J. L. (8 Vr.) 388 [1875].

¹ *Barton v. Kansas City*, 110 Mo. App. 31, 83 S. W. 1093 [1904].

² *Barton v. Kansas City*, 110 Mo. App. 31, 83 S. W. 1093 [1904].

he pays a special charge for such privilege is valid.¹ However, if no such provision is made by statute, and a regular license fee is provided for by statute, the city cannot impose an additional charge upon the owners of realty who have not paid such invalid assessment.²

§ 333. Private sewer.

If a sewer is constructed, not as a public improvement but as a private enterprise, it is not an improvement for which an assessment can be levied.¹ Thus, A. constructed a private sewer system under an ordinance authorizing him to construct such system, and giving him the exclusive right to construct the same, and authorizing him to collect reasonable annual compensation from all persons using such system. B. made connection with a sewer, so that B.'s land received the benefit of such system. It was held that A. could not collect from B. for such use.² However, the question of the power of the legislature to authorize such extension was not involved in this case, since the statute did not authorize such ordinance.

§ 334. Drainage a special local benefit.

The drainage of wet and marshy land renders it suitable for use as agricultural land, or for residence and manufacturing purposes. It makes useful land, which, before, was useless. There can be no question but that drainage confers a great benefit upon the owner of the property which is drained.¹ Possibly the special and local benefit is clearer in drainage than it is in any other of the public improvements for which assessments are levied. The improvements of drainage, and its beneficial effect upon the land drained are matters of general knowledge which have often been commented upon by the courts.² In order to justify a special assess-

¹Carson v. Brockton Sewerage Commission, 182 U. S. 398, 45 L. 1151, 21 S. 860 [1901]; (affirming Carson v. Sewerage Commissioners of Brockton, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]).

²State of Ohio ex rel. Durner v. Graydon, 6 Ohio C. C. 634 [1892]; (affirmed by a divided court, 30 W. L. 351). An additional charge of two dollars per front imposed by the city authorities for the privilege of connecting with the sewer was held to be invalid in this case.

¹Weaver v. Canon Sewer Company, 18 Colo. App. 242, 70 Pac. 953 [1902].

²Weaver v. Canon Sewer Co., 18 Colo. App. 242, 70 Pac. 953 [1902].

¹Zigler v. Menges, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782 [1889]; Donnelly v. Decker, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389 [1883].

²Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. 469, 4 S. 663 [1884]; (affirming Reclamation District No. 108 v. Hagar, 4

ment on the theory of benefits, however, it is necessary not merely that the improvement confer a special benefit, but that it also shall be of a public character, in order to justify the legislature in providing for such improvement, either at public expense or at the expense of the owners of property benefited. In the case of assessments for drainage improvements, the great difficulty is to find in all cases a public use and benefit which justifies the public in constructing the improvement and compelling the owners of land benefited to contribute thereto.

§ 335. Theory of benefit to public health.

If land in its natural condition is generally or often covered with stagnant water it is likely to be a menace to public health. The danger to health is, of course, greater, if the land is so poorly drained by nature as to be a marsh or a swamp. Under these circumstances there is no doubt that the drainage of such land, by artificial means, is an improvement which confers a benefit upon the public at large.¹ As far as the element of public interest is required the public health is a sufficient basis for local assessments for purposes of drainage.² At the same time it has

Fed. 366 [1880]); *Chicago, Burlington & Quincy Ry. Co. v. People*, 212 Ill. 103, 72 N. E. 219 [1904].

¹*Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; (affirming *Reclamation District No. 108 v. Hagar*, 4 Fed. 366 [1880]); *Laguna Drainage District v. Charles Martin Co.*, 144 Cal. 209, 77 Pac. 933 [1904]; *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222 [1874]; *Chicago, Burlington & Quincy Ry. Co. v. People*, 212 Ill. 103, 72 N. E. 219, (see discussion on p. 119) [1904]; *Zigler v. Menges*, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782 [1889].

²*Laguna Drainage District v. Charles Martin Co.*, 144 Cal. 209, 77 Pac. 933 [1904]; *Heffner v. Cass and Morgan Counties*, 193 Ill. 439, 58 L. R. A. 353, 62 N. E. 201 [1901]; *Bate v. Sheets*, 64 Ind. 209 [1878]; *Tillman v. Kircher*, 64 Ind. 104

[1878]; *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902]; *State ex rel. Utiek v. Board of County Commissioners of Polk County*, 87 Minn. 325, 60 L. R. A. 161, 87 N. W. 216 [1902]; *Lien v. Board of County Commissioners of Norman County*, 80 Minn. 58, 82 N. W. 1094 [1900]; *Mound City Land & Stock Co. v. Miller*, 170 Mo. 240, 94 Am. St. Rep. 727, 60 L. R. A. 190, 70 S. W. 721 [1902]; *O'Neill v. City of Hoboken*, 72 N. J. L. 67, 60 Atl. 50 [1905]; *Matter of Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Thompson v. Treasurer of Wood County*, 11 O. S. 678 [1860]; *Rude v. Town of St. Marie*, 121 Wis. 634, 99 N. W. 460 [1904]; *State ex rel. Witte v. Curtis*, 86 Wis. 140, 56 N. W. 475; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947 [1889]; *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545 [1887].

been held that lands which are not actually drained by artificial means cannot be assessed for the expense of such drainage, even though the public health throughout the whole neighborhood may be improved by means of such drainage. Benefits of this sort are said to be too uncertain and too indirect.³ This, however, is merely a special application of the principle that assessments cannot be levied for general benefits.⁴ It seems not to be necessary that the legislature should declare specifically that the improvement authorized will benefit public health. It is sufficient, if the court can take judicial knowledge of the topography of the country and see that benefit to the public health exists.⁵ If, however, the statute does not purport to limit the purpose of the drainage improvement to public health, convenience and welfare, the statute may be held invalid, though in the particular case such considerations may exist.⁶

§ 336. Theory of benefit to public highways.

While improvement of the public health is the usual form of benefit to the public arising out of such improvement it is not the only form of public benefit. The benefit that the public highways may receive from the drainage of large tracts of land has been held to be sufficient to authorize the levy of special assessments to pay for such drainage.¹ "That the drainage of large tracts of wet and overflowed lands will operate beneficially to the public there can be no serious doubt. Statutes authorizing and providing for such drains have been enacted and in force in this country for over a century and have been sustained on various grounds. Some have been upheld where large tracts of agricultural lands have been reclaimed and made suitable for cultivation, independent of any effect the drainage of such lands might have upon the public health; it being held in those cases

³ State, Skinkle, Pros. v. Inhabitants of the Township of Clinton in the County of Essex, 39 N. J. L. (10 Vr.) 656 [1877].

⁴ See § 654.

⁵ State ex rel. Utick v. Board of County Commissioners of Polk County, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216 [1902].

⁶ Reeves v. Treasurer of Wood County, 8 O. S. 333 [1858].

¹ Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District, 127 Ill. 581, 21 N. E. 206 [1890]; Oliver v. Monona County, 117 Ia. 43, 90 N. W. 510 [1902]; State ex rel. Utick v. Board of County Commissioners of Polk County, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216 [1902].

that draining considerable portions of the public domain and benefiting all lands through which the drain may pass and others adjacent, perhaps, is a public benefit within the meaning of the law. While the element of public health is often made an important factor in the consideration of statutes of this kind, it is believed that any public benefit, such as the improvement of highways or the reclamation of large tracts of otherwise waste lands is sufficient to support them."² Thus, where the drainage did not benefit the public health, but did benefit the public highways, and did also render several hundred acres of land more valuable and productive, it was held that a local assessment therefor could be levied on the lands benefited thereby, even though such lands were not benefited by the improvement of the public highways.³

§ 337. **Extent of special benefit does not constitute public benefit.**

Greater difficulty is presented where the condition of the land is not such as to be an acute menace to public health, and yet where the drainage of the land will be of great benefit to the owners of the land thus drained. Upon this question there are two theories, inconsistent in the form in which they are expressed, though not so often inconsistent in the results actually reached under such theories. According to the statement of one theory as set out in many cases, if the drainage system established is intended solely for the private gain of the owners of land which is to be drained thereby, and is not intended to subserve the public health, convenience or welfare, such an improvement cannot be constructed or authorized by the state, nor can a local assessment therefor be levied, even upon lands which are greatly benefited thereby.¹ As in other cases of assessment, the underlying theory

²State ex rel. Utiek v. Board of County Commissioners of Polk County, 87 Minn. 325, 335, 60 L. R. A. 161, 177, 178, 92 N. W. 216 [1902]; (citing Wurts v. Hoagland, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]; Head v. Amoskeag Manufacturing Co., 113 U. S. 9, 5 S. 441, 28 L. 889; O'Reilly v. Kankakee Valley Draining Company, 32 Ind. 169; Lowell v. City, 111 Mass. 454, 15 Am. Rep. 39; Coomes v. Burt, 22 Pick. 422; Wright v.

City, 9 Cush. 233; *In re Drainage of Lands*, 35 N. J. L. (6 Vr.) 497 [1872]; French v. Kirkland, 1 Paige (N. Y.) 117; Ohio v. Commissioners, 41 O. S. 423).

³Heick v. Voight, 110 Ind. 279, 11 N. E. 306 [1886].

¹Elmore v. Drainage Commissioners, 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010 [1892]; Gifford Drainage District v. Shroer, 145 Ind. 572, 44 N. E. 636; Zigler v. Menges, 121 Ind. 99, 16 Am. St. Rep. 357,

must be public good, not private advantage.² Unless public good demands, the owner of private property cannot be compelled to improve it against his will, no matter how wise it may be to make such improvement or how much it may add to the utility or value of his land. "If the sole purpose of the ditch was to improve certain specified lands for the direct pecuniary benefit of the owners thereof, then the whole statute would be unconstitutional; for the owner of one piece of property cannot be compelled to contribute to the expense of the improvement of another piece of property, nor can the land of one owner be taken for the purpose of furnishing an outlet for the drainage of the land of another. The statutory provisions which are involved in this case are supported on the theory that the public health convenience and welfare are promoted by the construction of the improvement—not simply that the lands of particular owners are rendered more valuable."³ The fact that by reason of the improvement the lands drained would be benefited,⁴ and that such land would be rendered more fertile and productive,⁵ or more valuable,⁶ is held not to be such a public purpose as will enable the legislature to authorize an assessment for such drainage, if no considerations of public health, welfare, or utility supervene.

22 N. E. 782 [1889]; *Bate v. Sheets*, 64 Ind. 209 [1878]; *Tillman v. Kircher*, 64 Ind. 104 [1878]; *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902]; *Fleming v. Hull*, 73 Ia. 598, 35 N. W. 673. 22 Am. & Eng. Corp. Ca. 319; *Hull v. Baird*, 73 Ia. 528, 35 N. W. 613; *Kinnie v. Bare*, 68 Mich. 625, 36 N. W. 672; *People ex rel. Butler v. Supervisors of Saginaw County*, 26 Mich. 22 [1872]; *State ex rel. Utick v. Board of County Commissioners of Polk County*, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216 [1902]; *Jenal v. Green Island Draining Co.*, 12 Neb. 163, 10 N. W. 547 [1881]; *Chicago & Erie Railroad Co. v. Keith*, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902]; *McQuillen v. Hatton*, 42 O. S. 202; *Miller v. Gradedistrict*, 90 Wis. 301, 63 N. W. 288. ham, 17 O. S. 1 [1866]; *Reeves v. Treasurer of Wood County*, 8 O. S. 333 [1858]; *In re Theresa Drainage*

²*Patterson v. Baumer*, 43 Ia. 477 [1876].

³*Oliver v. Monona County*, 117 Ia. 43, 55, 56, 90 N. W. 510 [1902]; (citing *Patterson v. Baumer*, 43 Ia. 477 [1876]. and *Fleming v. Hull*, 73 Ia. 598, 35 N. W. 673).

⁴*Elmore v. Drainage Commissioners*, 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010 [1892]; *Gifford Drainage District v. Shroer*, 145 Ind. 572, 44 N. E. 636; *Zigler v. Menges*, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782 [1889]; *State ex rel. Utick v. Board of County Commissioners of Polk County*, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216 [1902]; *Chicago & Erie Railroad Co. v. Keith*, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902]; *Reeves v. Treasurer of Wood County*, 8 O. S. 333 [1858].

⁵*McQuillen v. Hatton*, 42 O. S. 202.

⁶*Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902].

In New York, under an amendment to the constitution, providing "General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof necessary drains, ditches and dykes upon the lands of others, under proper restrictions and with just compensation,"⁷ it was held that local assessments for such drains were not authorized and that a statute providing for such assessments was unconstitutional.⁸ In this case the court divided on the question of whether such drainage, if solely for the benefit of the land drained was a public purpose. "Under its provisions the authority to tax may be exercised in favor of a single person for the improvement of a single acre of agricultural land—a result which we feel certain was not within the contemplation of the framers of the constitutional provision."⁹

§ 338. Theory of public interest in condition of land.

Under the other theory it is held that the reclamation of a large tract of ground, so as to convert it from marshy or swampy land into land suitable for use by man, of which uses agriculture is the most common, is of itself a use so public in its nature as to justify public corporations in requiring such work to be done and in levying local assessments therefor, if authorized by statute.¹ The public is said to have an interest in the condition of land within the boundaries of the state over and above its interest based upon considerations of the public health. "The public has an interest beyond the mere sanitary condition of land, and founded upon other and different principles than the controlling

⁷ Constitution of New York, Article I., § 7, adopted in 1894.

⁸ In the Matter of the Petition of Tuthill for the Appointment of Commissioners to Drain Certain Wet and Low Lands in the Towns of Chester and Blooming Grove in Orange County, 163 N. Y. 133, 79 Am. St. Rep. 574, 49 L. R. A. 781, 57 N. E. 303 [1900].

⁹ Opinion of appellate division quoted In the Matter of the Petition of Tuthill for the Appointment of Commissioners to Drain Certain Wet and Low Lands in the Towns of Chester and Blooming Grove in Orange

County, 163 N. Y. 133, 79 Am. St. Rep. 574, 49 L. R. A. 781, 792, 57 N. E. 303 [1900].

¹ *Wurts v. Hoagland*, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]; (affirming *Hoagland v. State*, *Simonton, Pros.*, 43 N. J. L. (14 Vr.) 456 [1881]; which affirmed *Matter of Drainage of the Great Meadows on Pequest River*, 42 N. J. L. (13 Vr.) 553 [1880] without opinion.); *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222 [1874].

or abatement of nuisances where any considerable number of persons are concerned or tract of land is useless, and improvements may be made commensurate to the benefits received and the land itself may be taxed for such benefits. The principle requires careful application but many illustrations of its existence can be found sustained by the highest authority."² This interest has been suggested to be one arising from an increase in the taxable value of the land caused by drainage. "The community is benefited by anything that makes considerable bodies of land arable and adds to their taxable value, and so it is by anything that lessens disease."³ Many of the cases which uphold statutes providing for the compulsory drainage of wet or marshy lands at the expense of the owners thereof, do so on the theory that such statutes are to be upheld "independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property."⁴ This theory is inconsistent with the one previously discussed, since it requires no public benefit to support such a statute other than that which will enure to the public through the private gain of the owners of the land benefited by such drainage.⁵ At the same time it will be found that the same court will uphold assessments now on the one theory, now on the other, and occasionally upon both the theory of benefit to the public health and the theory of reclamation of large tracts of land in combination. The theory that the improvement and reclamation of large tracts of land is of itself a public benefit and use sufficient to justify local assessments for drainage was at one time advanced in Wisconsin.⁶ These remarks were, however,

² *Lewis County v. Gordon*, 20 Wash. 80, 90, 91, 54 Pac. 779 [1898].

³ *Zigler v. Menges*, 121 Ind. 99, 102, 16 Am. St. Rep. 357, 22 N. E. 782 [1899].

⁴ *Head v. Amoskeag Manufacturing Co.*, 113 U. S. 9, 28 L. 889, 5 S. 441. See also as expressing similar views, *Wurts v. Hoagland*, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]; (affirming *Hoagland v. State*, *Simonton*, Pros., 43 N. J. L. (14 Vr.) 456 [1881]; which affirmed *Matter of Drainage of the Great Meadows on Pequest River*, 42 N. J. L. (13 Vr.)

553 [1880] without opinion.); *Coster v. Tide Water Company*, 18 N. J. Eq. (13 C. E. Green) 54 [1866].

⁵ *Zigler v. Menges*, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782 [1899].

⁶ In speaking of drainage and the nature of the public use and benefit the court said: "The primary object is solely to restore such lands to a proper condition for tillage and agriculture by the several owners and for their use alone. It enhances their value intrinsic and in market . . . This is the only object which

obiter, and while subsequently approved in other states,⁷ they have been criticised in Wisconsin, and the theory thus advanced has been repudiated.⁸

§ 339. Drainage assessments held part of common law.

The right to levy local assessments to pay for compulsory drainage, where any public benefit of any kind can be found, even though the real motive in requiring such drainage is primarily to benefit the property owners whose lands are drained thereby is a matter of history and tradition. In New Jersey the right to levy local assessments for the improvement, by drainage, of the land of private owners, was said to rest neither on the right of taxation nor on the right of eminent domain, but to exist as a "part of the local common law."¹ By reason of the antiquity of the system, rather than by its conformity to the principles of constitutional law, it was upheld on the theory that it was "quite too late to revert to first principles in order to overthrow a system of procedure which is possessed of such antiquity and has to its credit so many recognitions."² In a subsequent decision on the same facts and between the same parties the court upheld local assessments for drainage, as based on the right of eminent domain, and as therefore a case in which the amount of the assessment was not necessarily limited to the benefits conferred by the improvement.³ The decision of the state courts upon this question is final. The Supreme Court of the United States will not review their decisions upon the theory that such an assessment, if not for a public purpose, is a taking without due process of law.⁴

concerns their use and that use is strictly private." *Donnelly v. Decker*, 58 Wis. 461, 468, 46 Am. Rep. 634, 17 N. W. 389 [1883].

⁷ *Zigler v. Menges*, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782 [1899].

⁸ *Rude v. Town of St. Marie*, 121 Wis. 634, 99 N. W. 460 [1904].

¹ *Hoagland v. Wurts*, 41 N. J. L. (12 Vr.) 175, 180 [1879]; (affirming *Matter of Commissioners to Drain Great Meadows*, 39 N. J. L. (10 Vr.) 433 [1877]); See *State, Britton, Pros. v. Blake*, 36 N. J. L. (6 Vr.) 208 [1871].

² *Hoagland v. Wurts*, 41 N. J. L. (12 Vr.) 175, 180 [1879]; (affirming, *Matter of Commissioners to Drain Great Meadows*, 39 N. J. L. (10 Vr.) 433 [1877]).

³ *Matter of Drainage of the Great Meadows on Pequest River*, 42 N. J. L. (13 Vr.) 553 [1880]; (affirmed without opinion *Hoagland v. State, Simonton, Pros.*, 43 N. J. L. (14 Vr.) 456 [1881]; affirmed by the Supreme Court of the United States in *Wurts v. Hoagland*, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]).

⁴ *Wurts v. Hoagland*, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885];

§ 340. Drainage held proper purpose for assessment.

If a statute provides for a drainage improvement which confers any form of public benefit, it is held that local assessments may be levied to pay therefor.¹

(affirming *Matter of Drainage of Great Meadows on Pequest River*, 42 N. J. L. (13 Vr.) 553 [1880] which was affirmed as *Hoagland v. State Simonton, Pros.*, 43 N. J. L. (14 Vr.) 456 [1881] without opinion).

¹*Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; (affirming *Reclamation District No. 108 v. Hagar*, 4 Fed. 366 [1880]); *Davidson v. New Orleans*, 96 U. S. 97, 24 L. 616 [1877]; (affirming *In the Matter of the Commissioners of the First Draining District*, 27 La. Ann. 20 [1875]); *United States ex rel. Kilpatrick v. Capdevielle*, 118 Fed. 809, 55 C. C. A. 421 [1902]; *Hale v. Moore*, 82 Ark. 75, 100 S. W. 742 [1907]; *Ritter v. Drainage Dist. No. 1 Poinsett County*, 78 Ark. 580, 94 S. W. 711 [1906]; *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707 [1897]; *Reclamation District No. 536 v. Hall*, 131 Cal. 662, 63 Pac. 1000 [1901]; *Weinrich v. Hensley*, 121 Cal. 647, 54 Pac. 254 [1898]; *Reclamation District No. 551 v. Runyan*, 117 Cal. 164, 44 Pac. 131 [1897]; *Swamp Land District No. 307 v. Glide*, 112 Cal. 85, 44 Pac. 451 [1896]; *Lower Kings River Reclamation District No. 531 v. Phillips*, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 [1895]; *Swamp Land District No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866 [1893]; *Reclamation District No. 124 v. Gray*, 95 Cal. 601, 30 Pac. 779 [1892]; *Hutson v. Woodbridge Protection District No. 1*, 79 Cal. 90, 16 Pac. 549, 21 Pac. 435 [1889]; *People v. Hulbert*, 71 Cal. 72, 12 Pac. 43 [1886]; *Swamp Land District No. 307 v. Gwynn*, 70 Cal. 566, 12 Pac. 462 [1886]; *Reclamation District No. 3 v. Parvin*, 67 Cal. 501, 8 Pac. 43 [1885]; *Reclamation District No. 108 v. Hagar*,

66 Cal. 54, 4 Pac. 945 [1884]; *Reclamation District No. 108 v. Evans*, 61 Cal. 104 [1882]; *Bixler v. Board of Supervisors of the County of Sacramento*, 59 Cal. 698 [1881]; *People of the State of California v. Hagar*, 52 Cal. 171 [1877]; *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222 [1874]; *Iroquois & Crescent Drainage District v. Harroun*, 222 Ill. 489, 78 N. E. 780 [1906]; *City of Joliet v. Spring Creek Drainage District*, 222 Ill. 441, 78 N. E. 836 [1906]; *Barnes v. Drainage Commissioners of Drainage District No. 1, etc.*, 221 Ill. 627, 77 N. E. 1124 [1906]; *People ex rel. Young v. Prust*, 219 Ill. 116, 76 N. E. 68 [1905]; *Drainage Commissioners of District No. 1 v. Village of Cerro Gordo*, 217 Ill. 488, 75 N. E. 516 [1905]; *Stack v. People ex rel. Talbott*, 217 Ill. 220, 75 N. E. 347 [1905]; *Lacey Levee and Drainage District v. Langellier*, 215 Ill. 271, 74 N. E. 148 [1905]; *Pinkstaff v. Allison Ditch District No. 2 of Lawrence County*, 213 Ill. 186, 72 N. E. 715 [1904]; *Drainage Commissioners of Drainage District No. 2 v. Drainage Commissioners of Union Drainage District No. 3*, 211 Ill. 328, 71 N. E. 1007 [1904]; (affirming 113 Ill. App. 114; *Trigger v. Drainage District No. 1, etc.*, 193 Ill. 230, 61 N. E. 1114 [1901]; *Elgin, Joliet & Eastern Railway Company v. Hohenshell*, 193 Ill. 159, 61 N. E. 1102 [1901]; *People ex rel. Herman v. Commissioners of Bug River Special Drainage District*, 189 Ill. 55, 59 N. E. 605; *Hammond v. People*, 178 Ill. 254, 52 N. E. 1030 [1899]; *Hammond v. People, for Use, etc.*, 169 Ill. 545, 48 N. E. 573 [1897]; *People of the State of Illinois v. Weber*, 164 Ill. 412, 45 N. E. 723 [1897]; *Tucker v. People ex rel.*

This statement leaves for discussion elsewhere the the-

Wall, 156 Ill. 108, 40 N. E. 451 [1895]; Drainage District No. 3 v. People ex rel. Baron, 147 Ill. 404, 35 N. E. 238 [1894]; People ex rel., etc. v. Drainage Comrs., District No. 1 of Town of Young America, 143 Ill. 417, 32 N. E. 688 [1893]; Walker v. City of Aurora, 140 Ill. 402, 29 N. E. 741 [1893]; Briggs v. Union Drainage District No. 1, 140 Ill. 53, 29 N. E. 721 [1893]; People ex rel. Samuel, Sr. v. Cooper, 139 Ill. 461, 29 N. E. 872 [1893]; Commissioners of Lake Fork Special Drainage District v. The People ex rel. Bodman, 138 Ill. 87, 27 N. E. 857 [1892]; Wabash Eastern Railway Company of Illinois v. Commissioners of East Lake Fork Drainage District, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781 [1891]; Illinois Central Railroad Company v. Commissioners of East Lake Fork Special Drainage District, 129 Ill. 417, 21 N. E. 925 [1890]; Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District, 127 Ill. 581, 21 N. E. 206 [1890]; People ex rel. Barber v. Chapman, 127 Ill. 387, 19 N. E. 872 [1890]; Samuels v. Drainage Commissioners, 125 Ill. 536, 17 N. E. 829 [1889]; Scott v. People ex rel. Lewis, 120 Ill. 129, 11 N. E. 408 [1889]; Morrell v. Union Drainage District No. 1, 118 Ill. 139, 8 N. E. 675 [1887]; Keigwin v. Drainage Commissioners of Hamilton Township, 115 Ill. 347, 5 N. E. 575 [1886]; People ex rel. Little v. Clayton, 115 Ill. 150, 4 N. E. 193 [1886]; Kilgour v. Drainage Commissioners, 111 Ill. 342 [1885]; Drainage Commissioners v. Hudson, 109 Ill. 659 [1885]; Moore v. People ex rel. Lewis, 106 Ill. 376 [1883]; Commissioners of Spoon River Drainage District in Champaign County v. Conner, 121 Ill. App. 450 [1905]; Strenter v. Willow Creek Drainage District, 72 Ill. App. 561 [1897]; Carr v. Duhme, 167 Ind. 76, 78 N.

E. 322 [1906]; Taylor v. Strayer, 167 Ind. 23, 78 N. E. 236 [1906]; Quick v. Parrott, 167 Ind. 31, 78 N. E. 232 [1906]; Ager v. State ex rel. Heaston, 162 Ind. 538, 70 N. E. 808 [1903]; Skelton v. Sharp, 161 Ind. 383, 67 N. E. 535 [1903]; Sample v. Carroll, 132 Ind. 496, 32 N. E. 220 [1892]; Racer v. State for Use of Rhine, 131 Ind. 393, 31 N. E. 81 [1891]; McBride v. State for Use of Clandy, 130 Ind. 525, 30 N. E. 699 [1891]; White v. McGrew, 129 Ind. 83, 28 N. E. 322 [1891]; Budd v. Reidelbach, 128 Ind. 145, 27 N. E. 349 [1890]; Goodwine v. Leak, 127 Ind. 569, 27 N. E. 161 [1890]; Ziegler v. Menges, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782 [1889]; Otis v. De Boer, 116 Ind. 531, 19 N. E. 317 [1888]; Harris v. Ross, 112 Ind. 314, 13 N. E. 873 [1887]; Indianapolis & Cumberland Gravel Road Co. v. State ex rel. Flack, 105 Ind. 37, 4 N. E. 316 [1885]; McKinney v. State for Use of Nixon, 101 Ind. 355 [1884]; Albertson v. State ex rel. Wells, 95 Ind. 370 [1883]; Bannister v. Grassy Fork Ditching Association, 52 Ind. 178 [1875]; Bate v. Sheets, 50 Ind. 329 [1875]; Chase v. Arctic Ditchers, 43 Ind. 74 [1873]; Etchison Ditching Association v. Hillis, 40 Ind. 408 [1872]; Etchison Ditching Association v. Jarrell, 33 Ind. 131 [1870]; Jordan Ditching & Draining Association v. Wagoner, 33 Ind. 50 [1870]; Sarber v. Rankin, 154 Ind. 236, 56 N. E. 225 [1899]; Osborn v. Maxinkuckee Lake Ice Company, 154 Ind. 101, 56 N. E. 33 [1899]; Reamer v. Hogg, 142 Ind. 138, 41 N. E. 353 [1895]; Rogers v. Voorhees, 124 Ind. 469, 24 N. E. 374 [1890]; Louisville, New Albany & Chicago Railway Company v. State for the use of Beckman, 122 Ind. 413, 24 N. E. 350 [1889]; Johnson v. State for use of Davidson, 116 Ind. 374, 19 N. E. 298 [1888]; Prezinger v. Harness, 114 Ind. 491, 16 N. E. 495

ory of the measure of the amount of assessments in such

- [1887]: *Hackett v. State for use of Martindale*, 113 Ind. 532, 15 N. E. 799 [1887]; *Laverty v. State ex rel. Hill*, 109 Ind. 217, 9 N. E. 774 [1886]; *Deegan v. State for use of Stoddard*, 108 Ind. 155, 9 N. E. 148 [1886]; *Frazer v. State for Use of Ingberman*, 106 Ind. 471, 7 N. E. 203 [1886]; *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160 [1885]; *Nevins & Otter Creek Township Draining Company v. Alkire*, 36 Ind. 189 [1871]; *Seyberger v. Calumet Draining Company*, 33 Ind. 330 [1870]; *Large v. Keen's Creek Draining Company*, 30 Ind. 263, 95 Am. Dec. 696 [1868]; *Eel River Draining Association v. Topp*, 16 Ind. 242 [1861]; *Beck v. Tolen*, 62 Ind. 469 [1878]; *Ellison v. Branstrator*, 34 Ind. App. 410, 73 N. E. 146 [1904]; *State for Use of Cram v. Elliott*, 32 Ind. App. 605, 70 N. E. 397 [1903]; *Hoefgen v. State ex rel. Brown*, 17 Ind. App. 537, 47 N. E. 28 [1896]; *Zinser v. Board of Supervisors of Buena Vista County*, — Ia. —, 114 N. W. 51 [1907]; *Sisson v. Board of Supervisors of Buena Vista County*, 128 Ia. 442, 70 L. R. A. 440, 104 N. W. 454 [1905]; *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902]; *Wormley v. Board of Supervisors of Wright County, Iowa*, 108 Ia. 232, 78 N. W. 824 [1899]; *Hoertz v. Jefferson Southern Pond Draining Company*, 119 Ky. 824, 84 S. W. 1141, 27 Ky. L. R. 278 [1905]; *Dixon v. Labry*, — Ky. —, 78 S. W. 430, 25 Ky. L. Rep. 1679 [1902]; (denying rehearing of 24 Ky. S. Rep. 697, 69 S. W. 791 [1902]); *Burguires v. Sanders*, 111 La. 109, 35 So. 478 [1903]; *Beals v. Inhabitants of Brookline*, 174 Mass. 1, 54 N. E. 339 [1899]; *Beals v. James*, 173 Mass. 591, 54 N. E. 245 [1899]; *Dean v. Treasurer of Clinton County*, 146 Mich. 645, 109 N. W. 1131 [1906]; *Attorney-General v. McClear*, 146 Mich. 45, 109 N. W. 27 [1906]; *Murphy v. Dobben*, 137 Mich. 565, 100 N. W. 891 [1904]; *Polock v. Sowers*, 137 Mich. 368, 100 N. W. 596 [1904]; *Township of Flynn v. Woolman*, 133 Mich. 508, 95 N. W. 567 [1903]; *Anketell v. Hayward*, 119 Mich. 525, 78 N. W. 557 [1899]; *Brady v. Hayward*, 114 Mich. 326, 72 N. W. 233 [1897]; *Hilton v. Dumphrey*, 113 Mich. 241, 71 N. W. 527 [1897]; *Mogg v. Hall*, 83 Mich. 576, 47 N. W. 553; *Brownell v. Board of Supervisors of Gratiot County*, 49 Mich. 414, 13 N. W. 798 [1882]; *Taylor v. Burnap*, 39 Mich. 739 [1878]; *State ex rel. Utick v. Board of County Commissioners of Polk County*, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216 [1902]; *Clapp v. Minnesota Grass Twine Company*, 81 Minn. 511, 84 N. W. 344 [1900]; *Lien v. Board of County Commissioners of Norman County*, 80 Minn. 58, 82 N. W. 1094 [1900]; *Mound City Land & Stock Company v. Miller*, 170 Mo. 240, 94 Am. St. Rep. 727, 60 L. R. A. 190, 70 S. W. 721 [1902]; *State ex rel. Mispagel v. Angert*, 127 Mo. 456, 30 S. W. 118 [1894]; *Sheridan v. Fleming*, 93 Mo. 321, 5 S. W. 813 [1887]; *Dodge County v. Acom*, 72 Neb. 71, 100 N. W. 136 [1904]; (affirming on rehearing *County of Dodge v. Acom*, 61 Neb. 376, 85 N. W. 292 [1901]); *Zeliff v. Bog & Fly Meadow Company*, 68 N. J. L. (39 Vr.) 200, 56 Atl. 302 [1902]; *Mayor and City Council of East Orange v. Hussey*, 72 N. J. L. (43 Vr.) 71, 59 Atl. 1060 [1905]; *Mayor and City Council of East Orange v. Hussey*, 70 N. J. L. (41 Vr.) 244, 57 Atl. 1086 [1903]; *State, Kean, Pros. v. Driggs Drainage Company*, 45 N. J. L. (16 Vr.) 91 [1883]; *State, Brittin, Pros. v. Blake*, 36 N. J. L. (7 Vr.) 442 [1872]; *In the Matter of the Application for Drainage of Lands between Lower Chatham and Little Falls in the Counties of Passaic, Essex and Morris*, 35 N. J. L. (6 Vr.) 497 [1872]; *State, Brittin*.

cases,² the apportionment thereof,³ and the question of the governmental power to which the right to make such assessments, is to be referred,⁴ it may be said, as a general proposition, that the courts uphold the power to provide for local assessments to pay for the compulsory drainage wherever any public benefit can be found—the private benefit in such cases being so clear that it is not the difficult question.

§ 341. Purposes auxiliary to drainage.

In connection with and as part of a system of drainage local assessments may be levied for clearing out rivers¹ for tiling and ditching,² for levees to aid in drainage,³ and for pumping stations in connection with such drainage system.⁴ An assessment may be levied for a large trunk ditch or main ditch, if so constructed as to enable the owners of the land to be drained to connect

Pros. v. Blake, 35 N. J. L. (6 Vr.) 208 [1871]; McCarty v. Brick, 11 N. J. L. (6 Halst.) 27 [1829]; Alstad v. Sim, 15 N. D. 629, 109 N. W. 66 [1906]; State v. Fisk, 15 N. D. 219, 107 N. W. 191 [1906]; Turnquist v. Cass County Com'rs., 11 N. D. 514, 92 N. W. 852 [1902]; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841 [1902]; Sessions v. Crunkilton, 20 O. S. 349 [1870]; Kellogg v. Ely, 15 O. S. 64 [1864]; Thompson v. Treasurer of Wood County, 11 O. S. 678 [1860]; Seely v. Sebastian, 4 Or. 25; Rutherford v. Maynes, 97 Pa. St. 78; Drainage District No. 15 of Skagit County v. Armstrong, 44 Wash. 23, 87 Pac. 52 [1906]; State of Washington on the Relation of Matson v. Superior Court for Skagit County, 42 Wash. 491, 85 Pac. 264 [1906]; Espy Estate Company v. Pacific County, 40 Wash. 67, 82 Pac. 129 [1905]; Fraser v. Mulany, 129 Wis. 377, 109 N. W. 139 [1906]; *In re Dancy Drainage Dist.*, 129 Wis. 129, 108 N. W. 202 [1906]; Stone v. Little Yellow Drainage District, 118 Wis. 388, 95 N. W. 405 [1903]; Town of Muskego v. Drainage Commissioners, 78 Wis. 40, 47 N. W. 11 [1890]; State ex rel. Baltzell v.

Stewart, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947 [1889]; Bryant v. Robbins, 70 Wis. 258, 35 N. W. 545 [1887]; Donnelly v. Decker, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389.

² See § 659.

³ See Chapter XIII.

⁴ See § 89 *et seq.*

¹ Wurts v. Hoagland, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]; (affirming Hoagland v. State, Simon-ton, Pros., 43 N. J. L. (14 Vr.) 456 [1881] which affirmed without opinion, Matter of Drainage of Great Meadows on Pequest River, 42 N. J. L. (13 Vr.) 553 [1880]); Lipes v. Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 1160 [1885]; Brown v. Keener, 74 N. C. 714 [1876].

² Goodrich v. City of Minonk, 62 Ill. 121 [1871].

³ Cooper v. Arctic Ditchers, 56 Ind. 233; See § 343.

⁴ Swamp Land District No. 150 v. Silver, 98 Cal. 51, 32 Pac. 866 [1893]; Village of Hyde Park v. Spencer, 118 Ill. 446, 8 N. E. 846 [1888]; (However in this case the uncertainty of the description of the improvement invalidated the assessment.)

therewith.⁵ Without statutory authority no power exists, of course, to convert a living stream into a ditch.⁶

§ 342. Preventing accumulation of stagnant water.

If land is so far below the grade of the surrounding land that stagnant water can accumulate there so as to be a menace to the health of the neighborhood, the state may authorize a municipal corporation or other public corporation to fill up such land so as to prevent the accumulation of such stagnant water, and may authorize the public corporation to assess the expense of such filling upon the owner of the property thus filled in.¹ The power to assess for such filling has been recognized in New York;² though in some of the cases involving such doctrine the specific assessment has been held invalid, as where such improvement was made without the petition therefor of the property owners affected, as required by the statute then in force,³ or where distinct improvements were so intermingled that realty was assessed for work from which it received no benefit.⁴ Such an improvement or assessment, therefor, is not, however, an assessment referable to the power of taxation,⁵ and measured by the amount of the benefits received by the realty thus improved.⁶ This power is to be referred to the police power⁷ and rests upon the power of the state to abate nuisances at the expense of persons responsible

¹ *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160 [1885]; "Where the construction of a large ditch enables land-owners to carry their lateral ditches into it, and to thus secure good drainage without encroaching upon the rights of others, there is a special benefit." *Lipes v. Hand*, 104 Ind. 503, 508, 1 N. E. 871, 4 N. E. 160 [1885].

² *Commissioners of Greene County v. Harbine*, 74 O. S. 318, 78 N. E. 521 [1906].

³ *Horbach v. City of Omaha*, 54 Neb. 83, 74 N. W. 434 [1898]; *Bliss v. Kraus*, 16 O. S. 54 [1864]; *City of Philadelphia v. Gratz Land Co.*, 38 Pa. St. 359 [1861]; *Kennedy v. Board of Health*, 2 Pa. St. 366 [1845]; *Watkins v. City of Milwaukee*, 55 Wis. 335, 13 N. W. 222.

² In the Matter of the Application of Tappan to Vacate Certain Assessments, 54 Barb. (N. Y.) 225 [1869]; See also to the same effect, In the Matter of the Petition of Van Buren to Vacate an Assessment, 79 N. Y. 384 [1880]; In the Matter of the Petition of Van Buren, 55 How. (N. Y.) 513 [1878]; In the Matter of the Petition of Banta to Vacate an Assessment, 60 N. Y. 165 [1875].

³ In the Matter of the Petition of Banta to Vacate an Assessment, 60 N. Y. 165 [1875].

⁴ In the Matter of the Petition of Van Buren to Vacate an Assessment, 79 N. Y. 384 [1880]; In the Matter of the Petition of Van Buren, 55 How. (N. Y.) 513 [1878].

⁵ See § 9.

⁶ See § 717.

⁷ See § 93.

for the creation or continuance thereof.⁸ Accordingly, the owner cannot be assessed for the cost of filling the lot to any greater height than is reasonably necessary to prevent the accumulation of stagnant water.⁹ If the nuisance is created by the action of the municipality itself the owner of the property on which the stagnant water accumulates cannot be assessed for the cost of the filling necessary to remove it.¹⁰ Thus A. owned a tract of low land which was naturally drained by a stream. The city constructed a street across such stream at such a grade as to fill up the channel of the stream at the point of crossing; and accordingly A.'s land was converted thereby into a pond of stagnant water. It was held that A. could not be assessed for the expense of filling up such lot.¹¹ However, it has been held that if, in the proper and reasonable grading of a street, a nuisance is created upon a private lot because no proper provision is made for sewerage, such nuisance may be abated by the city at the cost of the lot-owner.¹² Since such an improvement and assessment therefor are referable to the police power, the validity of assessments for this purpose was recognized by the courts of South Carolina;¹³ although under their construction of their constitution assessments which are referable to the power of taxation are unconstitutional.¹⁴ Assessments for filling vacant lots have been held invalid for want of statutory authority therefor. Under a statute authorizing a city "to prevent and remove nuisances" it was held doubtful if a city could assess the owner of low land for the cost of filling it in.¹⁵

⁸ *Bush v. City of Dubuque*, 69 Ia. 233, 28 N. W. 542 [1886]; *City Council of Charleston v. Werner*, 46 S. C. 323, 24 S. E. 207 [1895]; *Watkins v. City of Milwaukee*, 55 Wis. 335, 13 N. W. 222.

⁹ *Bush v. City of Dubuque*, 69 Ia. 233, 28 N. W. 542 [1886].

¹⁰ *Lasbury v. McCague*, 56 Neb. 220, 76 N. W. 862 [1898].

¹¹ *City of Hannibal v. Richards*, 82 Mo. 330 [1884]; *Lasbury v. McCague*, 56 Neb. 220, 76 N. W. 862 [1898]; *Weeks v. City of Milwaukee*, 10 Wis. 242 [1860].

¹² *Smith v. City of Milwaukee*, 18 Wis. 63 [1864]; (explaining *Weeks v. City of Milwaukee*, 10 Wis. 242 [1860]).

¹³ *City Council of Charleston v. Werner*, 46 S. C. 323, 24 S. E. 207 [1895]; *Charleston v. Werner*, 38 S. C. 488, 37 Am. St. Rep. 776, 17 S. E. 33 [1892].

¹⁴ See § 118, § 159, in which the present view of the courts of South Carolina is set forth.

¹⁵ *Walker v. District of Columbia*, 6 Mackey (D. C.) 352 [1888]. This point, however, was not before the court for decision.

§ 343. Levees.

A levee built for the purpose of keeping low land from being flooded by high water when neighboring rivers are swollen by rain and melting snow, is undoubtedly a special benefit to the land thus protected from inundation.¹ As in the case of systems of public drainage,² the difficulty in upholding local assessments for constructing levees lies in the fact that the real object in constructing them is the private benefit and gain of those whose lands are thus protected. If the statute providing for the construction of levees by some public corporation is intended solely for the private benefit of the land owners in question, such statute is unconstitutional,³ and no local assessment can be levied thereunder.⁴ Such improvement can be made and local assessments levied therefor only where the public welfare will be subserved in some way.⁵ It has been suggested by the courts, however, that local assessments to pay for the construction of levees may be sustained on grounds of public health, since widespread disease is likely to follow an overflow;⁶ and that for this reason "the police power of the state is broad enough to authorize the law in question."⁷ The theory that levees promote public health and abate nuisances has been suggested.⁸ Other courts, in analogy to the theory advanced in some jurisdictions in the case of general systems of drainage,⁹ appear to hold that the protection of land subject to overflow and the benefit conferred upon them is sufficient to justify the exercise of governmental power in making such improvement and in levying local assessments therefor.¹⁰ Resting in part on these theories and in part on the necessity of

¹ Overstreet v. Levee Dist. No. 1 of Conway County, 80 Ark. 462, 97 S. W. 676 [1906]; Jonesboro L. C. & E. R. Co. v. Board of Directors of St. Francis Levee District, 80 Ark. 316, 97 S. W. 281 [1906]; Daily v. Swope, 47 Miss. 367 [1872]; Morrison v. Morey, 146 Mo. 543, 48 S. W. 629 [1898].

² See § 335 *et seq.*

³ Smith v. Atlantic & Great Western R. R. Co., 25 O. S. 91.

⁴ Wright v. Thomas, 26 O. S. 346 [1875].

⁵ Jenal v. Green Island Draining Co., 12 Neb. 163, 10 N. W. 547 [1881].

⁶ Morrison v. Morey, 146 Mo. 543, 48 S. W. 629 [1898].

⁷ Morrison v. Morey, 146 Mo. 543, 562, 48 S. W. 629 [1898]; See to the same effect Eldridge v. Trezevant, 160 U. S. 452, 40 L. 490, 16 S. 345.

⁸ Hagar v. Board of Supervisors of Yolo County, 47 Cal. 222 [1874].

⁹ See § 338.

¹⁰ Missouri, Kansas & Texas Railway Company v. Cambern, 66 Kan. 365, 71 Pac. 809 [1903]; Daily v. Swope, 47 Miss. 367 [1872].

some means of providing for protection to the flooded alluvial lands along the great rivers, the courts have, with few exceptions, held that the construction of a levee is an improvement so combining public benefit and especial local advantage that local assessments may be levied therefor.¹¹ In some of these states the question of the propriety of levying assessments for the construction of levees is settled as far as state constitutions are concerned by specific constitutional provisions authorizing the construction of levees as a public purpose. "A levee system shall be maintained in the state and a tax, not to exceed one mill, may be levied annually on all property subject to taxation, and shall be applied exclusively to the maintenance and repair of levees."¹² "The legislature shall impose for levee purposes, in addition to the levee taxes heretofore levied or authorized by law, a uniform tax of not less than two nor more than five cents an acre, per annum, upon every acre of land now or hereafter embraced within the limits of either or both of said levee districts. . . ."¹³ "The legislature shall have full power to provide such system of taxation for said levee districts as it shall, from time to time, deem

¹¹ *Ford v. Delta & Pine Land Company*, 164 U. S. 662, 41 L. 590, 17 S. 230 [1897]; (affirming *Ford v. Delta & Pine Land Co.*, 43 Fed. 181 [1890]); *Heine v. Levee Commissioners*, 86 U. S. (19 Wall.) 655, 22 L. 223 [1873]; (affirming *Heine v. Levee Commissioners*, 11 Fed. Cas. 1033, 1 Woods 246 [1872]); *Hart v. Levee Commissioners*, 54 Fed. 559; *Buckner v. Sugg*, 79 Ark. 442, 96 S. W. 184 [1906]; *Redfork Levee Dist. v. St. Louis, I. M. & S. Ry. Co.*, 80 Ark. 98, 96 S. W. 117 [1906]; *Alzheimer v. Plum Bayou Levee Dist.*, 79 Ark. 229, 95 S. W. 140 [1906]; *Memphis Land & Timber Company v. St. Francis Levee District*, 64 Ark. 258, 42 S. W. 763 [1897]; *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894]; *Fitzhugh v. Levee District*, 54 Ark. 224, 15 S. W. 455 [1891]; *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184; *Clayton v. Lafarone*, 23 Ark. 137 [1861]; *McDermott v. Mathis*, 21 Ark. 60 [1860]; *McGehee*

v. Mathis, 21 Ark. 40 [1860]; *Reclamation District No. 537 of Yolo County v. Burger*, 122 Cal. 442, 55 Pac. 156 [1898]; *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222 [1874]; *Chambliss v. Johnson*, 77 Ia. 611, 42 N. W. 427 [1889]; *Richman v. Supervisors of Muscatine County*, 77 Ia. 513, 14 Am. St. Rep. 308, 4 L. R. A. 445, 42 N. W. 422 [1889]; *Missouri, Kansas & Texas Railway Company v. Cambren*, 66 Kan. 365, 71 Pac. 809 [1903]; *State ex rel. Ashby v. Three States Lumber Co.*, 198 Mo. 430, 95 S. W. 333 [1906]; *State ex rel. Stotts v. Wall*, 153 Mo. 216, 54 S. W. 465 [1899]; *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629 [1898]; *Columbia Bottom Levee Company v. Meier*, 39 Mo. 53 [1866]; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276 [1858].

¹² Article 238, Constitution of Louisiana.

¹³ Article XI., § 236, Constitution of Mississippi.

wise and proper.”¹⁴ Under these and similar provisions there can be no doubt, as far as state law is concerned, that a levee is of general public benefit. As we have seen,¹⁵ there is no doubt that a levee confers an especial local benefit. Accordingly, in these states assessments for the construction of levees are upheld.¹⁶ The Supreme Court of the United States has acquiesced in this rule and follows the state law upon this question.¹⁷

§ 344. Illinois doctrine concerning levees.

While assessments for the construction of levees were held unconstitutional in Illinois,¹ the question of the nature of the improvement was not involved, but the decision turned on certain provisions of the constitution of Illinois limiting the general taxing power of the legislature. Under a provision that the legislature might confer the power of taxation upon counties, townships, school districts, cities, towns and villages, but that such taxes must be “uniform in respect to persons and property within the jurisdiction of the body imposing the same,”² it was held that the legislature could not grant power to levy taxes to any other body than the corporate authorities of the municipality or district to be taxed;³ and hence, could not authorize a levee district with

¹⁴ Article XI., § 237. Constitution of Mississippi.

¹⁵ See *ante* this section.

¹⁶ *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475 [1894]; *State ex rel. Hill v. Judges*, 46 La. Ann. 1292, 16 So. 219; *George v. Young*, 45 La. Ann. 1232, 14 So. 137 [1893]; *Munson v. Board of Commissioners of The Atchafalaya Basin Levee District*, 43 La. Ann. 15, 8 So. 906 [1891]; *Excelsior Planting & Manufacturing Company v. Green*, 39 La. Ann. 455, 1 So. 873 [1887]; *Charnock v. Fardoche and Grosse Tête Special Levee District Company*, 38 La. Ann. 323 [1886]; *Board of Levee Commissioners v. Lario Bros.*, 33 La. Ann. 276 [1881]; *Richardson v. Morgan*, 16 La. Ann. 429 [1862]; *Wallace v. Shelton*, 14 La. Ann. 498 [1859]; *Yeatman v. Crandall*, 11 La. Ann. 220 [1856]; *Gillispie v. Police Jury of Concordia*, 5 La. Ann. 403 [1850]; *Crowley v. Copley*, 2 La.

Ann. 329 [1847]; *Smith v. Willis*, 78 Miss. 243, 28 So. 878 [1900]; *Carlisle v. Yoder*, 69 Miss. 384, 12 So. 255; *Alcorn v. Hamer*, 38 Miss. 652 [1860]; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508 [1854].

¹⁷ *Ford v. Delta & Pine Land Company*, 164 U. S. 662, 41 L. 590, 17 S. 230 [1897]; (affirming *Ford v. Delta & Pine Land Co.*, 43 Fed. 181 [1890]).

¹ *Udike v. Wright*, 81 Ill. 49 [1876].

² Constitution 1848, Article IX., § 4.

³ *Board of Directors v. Houston*, 71 Ill. 318; *Gage v. Graham*, 57 Ill. 144; *Hessler v. Drainage Commissioners*, 53 Ill. 105; *Harward v. St. Clair & Monroe Levee and Drainage District*, 51 Ill. 130; *People ex rel. South Park Commissioners v. Salomon*, 51 Ill. 37.

power to levy local assessments. A provision in the constitution of 1870 enabled the General Assembly to "vest corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise,"⁴ but for all other purposes required taxation which should be uniform within the jurisdiction of the body imposing the same. Since a levee district was not a "city, town or village," it received no authority under this section to make local assessments. Another section of the constitution of 1870⁵ provided: "The General Assembly may make general laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of the others." However, the levee in question was not to be constructed as incidental to a system of drains and ditches, but was a levee running for many miles along the Wabash, intended as an independent and separate improvement. Accordingly it was held that in view of these restrictions on the taxing power, local assessments for levee purposes were not authorized by the constitution.⁶ Following this decision an amendment to the constitution was adopted,⁷ which provides: "The General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others and provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state by special assessments upon the property benefited thereby." Under this amendment statutes authorizing the construction of levees to be paid for by local assessments levied upon the property benefited thereby have been upheld.⁸

⁴ Constitution of 1870, Article IX., § 9.

⁵ Article IV., § 31.

⁶ *O'Brien v. Wheelock*, 184 U. S. 450, 46 L. 636, 22 S. 354 [1902]; (affirming, *O'Brien v. Wheelock*, 95 Fed. 883, 37 C. C. A. 309 [1899]; which affirmed 78 Fed. 673); *Udike v. Wright*, 81 Ill. 49.

⁷ Constitution of 1870, Article IV., § 31, adopted as an amendment in 1878.

⁸ *Stack v. People ex rel. Talbott*, 217 Ill. 220, 75 N. E. 347 [1905]; *Robeson v. People ex rel. Curry*, 161 Ill. 176, 43 N. E. 619 [1896]; *Riebling v. People*, 145 Ill. 120, 33 N. E. 1090; *Spear v. Drainage Commissioners*, 113 Ill. 632 [1886]; *Owners of Land v. People ex rel. Stookey*, 113 Ill. 296 [1886]; *Huston v. Clark*, 112 Ill. 344 [1885]; *Blake v. People for Use of Caldwell*, 109 Ill. 504 [1884].

§ 345. Tennessee doctrine concerning levees.

In Tennessee, the courts formerly recognized no distinction in apportionment between a tax and an assessment based on the theory of benefits, and accordingly upheld assessments only when the improvement could be justified on the theory of the police power.¹ An assessment for a levee has been held to be unconstitutional under this theory, the court holding that the improvement was primarily for the private benefit of the owners of realty protected from inundation by such levee, and that accordingly such improvement could not be justified under the police power.² With the repudiation of the fundamental theory of the invalidity of assessments for benefits in Tennessee,³ it is likely that assessments for levees would now be upheld.

§ 346. Waterworks and water-pipes.

A system of waterworks by which water can be supplied to the inhabitants of a municipality for domestic use, and can be made use of by the municipality in extinguishing fires and for other public purposes, undoubtedly confers a general benefit upon the public. It is one of the purposes for which taxes may be levied. Such a system may be paid for out of the public treasury. There appears, also, to be a private benefit enuring to the owners of land, available for residence or business purposes, which is thus supplied with water. Is this benefit of such a nature that local assessments may be levied therefor? In determining this question a distinction is made by some courts between the water-mains—pipes which bring the water to the land in question, hydrants and

¹ See § 93.

² Reelfoot Lake Levee District v. Dawson, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041 [1896]; "The paramount and controlling idea disclosed in every part of the act is to raise a fund with which to reclaim from frequent inundation a large body (some three hundred thousand acres) of land in the Mississippi Valley and thereby enhance its value and the wealth of its owners. Strictly speaking it is without an element or feature of regulation. The health of the people in the locality might be somewhat improved and even life itself might be saved accordingly by

the construction of the contemplated levee, and the consequent prevention of periodical overflows; but those are the most remote of the benefits to be anticipated from such a work, and were likely not thought of by the members of the general assembly. Without further enlarging upon the subject we hold unhesitatingly that this legislation is in no sense referable to the police power of the state and that it cannot be justified thereunder." Reelfoot Lake Levee District v. Dawson, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041 [1896].

³ See § 160.

the like, and the pumping station by which water is supplied to the entire system.

§ 347. Water-pipes.

The courts are practically unanimous in holding that the mains and pipes by which water is conducted to the land supplied therewith, constitute an especial local benefit for which such lands may be assessed.¹ If the assessment is levied in proportion to the benefits conferred, an assessment for water-pipes may be levied upon property upon which there is no immediate need for the use of water,² such as vacant lots.³ The general principle seems to be

¹ *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898]; (affirming, *Parsons v. District of Columbia*, 8 App. D. C. 391 [1896]; which followed *Burgdorf v. District of Columbia*, 7 App. D. C. 405); *Parsons v. District of Columbia*, 8 App. D. C. 391 [1896]; (affirmed in *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898]; and following *Burgdorf v. District of Columbia*, 7 App. D. C. 405); *District of Columbia v. Burgdorf*, 6 App. D. C. 465 [1895]; *McChesney v. City of Chicago*, 226 Ill. 238, 80 N. E. 770 [1907]; *Betts v. City of Naperville*, 214 Ill. 380, 73 N. E. 752 [1905]; *Town of Cicero v. Green*, 211 Ill. 241, 71 N. E. 884 [1904]; *Gordon v. City of Chicago*, 201 Ill. 623, 66 N. E. 823 [1903]; *Myers v. City of Chicago*, 196 Ill. 591, 63 N. E. 1037; *Harts v. People ex rel. Kochersperger*, 171 Ill. 458, 49 N. E. 538 [1898]; *Hewes v. Glos*, 170 Ill. 463, 48 N. E. 922; *O'Neill v. People ex rel. Kochersperger*, 166 Ill. 561, 46 N. E. 1096 [1897]; *Palmer v. City of Danville*, 166 Ill. 42, 46 N. E. 629 [1897]; *Hughes v. City of Momence*, 163 Ill. 535, 45 N. E. 300 [1896]; *Palmer v. City of Danville*, 154 Ill. 156, 38 N. E. 1067 [1894]; *McChesney v. City of Chicago*, 152 Ill. 543, 38 N. E. 767 [1894]; *Murphy v. People*, 120 Ill. 234, 11 N. E. 202; *Ricketts v. Village of Hyde Park*, 85 Ill. 110 [1877]; *Village of Hyde Park v.*

Waite, 2 Brad. (Ill.) 443 [1878]; *Young v. City of St. Louis*, 47 Mo. 492 [1871]; *City of Philadelphia v. Union Burial Ground Society of the City and County of Philadelphia*, 178 Pa. St. 533, 36 L. R. A. 263, 36 Atl. 172 [1896]; *City of Allentown v. Hower*, 93 Pa. St. (12 Norris) 332 [1880]; *Allentown v. Henry*, 73 Pa. St. (23 P. F. Smith) 404 [1873]; *Britton v. City of Philadelphia*, 32 Pa. St. (8 Casey) 387 [1859]; *City of Philadelphia v. Cooke*, 30 Pa. St. (6 Casey) 56 [1858]; *Northern Liberties v. Coates' Heirs*, 15 Pa. St. (3 Harr.) 245 [1850]; *Northern Liberties v. St. John's Church*, 15 Pa. St. (3 Harr.) 104 [1850]; *City v. McClamont*, 6 Phil. (Pa.) 543 [1868]; *Batterman v. City of New York*, 65 N. Y. App. Div. 576 [1901]; *Allen v. Drew*, 44 Vt. 174 [1872]; *R. & A. R. R. Co. v. City of Lynchburg*, 81 Va. 473 [1866]; *Vreeland v. City of Tacoma*. — Wash. —, 94 Pac. 192 [1908]; *Smith v. City of Seattle*, 25 Wash. 300, 65 Pac. 612 [1901]; *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29 [1899]; *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249 [1899].

² *Dasey v. Skinner*, 33 N. Y. State R. 15, 11 N. Y. Supp. 821 [1890]; (The benefits in this case consisted in increased fire protection.)

³ *Jones v. Water Commissioners*, 34 Mich. 273; *Crawford's Estate*, 14 Phila. (Pa.) 323.

recognized in cases in which the specific assessment was held to be invalid for some defect not going to the question of the propriety of authorizing assessments for such a purpose,⁴ as where the apportionment was arbitrary,⁵ the land already supplied with water-pipes,⁶ the city not empowered, by statute, to levy such assessment,⁷ the property assessed not described with sufficient accuracy,⁸ or the assessment not levied in the manner authorized by statute.⁹ So under an ordinance for buying water-pipes, hydrants cannot be purchased.¹⁰ It has been held that protection against fire is a sufficient local benefit and that an assessment may be levied for the cost of constructing water-pipes that are restricted to use in case of fire.¹¹

§ 348. Connections, hydrants and valves.

Assessments may be levied for incidental appliances, necessary to the local use of a system of waterworks. Thus an assessment may be levied for the cost of connections with the main water-pipes of the city, running from such water-pipes to the lot lines;¹ or even for connections with pipes belonging to a private water company, and pipes from such connections to the curb line of the street.² An assessment may be levied for extending an existing system of water-pipes.³ A regulation that persons desiring to use city water must lay service-pipes from their lands to the main pipes at their own expense has been upheld.⁴ While the assess-

⁴ *Cook Farm Co. v. City of Detroit*, 124 Mich. 426, 83 N. W. 130 [1900]; *City of Allentown v. Hower*, 93 Pa. St. (12 Norris) 32 [1880].

⁵ *Warren v. City of Chicago*, 118 Ill. 329, 11 N. E. 218 [1888].

⁶ *McChesney v. City of Chicago*, 213 Ill. 592, 73 N. E. 368 [1905]; *Baker v. Gartside*, 86 Pa. St. (5 Norris) 498.

⁷ *Alvord v. City of Syracuse*, 163 N. Y. 158, 57 N. E. 310 [1900].

⁸ *Bensinger v. District of Columbia*, 6 Mackey (D. C.) 285 [1888].

⁹ *Allentown v. Henry*, 73 Pa. St. (23 P. F. Smith) 404 [1873]; (A case in which the statute authorized an assessment on the land on streets where pipes were laid; and the as-

essment was on dwellings not supplied with hydrants.)

¹⁰ *Town of Cicero v. Green*, 211 Ill. 241, 71 N. E. 884 [1904].

¹¹ *City v. McClamont*, 6 Phil. (Pa.) 543 [1868].

¹ *Prindiville v. Jackson*, 79 Ill. 337 [1885]; (In this case the city merely required the owner to pay for the cost of such connection when he wished to make use of it.)

² *Palmer v. City of Danville*, 154 Ill. 156, 38 N. E. 1067 [1894]; *Gleason v. Waukesha Co.*, 103 Wis. 225, 79 N. W. 249 [1899].

³ *Myers v. City of Chicago*, 196 Ill. 591, 63 N. E. 1037 [1902].

⁴ *Prindiville v. Jackson*, 79 Ill. 337 [1875].

ments already referred to have been for water-pipes or mains,⁵ other purposes have been treated as local so as to permit of local assessments, such as hydrants and valves in addition to the pipes,⁶ lawn hydrants for sprinkling lawns,⁷ or reservoirs and fire hydrants in addition to the pipes.⁸

§ 349. Defective apportionment in assessment for water-pipes.

In the cases thus far discussed the apportionment has been fairly proportional to the benefits received from the laying of the water-pipes, for which the assessment is levied. If such charge is not apportioned with regard to special benefits received by the realty assessed it is held that such charge is not a valid assessment.¹ If not apportioned according to the value of the property legally assessed for taxation at its true value, it is not valid as a tax.² These questions are outside of the scope of this chapter and are discussed elsewhere.³ They are referred to here in order to arrive at a clear understanding of the force and effect of the New Jersey cases cited. They are often regarded as laying down the general rule that local assessments cannot be levied for a water supply. This is not, however, the real principle on which these cases rest, as the defect in the assessment in question was that there was no attempt to levy such assessments upon any theory of benefits.⁴ An assessment of seventy-five cents per foot frontage

⁵ *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922; *Hughes v. City of Mokence*, 163 Ill. 535, 45 N. E. 300 [1896].

⁶ *Betts v. City of Naperville*, 214 Ill. 380, 73 N. E. 752 [1905]; *Murr v. City of Naperville*, 210 Ill. 371, 71 N. E. 380 [1904].

⁷ *Lingle v. West Chicago Park Commissioners*, 222 Ill. 384, 78 N. E. 794 [1906].

⁸ *Harts v. People ex rel. Koehersperger*, 171 Ill. 458, 49 N. E. 538 [1898]; *O'Neil v. People ex rel. Koehersperger*, 166 Ill. 561, 46 N. E. 1096 [1897].

¹ *State, Culver, Pros. v. Mayor and Aldermen of Jersey City*, 45 N. J. L. (16 Vr.) 256 [1883]; *Mayor, etc., of Jersey City v. State, Vreeland*, 43 N. J. L. (14 Vr.) 638; (affirming *State, Vreeland v. Mayor and Aldermen of Jersey City*, 43 N. J.

L. (14 Vr.) 135); *State, United New Jersey Railroad & Canal Co. v. Mayor and Aldermen of Jersey City*, 41 N. J. L. (12 Vr.) 471; *Provident Institution for Savings v. Allen*, 37 N. J. Eq. (10 Stew.) 627 [1883]; (affirming without report *Provident Institution for Savings v. Allen*, 37 N. J. Eq. (10 Stew.) 36 [1883]).

² *Mayor, etc., of Jersey City v. State, Vreeland*, 43 N. J. L. (14 Vr.) 638; (affirming *State, Vreeland v. Mayor and Aldermen of Jersey City*, 43 N. J. L. (14 Vr.) 135); *State, United New Jersey Railroad & Canal Co. v. Mayor and Aldermen of Jersey City*, 41 N. J. L. (12 Vr.) 471.

³ See § 147 *et seq.*; Chapter XIII.

⁴ See discussion of these cases in *Doughten v. City of Camden*, 71 N. J. L. 426, 59 Atl. 16 [1904].

was levied for the cost of laying water-pipes. In the lower court such assessment was held valid at least as far as concerns owners of realty who made no objection to the work and who made use of the water furnished through the pipes for which such assessment was levied.⁵ This case was, however, reversed in the court of last resort on the ground that the charge was invalid as an assessment as not apportionate according to benefits,⁶ and that if not an assessment it could not be upheld as it was not a valid exercise of the police power.⁷ The peculiarity of the New Jersey cases rests in their views on the subject of apportionment,⁸ and not in their views as to the power of the legislature to assess for laying water-pipes. The propriety of levying an assessment for such purpose has been recognized, although the specific assessment has been held invalid as being levied against farm land and at the same time apportioned by the front foot rule,⁹ a system of apportionment not allowed in Pennsylvania as to rural or farm land.¹⁰

§ 350. Special views in certain jurisdictions.

In Minnesota, prior to any specific constitutional provision upon this subject, the purpose of laying water-pipes was not seriously questioned as one which was not proper for local assessment; but practical difficulties were found in levying such assessments,¹ and subsequently the constitution of Minnesota was amended by the addition of the following provision: "And provided further, that for the purpose of defraying the expenses of laying water-pipes and supplying any city or municipality with water, the legislature may, by general or special law, authorize any such city or municipality having a population of five thousand or more, to levy an

⁵ Doughten v. City of Camden, 71 N. J. L. 426, 59 Atl. 16 [1904]; (distinguishing State, Vreeland, v. Mayor and Aldermen of Jersey City, 43 N. J. L. (14 Vr.) 135; Mayor, etc., of Jersey City v. State, Vreeland, 43 N. J. L. (14 Vr.) 638; and State, Culver, Pros. v. Mayor and Aldermen of Jersey City, 45 N. J. L. (16 Vr.) 256 [1883]; as cases where the city had not been given power by the legislature to charge the expense of constructing water mains on the property benefited thereby; and where furthermore the city had made

an arbitrary charge on realty and had not fixed the charge to meet either the cost of laying the pipes or the benefit accruing therefrom).

⁶ See § 118; Chapter XIII.

⁷ Doughten v. City of Camden, 72 N. J. L. 451, 111 Am. St. Rep. 680, 3 L. R. A. (N. S.) 817, 63 Atl. 170 [1906].

⁸ See Chapter XIII., § 690 *et seq.*

⁹ City of Allentown v. Adams, 5 Sadler (Pa.) 253 [1887].

¹⁰ See § 610, § 706.

¹ Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 468 [1874].

annual tax or assessment upon the lineal foot of all lands fronting on any water-main or water-pipe laid by such city or municipality within corporate limits of said city for supplying water to the citizens thereof without regard to the cash value of such property; and to empower such city to collect any such tax, assessments or fines, or penalties for failure to pay the same, or any fine or penalty for any violation of the rules of such city or municipality in regard to the use of water, or for any water rate due for the same. . . . ”² Accordingly, under such constitutional provision, such assessments have been upheld in Minnesota after some hesitation; the vacillation of judicial opinion being due to the supposed effect of the United States Constitution upon the method of apportioning such assessments, and not to any doubt as to the effect of the state constitution. An assessment for the construction of water-mains and pipes levied on the realty in front of which such mains and pipes were laid and apportioned according to frontage, was originally held valid under the state constitution.³ Subsequently, in view of the supposed holding in *Norwood v. Baker*,⁴ such assessment was held to be invalid, as being in conflict with the Constitution of the United States;⁵ but this last decision was subsequently reversed on re-argument and the assessment was held to be valid.⁶ In Massachusetts it has been held that in estimating the benefits enuring from a number of improvements it is proper to include the benefits caused by laying water-pipes.⁷ It will thus be seen that many jurisdictions have passed upon the validity of such assessments and have upheld them. The construction which the courts of South Carolina have placed upon the clause of their constitution, which protects property from being taken except by due process of law, has practically done away

² Article IX., § 1, Constitution of Minnesota, amended 1881.

³ *State of Minnesota v. Robert P. Lewis Co.*, 72 Minn. 87, 75 N. W. 108; *sub nomine* *Ramsey County v. Robert P. Lewis Co.*, 42 L. R. A. 639 [1898]; *Noonan v. City of Stillwater*, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444.

⁴ 172 U. S. 269, 43 L. 443, 19 S. 187 [1898].

⁵ *State v. Robert P. Lewis Co.*, 82 Minn. 390, 85 N. W. 207; *sub nomine*,

Ramsey County v. Robert P. Lewis Co., 53 L. R. A. 421 [1901].

⁶ *State v. Robert P. Lewis Co.*, 82 Minn. 402, 86 N. W. 611; *sub nomine* *Ramsey County v. Robert P. Lewis Co.*, 53 L. R. A. 427; See also as upholding an assessment for pipes for a water-works system, *State v. Trustees of Macalester College*, 87 Minn. 165, 91 N. W. 484 [1902].

⁷ *Lincoln v. Board of Street Commissioners of the City of Boston*, 176 Mass. 210, 57 N. E. 356 [1900].

with the possibility of local assessments in that state.⁸ Accordingly, we find that local assessments cannot be levied on lots abutting the streets on which water-pipes are laid to pay for the purchase of a waterworks plant.⁹ No distinction was made in this holding between assessing to pay for the pumping station and assessing to pay for the cost of the water-pipes, but the entire assessment was treated as violating the constitutional provision.

§ 351. Pumping station.

In some jurisdictions an attempt has been made to levy local assessments on realty supplied with water by means of a waterworks system to pay the cost of the pumping station and other parts of the plant other than the local pipes. Whether such assessments can be levied is a question upon which there is a conflict of authority. In Arkansas such assessments have been levied under a statute specially authorizing local assessments for such a purpose, and the courts have held that such assessments may be authorized without violating the constitutional rights of the property owner.¹ In Illinois such assessments have been levied under statutory and constitutional provisions authorizing municipalities to assess for "local improvements." Under such provisions it has been held that the pumping station and similar parts of the plant are not "local improvements" within the meaning of either the constitution or the statute; and that accordingly local assessments cannot be levied therefor.² Under this theory it has been held that local assessments cannot be levied for a stand-pipe and engine-house,³ for a reservoir, well, stand-pipe and pumping-

⁸See § 118, § 159.

⁹*Stehmeyer v. City Council of Charleston*, 53 S. C. 259, 31 S. E. 322 [1898].

¹*Morrilton Waterworks Improvement District v. Earl*, 71 Ark. 4, 69 S. W. 577, 71 S. W. 666 [1903]; *Crane v. Siloam Springs*, 67 Ark. 30, 55 S. W. 95 [1899]. The statute in question authorized the municipality or district to take steps for the "purchase of land or erection of houses, reservoirs or other improvements necessary for the proper construction and operation of water-works."

²*Harts v. People ex rel. Kocher-*

sperger, 171 Ill. 458, 49 N. E. 538 [1898]; *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922; *O'Neill v. People ex rel. Kochersperger*, 166 Ill. 561, 46 N. E. 1096 [1897]; *Hughes v. City of Momence*, 163 Ill. 16, 45 N. E. 302 [1896]; *Hughes v. City of Momence*, 164 Ill. 535, 45 N. E. 300 [1896]; *Village of Blue Island v. Eames*, 155 Ill. 398, 40 N. E. 615; *Village of Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611 [1895].

³*O'Neill v. People ex rel. Kochersperger*, 166 Ill. 561, 46 N. E. 1096 [1897].

works,⁴ or for pumping-works, pumps and a stand-pipe.⁵ These two theories are irreconcilable. While the Arkansas court has endeavored to reconcile the cases by pointing that in Illinois the legislature had not specially authorized local assessments for such a purpose, but in Arkansas it had expressly authorized such an assessment,⁶ the fact remains that the Illinois courts base their holding on the meaning of the phrase "local improvement," which occurs both in statute and in constitution. The truth is that the two jurisdictions differ in one respect at least in their fundamental theories of local improvements, the Arkansas courts holding that an improvement which is at once public in its nature and confers a special benefit upon the real property assessed is a local improvement, even if such real property may include all the realty within the territorial limits of the municipality which makes the improvement,⁷ while the Illinois courts take the position that if the benefit is shared by all the realty in the municipality the improvement cannot be regarded as a local one.⁸ This inconsistency in the theory of local assessment is discussed elsewhere.⁹ It may here be observed that the Illinois courts have thus reached the conclusion that a pumping-station for a water system cannot be a local improvement, while a pumping station for a system of sewers may be a local assessment.¹⁰ Apart from the peculiar construction put upon the constitution of Illinois by its courts, no good reason appears for discriminating between pumping-station of a waterworks system and the pipes. Neither is of any benefit without the other. All the reasons which make it proper to assess for the local pipes forbid us to say that as a matter of law the pumping station cannot be of any especial benefit to the property supplied thereby. The propriety of levying a local assessment to pay the interest upon a debt incurred for constructing a system of waterworks, including apparently the central pumping station, has been recognized in cases in

⁴ Hughes v. City of Momence, 164 Ill. 16, 45 N. E. 302 [1896]; Hughes v. City of Momence, 163 Ill. 535, 45 N. E. 300 [1896].

⁶ Harts v. People ex rel. Kochersperger, 171 Ill. 458, 49 N. E. 538 [1898].

⁹ See the discussion of the Illinois cases in Crane v. Siloam Springs, 67 Ark. 30, 55 S. W. 955 [1899].

⁷ Crane v. Siloam Spring, 67 Ark. 30, 55 S. W. 955 [1899].

⁸ Village of Morgan Park v. Wall, 155 Ill. 262, 40 N. E. 611 [1895].

⁹ See § 283 *et seq.*; § 654.

¹⁰ See § 330.

which the specific assessment has been held to be invalid, as where not levied in compliance with the statute,¹¹ or where the statute is invalid as not providing for hearing and notice.¹²

§ 352. Wells and cisterns.

Wells and cisterns for furnishing water for domestic use and for extinguishing fires are as clearly a public benefit, though to a slighter degree, as a system of waterworks. Such improvements are so clearly a public benefit that it is well settled that a public corporation may construct them and may pay therefor out of funds raised by general taxation. If the pipes and hydrants of a system of waterworks confer an especial and local benefit for which local assessments may be levied, as it is held that they do,¹ the same principles would lead to the conclusion that cisterns and wells constructed for public purposes furnish such a local benefit that local assessments may be levied therefor upon property especially benefited thereby. While statutes authorizing assessments for this purpose are rather rare, it has been held specifically that such assessments may be levied;² and the constitutional validity of such assessments has been upheld in cases in which the petition in action to recover the same was held insufficient on demurrer because while it set forth the special ordinance providing for such improvement at the cost of "the owners of property chargeable therefor under the city charter and ordinances," it did not set forth the general ordinance which specified the distance from the cistern within which property should be, to be charged with the cost of such improvement.³ The propriety of an assessment for such purpose has been impliedly recognized even where a sale was held to be invalid as a means of enforcing such assessment.⁴

¹¹ *Wheeler v. Treasurer of Muskingum County*, 3 Ohio C. C. 596 [1889].

¹² In the Matter of the Application of the Trustees of Union College for an Order Directing the Treasurer of Long Island City to Cancel Certain Water Rates and Rents, 129 N. Y. 308, 29 N. E. 460 [1891]; *Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564 [1887].

¹ See §§ 346, 347.

² *Abraham v. City of Louisville*, — (Ky.) —, 62 S. W. 1041, 23 Ky. L. R. 375; *Louisville Steam Forge Co. v. Anderson*, — (Ky.) —, 57 S. W. 617, 22 Ky. L. Rep. 397; *City of Louisville v. Osborne*, 73 Ky. (10 Bush.) 226 [1874].

³ *Stephens v. Guthrie*, 67 Ky. (4 Bush.) 462 [1868]; *Babbitt v. Woolley*, 66 Ky. (3 Bush.) 703 [1868].

⁴ *Sharp v. Spier*, 4 Hill (N. Y.) 76.

§ 353. Water rates as charges for water used.

Water rates or charges for the use of water and the benefit received from the continued operation of the waterworks system, are often referred to indiscriminately as "assessments" and "taxes."¹ The term has no exact meaning, as it is used to denote two or three very different forms of exacting compensation. The term is often employed to denote a charge upon the consumer for the amount of water actually used, based upon a price known to the consumer in advance. In such a case the liability of the consumer is based upon his voluntary assent to the proposition for the sale of water, which consists of his acceptance and use of the water furnished. If he does not choose to use any water, he is under no liability. This is evidently neither a tax nor a local assessment, but an ordinary contract of sale, which on performance by the vendor leaves the vendee liable for the purchase price.² Since such a charge is neither a tax nor an assessment, notice to the party against whom such charge is made in order to give him an opportunity to be heard on the question of the rate to be charged and the amount to be assessed against him, is not necessary.³ Furthermore, such charge is not required to be uniform.⁴ A flat rate may be charged depending on the size of the building as determined by the rules laid down

¹ Cook County v. City of Chicago, 103 Ill. 646 [1882].

² Provident Institution for Savings v. Mayor and Aldermen of Jersey City, 113 U. S. 506, 28 L. 1102, 5 S. 612 [1884]; (affirming Provident Institution for Savings v. Allen, 37 N. J. Eq. (10 Stew.) 627 [1883]; which affirmed without opinion Provident Institution for Savings v. Allen, 37 N. J. Eq. (10 Stew.) 36 [1883]); Wagner v. City of Rock Island, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545 [1893]; Young v. Boston, 104 Mass. 95; Board of Water Commissioners of City of Detroit v. Commissioners of Parks and Boulevards, 126 Mich. 459, 85 N. W. 1132; Preston v. Board of Water Commissioners of Detroit, 117 Mich. 589, 76 N. W. 92; City of East Grand Forks v. Luck, 97 Minn. 373, 6 L. R. A. (N. S.)

198, 107 N. W. 393 [1906]; Powell v. City of Duluth, 91 Minn. 53, 97 N. W. 450 [1903]; Burke v. City of Water Valley, 87 Miss. 732, 112 Am. St. Rep. 468, 40 So. 820 [1905]; Vreeland v. Mayor and Aldermen of Jersey City, 37 N. J. Eq. (10 Stew.) 574 [1883]; (affirming Vreeland v. O'Neil, 36 N. J. Eq. (9 Stew.) 399); Silkman v. Board of Water Commissioners of City of Yonkers, 152 N. Y. 327, 37 L. R. A. 827, 46 N. E. 612 [1897]; Pittsburg v. Brace Brothers, 158 Pa. St. 174, 27 Atl. 854 [1893].

³ Silkman v. Board of Water Commissioners of City of Yonkers, 152 N. Y. 327, 37 L. R. A. 827, 46 N. E. 612 [1897].

⁴ Wagner v. City of Rock Island, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545 [1893].

by the city.⁵ A table of rates may be adopted charging the large consumers less for a given amount than the small consumers.⁶ So if the city thinks it best to supply meters and refuses to furnish water except to persons who receive their supply through meters thus furnished, it has the power so to do,⁷ even if the meter rates exceed the flat rates;⁸ and it may compel consumers who are supplied from large service pipes to use meters.⁹ So if authorized by statute the city may furnish water to persons outside the city limits and enforce a lien therefor.¹⁰ A similar transaction exists where one city is bound to furnish water to another city at a fixed rate.¹¹ The business of furnishing water is not, however, a private one if engaged in by a city under statutory authority.¹² Thus, if the pipes are allowed to become clogged and damages thus caused in case of fire, the city is not liable therefor even if negligent.¹³ Charges of this sort often have, by legislative provision, certain incidents of taxes; especially with reference to their enforcement and collection. In a West Virginia case what appears to be a charge of this sort was referred to as a "water rent," and a "water rent or tax."¹⁴ This point was not, however, involved in the decision, as the question presented was whether a creditor of the party owing such water rent might recover the amount of such tax paid in to the collector, if the tax was justly due, but had not been so assessed by the council

⁵ Provident Institution for Savings v. Mayor and Aldermen of Jersey City, 113 U. S. 506, 28 L. 1102, 5 S. 612 [1885]; (affirming *Provident Institution for Savings v. Allen*, 37 N. J. Eq. (10 Stew.) 627; which affirmed without opinion, *Provident Institution for Savings v. Allen*, 37 N. J. Eq. (10 Stew.) 36 [1883]); *Allen v. Drew*, 44 Vt. 174 [1872].

⁶ *Powell v. City of Duluth*, 91 Minn. 53, 97 N. W. 450 [1903]; *Silkman v. Board of Water Commissioners of City of Yonkers*, 152 N. Y. 327, 37 L. R. A. 827, 46 N. E. 612 [1897].

⁷ *Wagner v. City of Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545 [1893]; *Powell v. City of Duluth*, 91 Minn. 53, 97 N. W. 450 [1903].

⁸ *Powell v. City of Duluth*, 91 Minn. 53, 97 N. W. 450 [1903]; (citing *Jones v. Water Commissioners*, 34 Mich. 273).

⁹ *State ex rel. Hallauer v. Gosnell*, 116 Wis. 606, 61 L. R. A. 33, 93 N. W. 542 [1903].

¹⁰ *Pittsburg v. Brace Brothers*, 158 Pa. St. 174, 27 Atl. 854 [1893].

¹¹ *City of Chicago v. Town of Cicero*, 210 Ill. 290, 71 N. E. 356 [1904].

¹² *Springfield Fire & Marine Insurance Co. v. Village of Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667, 30 L. R. A. 660, 42 N. E. 405 [1895].

¹³ *Springfield Fire & Marine Insurance Co. v. Village of Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667, 30 L. R. A. 660, 42 N. E. 405 [1895].

¹⁴ *Aumann v. Black*, 15 W. Va. 773 [1879].

that a levy could have been made; and it was held that no recovery could be had. It was referred to as a tax because of the summary method of collection which was provided therefor. Charges of this sort were said to be "not, strictly speaking, taxes, and certainly not taxes on property to be regulated under article twelve of the constitution;"¹⁵ but the court held that such charges could be regarded as taxes other than taxes on property and hence that they might be turned into the general revenue fund. So charges for the use of water were held to be taxes within the meaning of the term in a statute giving taxes priority of payment out of estates for which a receiver has been appointed.¹⁶ The legislature may provide that such charges shall be a lien upon the estate of the person by whom the water was received and used on such realty.¹⁷ Under such statute the interest of a lessor cannot be sold for charges for water used by a lessee.¹⁸ In the absence of a statute restricting the lien to the estate of the person receiving and using the water, there seems to be no objection to making such charge a lien upon the realty, irrespective of the various estates therein.¹⁹ Accordingly, a regulation making the owner liable for the cost of water furnished to his tenant is reasonable.²⁰ However, it has been held that a rule that the water shall be turned off in case of delinquency in making payment and not turned on again until the delinquency is paid, is unreasonable and void if so applied as to prevent a tenant who tenders payment for the amount due from himself from obtaining water unless he also pays the amount due from a former tenant.²¹ If the ordinance provides that the lien shall be lost if the water is not turned off thirty days prior to the expiration of a collection period and the water is not so turned

¹⁵ *Alter v. Cincinnati*, 56 O. S. 47, 67, 35 L. R. A. 737, 46 N. E. 69.

¹⁶ *Waite v. Worcester Brewing Co.*, 176 Mass. 283, 57 N. E. 460.

¹⁷ *Provident Institution for Savings v. Mayor and Aldermen of Jersey City*, 113 U. S. 506, 28 L. 1102, 5 S. 612 [1884]; *Vreeland v. Mayor and Aldermen of Jersey City*, 37 N. J. Eq. (10 Stew.) 574 [1883]; (affirming *Vreeland v. O'Neil*, 36 N. J. Eq. (9 Stew.) 399).

¹⁸ *Carpenter v. Mayor and Council of the City of Hoboken*, 33 N. J.

Eq. (6 Stew.) 27 [1880]. The subject of the lien of assessments is discussed in detail elsewhere. See Chapter XX.

¹⁹ *City of East Grand Forks v. Luek*, 97 Minn. 373, 6 L. R. A. (N. S.) 198, 107 N. W. 393 [1906].

²⁰ *City of East Grand Forks v. Luek*, 97 Minn. 373, 6 L. R. A. (N. S.) 198, 107 N. W. 393 [1906].

²¹ *Burke v. City of Water Valley*, 87 Miss. 732, 112 Am. St. Rep. 468, 40 So. 820 [1905].

off, the vendee of realty cannot be held for arrearages accruing prior to his purchase of such realty the lien whereof has been lost.²² Under a statute providing that water rent shall be a lien against the real estate upon which the water was furnished, no personal liability exists against the owner of the realty.²³

§ 354. Other meaning of water rates.

The term "water rates" is employed in another sense as a charge upon realty to which water can be furnished by the water-works system, irrespective of whether water is actually received and used on such realty or not. If such charge is apportioned according to the benefit received by such property in such a way as to limit the amount of the charge to the actual benefits received by the property assessed, the charge is a form of local assessment and is valid if governed by the principles which control the validity of local assessments.¹ Protection against fire is a form of benefit held to be so especial as to justify local assessments.² In Ohio the original expense of a waterworks system was to be borne by general taxation, but the running expenses, including interest on the debt incurred for such system are to be paid by assessments on realty abutting upon the streets through which the water-pipe is laid.³ If vacant land receives any actual benefit from the supply of water it may be assessed.⁴

²² *City of Chicago v. Northwestern Mutual Life Insurance Co.*, 218 Ill. 40, 1 L. R. A. (N. S.) 770; 75 N. E. 803 [1905].

²³ *Theobald v. Sylvester*, 27 Pa. Super. Ct. 362; On the question of charges for water furnished, see *Weidman v. Wilson*, — Mich. —, 116 N. W. 593 [1908]; *Board of Public Works of City of Niles v. Pinch*, — Mich. —, 116 N. W. 408 [1908]; *American Brewing Co. v. St. Louis*, — Mo. —, 108 S. W. 1 [1907, 1908]; *Regan Land Co. v. City of Carthage*, — Mo. App. —, 108 S. W. 589 [1908]; *Hoboken Manufacturers Co. v. Mayor, etc., of City of Hoboken*, — N. J. L. —, 68 Atl. 1098 [1908].

¹ *Dasey v. Skinner*, 33 N. Y. State R. 15, 11 N. Y. Supp. 821 [1890]; *Allen v. Drew*, 44 Vt. 174 [1872];

² *Dasey v. Skinner*, 11 N. Y. Supp. 821.

While this general principle was possibly recognized, the particular assessment was held invalid on the ground that the property to be assessed was selected arbitrarily, the statute providing for assessing realty within five hundred feet of a hydrant. Still in its opinion the court referred to fire protection as a general benefit to the public. *Village of Canaseraga v. Green*, 88 N. Y. S. 539 [1903].

³ *Wheeler v. Treasurer of Muskingum County*, 3 Ohio C. C. 596 [1889].

⁴ For the general problem of the effect of use or non-use of realty upon the right to levy local assessments on such realty see § 578 *et seq.*

Thus an assessment on land which could be supplied with water from the water works system amounting to eight cents a front foot for vacant land; twelve cents a front foot for land on which was a one-story building, and sixteen cents a front foot for land on which was a two-story building has been upheld.⁵ The power to levy local assessments upon vacant realty in return for the benefits thereto has been upheld or at least recognized in cases where the specific assessment was held to be invalid for want of notice to the owner of the property assessed, and for want of an opportunity for him to be heard.⁶ If, however, a charge is imposed upon vacant property not in proportion to the benefits enuring to it from the construction of a waterworks system, it cannot be sustained as an assessment for benefits, and since water is not used upon such premises, it cannot be sustained as an assessment for goods sold. Such an exaction cannot therefore be sustained upon either theory.⁷ Thus a charge upon each lot which abuts on any street through which water supply pipes are laid and which can be supplied therefrom conveniently, amounting to two dollars and a half per annum plus the charge for water used, was held to be invalid.⁸

§ 355. Irrigation.

Irrigation is undoubtedly a great and especial local benefit. By its means land previously arid and unproductive has been converted into the best of agricultural land. The difficulty in determining whether it is a purpose for which local assessments can be levied is to find a general benefit above the especial benefit to the owners of the realty irrigated, since the real purpose of irrigation is undoubtedly the private benefit of the land-owners, and it is difficult to find the argument of public health which can be urged in case of drainage.¹ However, the courts

⁵ *Allen v. Drew*, 44 Vt. 174 [1872].

⁶ In the Matter of the Application of the Trustees of Union College for an Order Directing the Treasurer of Long Island City to Cancel Certain Water Rates and Rents, 129 N. Y. 308, 29 N. E. 460 [1891]; *Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564 [1887].

⁷ *Village of Lemont v. Jenks*, 197 Ill. 363, 90 Am. St. Rep. 172, 64 N. E. 362 [1902]; *State, Vreeland, Pros. v. Mayor and Aldermen of Jersey City*, 43 N. J. L. (14 Vr.)

135 [1881]; *Provident Institution for Savings v. Allen*, 37 N. J. Eq. (10 Stew.) 36 [1883].

⁸ *Village of Lemont v. Jenks*, 197 Ill. 363, 90 Am. St. Rep. 172, 64 N. E. 362 [1902].

¹ See § 335.

Public health and the abatement of nuisances have been suggested as the real foundation for such assessments. *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222 [1874].

have found a public benefit in the supply of water by a regular waterworks system,² and they have managed to extend the same principle to irrigation. It has been held to be a purpose so public in its nature that the power of eminent domain may be exercised in its behalf,³ and it is held that such an improvement may be paid for by general taxation.⁴ If these principles are correct, and they have been settled by judicial decisions of overwhelming weight, irrigation is an improvement which confers a general benefit to the public and, since the private benefit of the owners of the realty irrigated is clear, it is an improvement for the expense of which local assessments may be levied.⁵ While a statute which provided for the construction of an artesian well and of water courses, the expense thereof to be met by an assessment levied upon realty "with reference to the relative distance of such lands from the well itself and the water courses," was held to be unconstitutional, the objection thereto was the method of apportioning the assessment and not the purpose for which the assessment was levied.⁶

§ 356. Public parks.

A public park is undoubtedly a public benefit. Under modern ideas of the scope of the functions of a municipal corporation.

² See § 346 *et seq.*

³ *Clark v. Nash*, 198 U. S. 361. 25 S. 676 [1905]: (affirming *Nash v. Clark*, 27 Utah 158, 101 Am. St. Rep. 953, 1 L. R. A. (N. S.) 208, 75 Pac. 371 [1904]); *Ellinghouse v. Taylor*, 19 Mont. 462, 48 Pac. 757 [1897]; *Cummings v. Hyatt*, 54 Neb. 35, 74 N. W. 411 [1898]; *Prescott Irrigation Co. v. Flatlers*, 20 Wash. 454, 55 Pac. 635 [1899].

⁴ *State of Washington on the Relation of Witherop v. Brown*, 19 Wash. 383, 53 Pac. 548 [1898].

⁵ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; (reversing *Bradley v. Fallbrook Irrigation District*, 68 Fed. 948 [1895]); *Best v. Wohlford*, 144 Cal. 733, 78 Pac. 293 [1904]; *Boskowitz v. Thompson*, 144 Cal. 724, 78 Pac. 290 [1904]; *Merchant's National Bank of San Diego v. Escondido Irrigation District*, 144 Cal.

329, 77 Pac. 937 [1904]; *Perry v. Otay Irrigation District*, 127 Cal. 565, 60 Pac. 40 [1900]; *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514 [1894]; *Quint v. McMillen*, 103 Cal. 381, 37 Pac. 381 [1894]; *Tregea v. Owens*, 94 Cal. 317, 29 Pac. 643 [1892]; *In the Matter of the Bonds of the Madera Irrigation District*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891]; *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222 [1874]; *Anderson v. Grand Valley Irrigation District*, 35 Colo. 525, 85 Pac. 313 [1906]; *Pioneer Irrigation District v. Bradley*, 8 Ida. 310, 101 Am. St. Rep. 201, 68 Pac. 295; *Board of Directors of Alfalfa Irrigation District v. Collins*, 46 Neb. 411, 64 N. W. 1086.

⁶ *Tripp v. City of Yankton*, 10 S. D. 516, 74 N. W. 447 [1898].

it is felt that it is derelict in its duties unless it provides parks as breathing places, play-grounds and places of beauty for its inhabitants. There is now no serious question but that a municipal corporation may expend public funds, raised by general taxation, for the purpose of buying land for a park and beautifying it after the land is bought. So it is a proper subject for the exercise of the power of eminent domain.¹ Whether a public park confers an especial benefit upon abutting and adjoining property is a question which has caused more trouble and discussion for the courts. It seems to be well settled by this time, however, that the undoubted advantage of having an open space opposite to one's land is an especial benefit for certain uses of realty; while the convenience of access to a public park is an additional source of especial benefit.² An investigation and analysis of the objections to assessments for public parks has convinced the courts that to sustain such objections would be to overthrow the entire system of special assessments for all purposes. "Upon a final analysis, this proposition (i. e., that a public park can be paid for only by general taxation and not by local assessment) will be found to resolve itself into a denial of the validity of special assessments in any case where the work in question is undertaken by the public authorities without the express assent or desire of the property holders. The effort made to distinguish between streets and highways, as constituting proper subjects of taxation for special benefits, and public parks as matters of such a general nature as not to justify special assessment, does not appear to us to be successful. Legislation of this character, both in respect to its justice and its constitutional validity has been thoroughly discussed by the judicial tribunals of nearly every state in the Union."³ Accordingly, it is very

¹ Shoemaker v. United States, 147 U. S. 282, 37 L. 170, 13 S. 361 [1893]; Matthews v. Kimball, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547; West Chicago Park Com. v. Western Union Telegraph Co., 103 Ill. 33; Cook v. South Park Com., 61 Ill. 115; People v. Williams, 51 Ill. 63; Andrews v. People ex rel. Rumsey, 83 Ill. 529 [1876]; People ex rel. Huck v. Gage, 83 Ill. 486 [1876]; State of Minnesota ex rel. Merchant v. District Court for St. Louis County, 66 Minn. 161, 68 N.

W. 860 [1896]; Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860; County Court of St. Louis County v. Griswold, 58 Mo. 175; Vernon Park, 163 Pa. St. 70, 29 Atl. 972; City of Memphis v. Hastings, 113 Tenn. 142, 69 L. R. A. 750, 86 S. W. 609 [1904].

² State ex rel. City of St. Paul v. District Court of Ramsey County, 75 Minn. 292, 77 N. W. 968 [1899].

³ Wilson v. Lambert, 168 U. S. 611, 614, 42 L. 599, 18 S. 217 [1898]; (reversing *Craig-hill v. Van Riswick*, 8 App. D. C. 185 [1896]).

generally held that a public park so combines public advantage and especial private that local assessments may be levied to pay for the expenses thereof.⁴ Nor is it necessary in order to justify local assessments for a public park that the use of such park should be limited to that locality or to that municipality. The fact that Congress has declared that a park shall be a national park as well as a local park does not do away with the right to levy local assessments on the property benefited thereby to pay the expense thereof. “. . . So far from being

⁴*Lombard v. West Chicago Park Commissioners*, 181 U. S. 33, 45 L. 731, 21 S. 507 [1901]; *Wilson v. Lambert*, 168 U. S. 611, 42 L. 599, 18 S. 217 [1898]; (reversing *Craig-hill v. Van Riswick*, 8 App. D. C. 185 [1896]); *Shoemaker v. United States*, 147 U. S. 282, 37 L. 170, 13 S. 361 [1893]; *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898]; *West Chicago Park Commissioners v. Sweet*, 167 Ill. 326, 47 N. E. 728 [1897]; *Chicago & N. W. Ry. Co. v. People*, 120 Ill. 104, 11 N. E. 418, *Kedzie v. West Chicago Park Commissioners*, 114 Ill. 280, 2 N. E. 182 [1886]; *People ex rel. Johnson v. Springer*, 106 Ill. 542 [1883]; *McChesney v. People ex rel. Johnson*, 99 Ill. 216 [1881]; *Dunham v. People ex rel. McCrear*, 96 Ill. 331 [1880]; *Smith v. People ex rel. Huck*, 87 Ill. 74 [1877]; *People ex rel. Miller v. Brislín*, 80 Ill. 423 [1875]; *Hundley and Rees v. Commissioners of Lincoln Park*, 67 Ill. 559 [1873]; *New England Hospital for Women and Children v. Street Commissioners of the City of Boston*, 188 Mass. 88, 74 N. E. 294 [1905]; *De Las Casas, Petitioner*, 178 Mass. 213, 59 N. E. 664 [1901]; *Briggs v. Whitney*, 159 Mass. 97, 34 N. E. 179 [1893]; *Kingman, Petitioner*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778 [1891]; *Foster v. Park Commissioners of Boston*, 133 Mass. 321; *Foster v. Park Commissioners of Boston*, 131 Mass. 225; *Holt v. City Council of Somerville*, 127 Mass. 408 [1879]; *State*

ex rel. City of St. Paul v. District Court of Ramsey County, 75 Minn. 292, 77 N. W. 968 [1899]; *State ex rel. Spencer v. Ensign*, 55 Minn. 278, 56 N. W. 1006 [1893]; *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045 [1900]; *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860 [1898]; *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600 [1896]; *St. Louis County Court v. Griswold*, 58 Mo. 175; *Kittinger v. City of Buffalo*, 148 N. Y. 332, 42 N. E. 803 [1896]; *In the Matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York*, 99 N. Y. 569 [1885]; (affirming 34 Hun. (N. Y.) 44 [1885]); *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70 [1871]; *In the Matter of the Application of the Commissioners of the Central Park to Confirm the Report of the Commissioners of Estimate and Assessment for Opening Riverside Park*, 63 Barb. (N. Y.) 282 [1872]; *In the Matter of the Application of the Commissioners of the Central Park for and in Behalf of the City of New York, Relative to the Opening of Certain New Avenues, Roads and Public Squares or Places as Laid Out by the Commissioners of Central Park*, 60 Barb. (N. Y.) 132; *In the Matter of Deering*, 55 How. (N. Y.) 296 [1878]; *In re Beechwood Avenue, Appeal of O'Mara*, 194 Pa. St. 86, 45 Atl. 127 [1899]; *Gilman v. City of Milwaukee*, 55 Wis. 328, 13 N. W. 266 [1882].

injured by the declaration that the park shall also have a national character, it is apparent that thereby the welfare of the inhabitants of the district will be promoted. Whatever tends to increase the attractiveness of the city of Washington as a place of permanent or temporary residence will operate to enhance the value of the private property situated therein or adjacent thereto."⁵ Land acquired by a municipal corporation for park purposes may be paid for by local assessments.⁶ Under the general power to assess for park purposes, local assessments may be levied for streets and roadways in a park,⁷ and for hydrants for sprinkling and electric cables for lighting.⁸

§ 357. Public squares.

A public square, being intended for the public use, is undoubtedly a public benefit. It is an improvement, therefore, which may be undertaken by a public corporation and paid for by general taxation. Since streets¹ and parks² are both looked upon as conferring such an especial and local benefit that local assessments may be levied therefor upon realty benefited thereby, no reason appears why a public square which is in some respects of a nature intermediate between a street and a park may not be paid for by local assessments. Accordingly it is held that a public square is such an improvement that local assessments may be levied to pay the cost thereof.³ This principle has apparently been recog-

⁵ *Wilson v. Lambert*, 168 U. S. 611, 617, 42 L. 599, 18 S. 217 [1898]; (reversing *Craighill v. Van Riswick*, 8 App. D. C. 185 [1896]).

⁶ *Shoemaker v. United States*, 147 U. S. 282, 37 L. 170, 13 S. 361 [1893]; *Holt v. City Council of Somerville*, 127 Mass. 408 [1879]; *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860 [1898]; *In re Mayor*, etc., of New York, 89 N. Y. S. 6, 95 App. Div. 552 [1904]; *Gilman v. City of Milwaukee*, 55 Wis. 328, 13 N. W. 266 [1882].

⁷ *Kittinger v. City of Buffalo*, 148 N. Y. 332, 42 N. E. 803 [1896]; *In re Beechwood Avenue*, Appeal of O'Mara, 194 Pa. St. 86, 45 Atl. 127 [1899].

⁸ *Lingle v. West Chicago Park Commissioners*, 222 Ill. 384, 78 N. E. 794 [1906].

¹ See § 301.

² See § 356.

³ *Owners of Ground v. Albany*, 15 Wend. (N. Y.) 374; "A public square depends on the same principle (i. e., as a public street); it is for public use, whether it is intended to be traveled on or not. The mode of compensation for such property is not important. It was formerly out of the public purse; but there is no injustice in requiring those individuals to make compensation who receive from the improvement an equivalent or more in the enhanced value of their own adjacent property; and whether the number is large or small does not affect the question." *Owners of Ground v. Albany*, 15 Wend. (N. Y.) 374.

nized where not directly involved.⁴ Thus land was taken by eminent domain for enlarging a public square. Apparently in this case it was to be made chiefly into a small park. Before the city took possession of the land it leased it to the Milwaukee Industrial Exposition Company for a term of fifty years. The assessment was assumed to be valid except for such diversion of use, and was resisted on that ground alone. The court upheld the assessment, however, on the theory that such diversion of use was no defense if the city had acquired title to such realty, the remedy being to pay the assessment and enjoin such diversion.⁵

§ 358. Public market place.

A public market place is a benefit to the public in general. Whether a market place is also an especial and local benefit to the adjoining property is a question upon which there is but little direct authority. Such an assessment has been upheld in Missouri.¹ This assessment was levied under a statute giving a city power to vacate streets and establish market places. The market place for which such assessment was levied was used as a market for only a small part of each day, and in other respects the space was used as any other public street. In New York the validity of an assessment for such purposes seems to have been recognized, though the particular assessment in question was held to be invalid since the common council made no effort to determine what lands were benefited by such improvement, but delegated the determination of this question to the assessors.² On the other hand an attempt to discontinue a prior plan of laying out a street, and to lay it out on a new plan, larger and more expensive to benefit Fulton Market was said to be unfair to the abutting land-owners who were to be assessed for the cost of such improvement, on the ground that the cost of such an improvement should be borne by the city.³ In determining this question, however, the court seems to have been acting under

⁴ *Gilman v. City of Milwaukee*, 55 Wis. 328, 13 N. W. 266 [1882].

⁵ *Gilman v. Milwaukee*, 55 Wis. 328, 13 N. W. 266 [1882].

¹ *Donovan v. Coles*, 33 Mo. App. 161 [1888].

² *Savage v. City of Buffalo*, 59 Hun. 606, 14 N. Y. Supp. 101 [1891].

³ In the Matter of the Petition of the Mayor, Aldermen and Commonalty of the City of New York for Enlarging, Extending and Improving Beckman Street in Said City, 20 Johns (N. Y.) 269 [1822].

a statutory grant of power, as commissioners passing upon the advisability of such an improvement and assessment, rather than as a court exercising judicial functions. So in Illinois the propriety of levying local assessments for a public market seems to be assumed, though on account of the apportionment the specific assessment was held to be invalid.⁴ In Indiana a local assessment for the improvement of land to be used as a market, has been held to be invalid. The question decided, however, was not one of constitutional authority, but turned on the construction of the statutes giving authority to the city to levy assessments. By these statutes the city was authorized to assess for improving streets and alleys; and it was held that under such a grant of power, local assessments could not be levied for a market place.⁵

§ 359. Bridges and viaducts.

A bridge which is built to furnish the means of raising a public street above what would otherwise be its grade, is really the substructure of such street; and is an improvement which is a general benefit to the public at large as clearly as is the street itself. Whether a bridge confers an especial benefit upon adjoining or abutting property, so that a local assessment may be levied on such property for the construction of such bridge is a question of greater difficulty. An improvement of this sort stands on a different footing from ordinary grading.¹ The benefit conferred by means of a bridge, upon the public in general, is much greater, while that conferred upon the abutting or adjoining property is usually much less or at least no greater than in case of a street. It seems unjust to charge property in the immediate neighborhood with the expense of an improvement which enures to the benefit, it may be, of the entire municipality. This, however, is but another form of the problem presented by the improvement of great public thoroughfares;² and in this case as in the former, the considerations urged serve to show that in apportioning the assessment, a comparatively small part thereof should be assessed against the adjoining property, but do not

⁴ *Berdel v. City of Chicago*, 217 Ill. 429, 75 N. E. 386 [1905].

⁵ *City of Fort Wayne v. Shoaff*, 106 Ind. 66, 5 N. E. 403 [1885].

¹ "The construction of bridges . . . is not the ordinary or usual

method of grading streets." *Schneider v. City of Detroit*, 72 Mich. 240, 247, 2 L. R. A. 54, 40 N. W. 329 [1888].

² See § 304.

show that no local assessment of any kind whatever should be levied. Accordingly by the weight of authority, local assessments may be levied for the expense of constructing bridges on which streets may be carried over streams, at a proper grade.³ An assessment may be levied to pay the cost of property taken for an approach to a bridge.⁴ In some cases the method of enforcing compensation by the individual is in that intermediate class which consists in apportioning the cost of an improvement among two or more public corporations, and which possesses some of the attributes of general taxation and some of local assessment;⁵ but which recognizes and enforces the liability of the owner of property especially benefited to make compensation in some way for such benefit. The benefit accruing to adjoining property from the expectation that a bridge would be built in the future at the point where a newly-opened street crosses a river has been held to be an element which may be considered in determining the benefits accruing from the opening of such street.⁶ In an early case in South Carolina it was apparently held that a local assessment for the construction and repair of a bridge might be levied.⁷ This point was not, however, specifically passed upon and the court divided equally upon the question of the propriety of an injunction. The later South Carolina cases have apparently done away with the system of

³ Williams, Treasurer v. Eggleston, 170 U. S. 304, 42 L. 1047, 18 S. 617 [1898]; (affirming State ex rel. Bulkley v. Williams, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 421 [1896]); State v. Ensign, 54 Minn. 372, 56 N. W. 41; State of Minnesota ex rel. Burger v. District Court of Ramsey County, 33 Minn. 295, 23 N. W. 222 [1885]; People ex rel. Knox v. Village of Yonkers, 39 Barb. (N. Y.) 266 [1863]; King v. Portland, 38 Ore. 402, 52 L. R. A. 812, 63 Pac. 2 [1900].

⁴ State ex rel. Ryan v. District Court of Ramsey County, 87 Minn. 146, 91 N. W. 300 [1902].

⁵ Williams, Treasurer, v. Eggleston, 170 U. S. 304, 42 L. 1047, 18 S. 617 [1898]; (affirming State v. Williams, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 421 [1896]); Maltby v.

Tautges, 50 Minn. 248, 52 N. W. 858 [1892]; Guilder v. Town of Otsego, 20 Minn. 74, 20 Gil. 59. The nature of a similar proceeding is discussed while considering the effect of the act which repealed it, in Town of Underhill v. Town of Essex, 64 Vt. 28, 23 Atl. 617 [1891]; in which an assessment apportioned among several towns in proportion to the benefits received by each from the bridge for which such assessment was levied, was said to be referable to the doctrine of eminent domain. See also on the same subject Wardsboro v. Jamaica, 59 Vt. 514, 9 Atl. 11; Tunbridge v. Royalton, 58 Vt. 212, 1 Atl. 487.

⁶ Dickson v. City of Racine, 65 Wis. 306, 27 N. W. 58 [1886].

⁷ Lindsay v. Commissioners, 2 Bay (S. C.) 38 [1796].

local assessments,⁸ unless it may be those apportioned according to the value of the property assessed. A question presenting an analogy to the doctrine of assessments was presented where an adjoining property owner whose land was not taken for the bridge, but whose access to such property was impaired, brought suit against the municipal corporation to recover damages for such injury. It was held that the city while liable for such damages could set off against them the benefit received by such property from the construction of such bridge as shown by its increase in price.⁹ Where the power to assess for the construction of a bridge is denied in the particular instance, it is for reasons which do not affect the general power of the legislature to authorize assessments for such improvements. Thus an assessment was levied for the construction of a new bridge in the line of a public thoroughfare. The court held that such an improvement should be paid for by the public, as it was primarily for the public benefit;¹⁰ that if any assessment could be levied, it would be in proportion to the benefits actually received by the adjoining property,¹¹ and that in any event it was doubtful if an assessment could be levied in a case where an existing bridge had been removed and a new bridge constructed in its place.¹² So under a statute authorizing a city to grade and pave streets, an assessment for constructing a bridge cannot be levied.¹³ So under a statute providing that bridges, including those across the Mississippi and other natural streams and those across railroad tracks, shall be built and repaired as a general city charge, an assessment cannot be levied for the cost of a bridge across rail-

See § 118, § 159.

⁹ *Hurt v. City of Atlanta*, 100 Ga. 274, 28 S. E. 65 [1896].

¹⁰ "The bridge was constructed to serve an apparent and essential public interest, and to impose the cost of it on individuals selected out of the mass of the community on any conceivable rule that viewers could adopt would be the placing of public burdens on private shoulders." *In re Saw Mill Run Bridge*, Ballentine's Appeal, 85 Pa. St. 163, 168 [1877].

¹¹ "At the very utmost, in the case of an improvement whose public ob-

ject and character are palpable, assessment of individual property to meet its cost would be justified only by affirmative and distinct proof appearing on the record of individual benefits actually conferred and of their nature, extent and value." *In re Saw Mill Bridge*, Ballentine's Appeal, 85 Pa. St. 163, 169 [1877].

¹² In Pennsylvania the present rule is that a local assessment cannot be levied for a reconstruction unless solely under the police power. See § 382.

¹³ *State ex rel. Vangh v. Mayor of Ashland*, 71 Wis. 502, 37 N. W. 809.

road tracks.¹⁴ Considerations similar to those which apply in the case of an ordinary bridge apply in case of a viaduct over railroad tracks. Whether referable to the police power, the power of eminent domain or the power of taxation, the weight of authority recognizes the right to construct a viaduct for the purpose of carrying the street across the railroad tracks above their level, and to assess the cost thereof upon property benefited or upon the railroad.¹⁵ The entire cost of carrying the railroad over the street may be imposed upon the railroad in question,¹⁶ or may be apportioned between two railroads, both of which are concerned,¹⁷ or it may be apportioned between the city and the railroad.¹⁸ The charge may be imposed by virtue of a provision in the charter of the corporation,¹⁹ or by virtue of a reservation of power to amend the charter in the future.²⁰ Such charge is imposed upon the railroad on the theory that it cannot be permitted to obstruct a public highway when the traffic upon the highway and the extent of business upon the railroad make a grade crossing a practical obstruction of traffic. The legislature may authorize an apportionment of the cost by a board of commissioners.²¹ While some cases deny the validity of specific as-

¹⁴ *State v. Smith*, 99 Minn. 59, 108 N. W. 822 [1906].

¹⁵ *Northern Pacific Ry. v. Duluth*, 208 U. S. 583 [1908]; (affirming *State ex rel. City of Duluth v. Northern Pacific Ry. Co.*, 98 Minn. 429, 108 N. W. 269); *Chicago, Burlington & Quincy Railroad Company v. Nebraska ex rel. Omaha*, 170 U. S. 57, 42 L. 948, 18 S. 513 [1898]; (affirming *Chicago, Burlington & Quincy Railroad Co. v. State of Nebraska*, 47 Neb. 549, 53 Am. St. Rep. 557, 41 L. R. A. 481, 66 N. W. 624 [1896]); *City of Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 80 Pac. 467 [1905]; *Fairfield's Appeal*, 57 Conn. 167; *West Chicago Park Commissioners v. Sweet*, 167 Ill. 326, 47 N. E. 728 [1897]; *Louisville & Nashville Railroad Company v. City of East St. Louis*, 134 Ill. 656, 25 N. E. 962 [1891]; *Kelly v. Minneapolis*, 57 Minn. 294, 47 Am. St. Rep. 605, 26 L. R. A. 92, 57 N. W. 294 [1894]; *In re Park Avenue Viaduct Assessment*, 78 N. Y. Supp. 1030, 77 App. Div. 136 [1902].

¹⁶ *Fairfield's Appeal*, 57 Conn. 167.

¹⁷ *Woodruff v. Catlin*, 54 Conn. 277.

¹⁸ *New York & N. E. R. Co.'s Appeal*, 58 Conn. 532.

¹⁹ *State v. Minneapolis & St. L. R. Co.*, 39 Minn. 219; *State v. St. Paul, M. & M. R. Co.*, 38 Minn. 246; *State v. St. Paul, M. & M. R. Co.*, 35 Minn. 131, 59 Am. Rep. 313; *Raritan Township v. Port Reading R. Co.*, 49 N. J. Eq. 11; *Newark v. Delaware, L. & W. R. Co.*, 42 N. J. Eq. 196; *Central R. Co. of New Jersey v. State*, 32 N. J. L. 220.

²⁰ *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. 269; (affirming *New York & N. E. R. Co. Appeal*, 62 Conn. 527); *Roxbury v. Boston & P. R. Corp.*, 6 Cush. 424; *People v. Boston & A. R. Co.*, 70 N. Y. 569.

²¹ *Boston and L. Ry. v. Winchester*, 156 Mass. 217, 30 N. E. 1139; *Northampton's Petition*, 158 Mass. 299, 33 N. E. 568; *Boston & A. Ry. Co. v. Hampden County Commissioners*, 116 Mass. 73.

assessments for the construction of a viaduct, they do so ordinarily on grounds that are not inconsistent with the existence of the right to assess for such purpose. Thus it has been held that a municipal corporation cannot determine that an existing bridge over a railroad track is insufficient, construct a new one, and assess the entire expense thereof upon the property of the railroad company, when no notice was given, no examination or hearing had, no attempt made to find what the benefits actually were, or what were the benefits to the adjoining property owners or to the street railway company, which made use of the bridge and on account of whose heavy cars the new bridge was ordered.²² Different principles apply where the bridge is constructed to carry the tracks of the railroad across a public street and above the grade thereof. A municipal corporation provided by ordinance what sort of a railway bridge must be built to carry a railway across one of the streets of the municipal corporation above the grade thereof, and provided for constructing such bridge itself, and levied a special tax upon the property of the railway company to pay the cost of constructing such bridge. It was held that such assessment was invalid; that such bridge was not a local improvement; that the railway company had to build a bridge across such street as part of its own right of way; that the bridge would, when built, belong to the railway company and the railway company was responsible to the public for the proper construction thereof, and that therefore it should be allowed to construct a bridge in its own way and according to its own specifications.²³

§ 360. River and harbor improvements.

To widen and deepen navigable streams, or to improve streams originally non-navigable so that they become navigable or to construct or improve harbors are improvements of a public nature, conferring a general benefit on the public. They may be paid for out of the general treasury from funds raised by general taxation. Thus a state may authorize a county to improve a public harbor to be paid therefor by bonds which were ultimately

²² People of the State of New York ex rel. Western New York and Pennsylvania Railroad Company v. Adams 88 Hun. 122. 34 N. Y. S. 579 [1895].

²³ City of Bloomington v. Chicago & Alton Railroad Company, 134 Ill. 451, 26 N. E. 366 [1891].

to be paid for by general taxation upon the property in the county.¹ So the state may create a special district situated on a river capable of being rendered navigable, and may authorize it to improve such river so as to have a depth of twenty-five feet up to and through such district and pay the expense thereof by general taxation.² Whether such improvement confers such especial local benefit that local assessments may be levied to pay therefor is a question upon which there is a conflict of authority. In some jurisdictions it is held that it cannot be said as a matter of law that no local benefit can exist. In such jurisdictions, accordingly, if a special local benefit does exist, local assessments may be levied to pay for such improvement.³ The reasons which justify assessments for roads and other highways are said to justify assessments for waterways.⁴ This theory has been applied in upholding assessments for widening⁵ and improving⁶ a navigable river, or for removing obstructions therefrom,⁷ even if the obstruction consisted of the wreck of a float which the city had negligently allowed to sink, and on the wreck of which other wrecks had sunk,⁸ or for excavating waterways in tide lands,⁹ or for constructing piers and breakwaters, for protecting the lake front.¹⁰

¹ *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. 238 [1880]: (affirming *Kimball v. Mobile*, 14 Fed. Cas. 489, 3 Woods. 555.)

² *Cook v. Port of Portland*, 20 Or. 580, 13 L. R. A. 533, 27 Pac. 263 [1891].

³ *People of the State of New York ex rel. Lehigh Valley Railway Company v. City of Buffalo*, 147 N. Y. 675, 42 N. E. 344 [1895]; *Delaware and Hudson Canal Co. v. City of Buffalo*, 39 App. Div. 333, 56 N. Y. Supp. 967, affirmed on authority of opinion below in *Delaware and Hudson Canal Co. v. City of Buffalo*, 167 N. Y. 589, 60 N. E. 1119 [1901]; *Buffalo Union Iron Works v. City of Buffalo*, 13 Abb. Pr. (N. Y.) 141 [1870]; *Seattle and Lake Washington Waterway Company v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845 [1904]; *Teegarden v. City of Racine*, 56 Wis. 545, 14 N. W. 614 [1883]; *Holton v. City of Milwaukee*, 31 Wis. 27 [1872]; *Hale v. City of Kenosha*,

29 Wis. 599 [1872]; *Soens v. City of Racine*, 10 Wis. 271 [1860].

⁴ *Johnson v. City of Milwaukee*, 40 Wis. 315 [1876].

⁵ *Holton v. City of Milwaukee*, 31 Wis. 27 [1872].

⁶ *People of the State of New York ex rel. Lehigh Valley Railway Company v. City of Buffalo*, 147 N. Y. 675, 42 N. E. 344 [1895].

⁷ *Buffalo Union Iron Works v. City of Buffalo*, 13 Abb. Pr. (N. Y.) 141 [1870].

⁸ *Buffalo Union Iron Works v. City of Buffalo*, 13 Abb. Pr. (N. Y.) 141 [1870].

⁹ *Seattle and Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845 [1904]; (affirmed in *Seattle Dock Co. v. Seattle and Lake Washington Waterway Co.*, 195 U. S. 624, 25 S. 789 [1904]); in a *per curiam* without report.

¹⁰ *Teegarden v. City of Racine*, 56 Wis. 545, 14 N. W. 614 [1883]; *Soens v. City of Racine*, 10 Wis. 271 [1860].

A statute allowing a city to improve a harbor, and to assess all lands subject to taxation, not including improvements, to pay for the cost thereof, was upheld, and the charge was said to be a local assessment,¹¹ but in a subsequent case it was doubted if this was really an assessment.¹² The propriety of an assessment for such purpose has been recognized, though the specific assessment has been held invalid as where not restricted to or apportioned to the benefits conferred.¹³ In Minnesota the power to assess for the improvement of navigation was impliedly recognized in a case involving a proceeding under a statute passed for the "improvement of navigation, preservation of public health and for public advantage, benefit and use." The improvement was intended to keep the water of Lake Minnetonka at a uniform height intermediate between the extremes of high and low water. The specific proceeding, however, was held not sufficient to support a valid assessment, as no provision was made for compensating the riparian owners whose lands would be submerged permanently by such improvement for such loss.¹⁴ In Illinois assessments for deepening navigable rivers were at one time impliedly recognized, though in the specific cases held invalid. Under a charter which provided for assessments for widening a river it was held that the city of Chicago could not levy an assessment for deepening Chicago River,¹⁵ and under a contract by which the city was to pay a contractor for dredging and deepening Chicago River, the city to levy assessments to raise such fund, it was held that such assessments could not be levied, but that the city was liable to the contractor.¹⁶ Assessments were held valid to pay the expense of widening a navigable river; and it was held that such deepening thereof as was a mere incident to widening might be included in such assessment.¹⁷ A subsequent statute, following the language of the constitution then in force, conferred power to make "local improvements by special assessment or by special taxation." It was held that the widening of

¹¹ *Bond v. City of Kenosha*, 17 Wis. 284 [1863].

¹² *Hale v. City of Kenosha*, 29 Wis. 599.

¹³ *Johnson v. City of Milwaukee*, 40 Wis. 315 [1876].

¹⁴ *In re Minnetonka Lake Improvement*, 56 Minn. 513, 45 Am. St. Rep.

494, 58 N. W. 295.

¹⁵ *Wright v. City of Chicago*, 20 Ill. 252 [1858].

¹⁶ *Maher v. City of Chicago*, 38 Ill. 266 [1865].

¹⁷ *Elston v. City of Chicago*, 40 Ill. 514, 89 Am. Dec. 361 [1866].

Chicago River was not a "local improvement" within the meaning of such constitutional and statutory provisions.¹⁸ An additional objection to such assessment was that as Chicago River was navigable and under the control of the United States, it could not be improved by a municipal corporation unless the Secretary of War had approved the plan of the improvement, and such approval was not shown. In some of these cases the dredging and deepening of the streams or harbors is primarily for the purpose of affording access for vessels of deeper draft to docks to be constructed on private land by the owner thereof for his own benefit. The special local benefit is clearer in such cases than it is in cases where the improvement is solely for general public navigation, and assessments therefor are held valid.¹⁹ The improvement made has consisted of the excavation of waterways in tide lands while owned by the state, the state then selling such lands to purchasers who by agreement took subject to the lien for such improvement. Such liens were held valid against such purchasers.²¹ This is not, however, a case of an assessment against an owner of land who does not consent thereto, but rather one against a vendee who expressly agrees to pay such charge.²¹ The power to assess for widening and deepening streams as incidental to a system of drainage is discussed elsewhere.²² An assessment levied may also be levied for filling up a slip.²³

§ 361. Canals.

A canal has been held to be a "highway,"¹ and hence a public purpose within the rule permitting taxation for a public purpose. Thus, where certain individuals entered into a bond to pay the excess of certain extraordinary expenses for securing the termination of a canal at Utica, and the legislature voted a tax

¹⁸ *City of Chicago v. Law*, 144 Ill. 569, 33 N. E. 855 [1893].

¹⁹ *Delaware and Hudson Canal Co. v. City of Buffalo*, 39 App. Div. (N. Y.) 333, 56 N. Y. Sup. 976; (affirmed on authority of opinion of court below in *Delaware and Hudson Canal Co. v. City of Buffalo*, 167 N. Y. 589, 60 N. E. 1119 [1901]).

²⁰ *Seattle and Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845 [1904]; (affirmed in *Seattle Dock Co. v.*

Seattle and Lake Washington Waterway Co., 195 U. S. 624, 25 S. 789 [1904]); in a *per curiam* without report.

²¹ See § 10, § 20.

²² See § 341.

²³ *Mayor, etc., of New York v. Whitney*, 7 Barb. (N. Y.) 485 [1849]; *Ross v. Mayor of New York*, 3 Wend. (N. Y.) 333.

¹ *Thomas v. Leland*, 24 Wend. (N. Y.) 65.

on realty in Utica to reimburse them, the case was said to be the "ordinary one of local taxation to make or improve a highway."² It is a purpose so public in its nature that land may be appropriated for its construction and for supplying it with water.³ Where such an improvement causes an especial local benefit to adjoining realty, it seems to be held that an assessment for the cost of such improvement is valid.⁴ Thus the propriety of levying an assessment to pay the cost of constructing a ship canal has been recognized.⁵ In this case the specific assessment was held to be invalid, because it was not levied in compliance with the statute. The comptroller was authorized to make out a new assessment roll, showing the realty assessed where the former roll described the property imperfectly. In making out such new roll, he inserted the name of another person as owner of a certain realty, and such person was given no notice of the insertion of his name, nor was he given an opportunity, secured to property owners by statute, to apply for correction of such assessment. The court, however, seemed to hold that if the assessments were levied in accordance with the statute the purpose was a proper one. Where land has been taken for a canal, an assessment of the indirect sort, consisting of a deduction of the benefits received from the damages for taking such land, has been permitted.⁶

§ 362. Docks.

The propriety of an assessment for the construction of a public dock has rarely been presented to the courts for judicial consideration. In a recent Wisconsin case, a property owner was ordered to construct a dock upon his land, which if constructed was to be a public dock. The owner refused to construct such dock, and the city then constructed it, and attempted to levy an assessment against the owner for the cost thereof. This, it will be observed, was not an assessment based upon the theory of

² Thomas v. Leland, 24 Wend. (N. Y.) 65.

³ Waterloo Woolen Manufacturing Co. v. Shanahan, 128 N. Y. 345, 14 L. R. A. 481, 28 N. E. 358 [1891].

⁴ Kennedy v. Indianapolis, 103 U. S. 599, 26 L. 550 [1880]; (affirming Kennedy v. Indianapolis, 14 F. C.

314, 11 Biss. 13 [1878]); Bennett v. City of Buffalo, 17 N. Y. 383 [1858].

⁵ Bennett v. City of Buffalo, 17 N. Y. 383 [1858].

⁶ Kennedy v. Indianapolis, 103 U. S. 599, 26 L. 550 [1880]; (affirming Kennedy v. Indianapolis, 14 F. C. 314, 11 Biss. 13 [1878]).

benefits, but was one based on the theory that the owner was legally bound to construct such dock upon demand, and that in the event of his refusal so to do he might be charged with the cost of such construction, irrespective of the amount of benefits. It was held that an assessment of this type could not be levied for such purpose.¹ This case does not, however, involve the question whether an assessment limited to and apportioned according to benefits conferred by the construction of a dock, could be levied upon the properties especially benefited by such construction. Under statutory authority to improve a street unsuccessful attempts have been made to improve a way from the high-water mark of a navigable river to the low-water mark thereof as a means of access to wharves and wharfboats;² or to improve a street running between water-lots to give access to a dock.³

§ 363. Fences.

A fence for the purpose of keeping live stock from straying away and from destroying crops is undoubtedly a private benefit to the owner of the stock and to the owner of the crops. The existence of a general public benefit of such a nature that a public corporation may be authorized to compel the property owners to pay the expense of such an improvement is not so clear. It would seem difficult to justify the application of funds raised by general taxation to such a purpose. Such an improvement may, however, be referred to the power of the state to prescribe regulations for the management of property which can be managed and improved in a more satisfactory manner by the co-operation, voluntary or involuntary, of the property owners concerned.¹ It is on this principle that partition fences may be constructed at the expense of the adjoining owners by public authorities.² Another analogy

¹ *Lathrop v. City of Racine*, 119 Wis. 461, 97 N. W. 192 [1903].

² *Terrell v. City of Paducah*, — Ky. —, 5 L. R. A. (N. S.) 289, 92 S. W. 310 [1906].

³ *Reed v. Erie*, 79 Pa. St. 346.

¹ See § 93, § 338.

² *Maudlin v. Hansecombe*, 12 Colo. 204, 20 Pac. 619; *Sharp v. Curtiss*, 15 Conn. 526 [1843]; *Hill v. Tobill*,

225 Ill. 384, 80 N. E. 253 [1907]; *McCormick v. Tate*, 20 Ill. 334 [1858]; (involving liability for removing a partition fence without notice): *Tomlinson v. Bainaka*, 163 Ind. 112, 70 N. E. 155 [1904]; *State ex rel. Magnet v. Kemp*, 141 Ind. 125, 40 N. E. 661 [1894]; *Bruner v. Palmer*, 108 Ind. 397, 9 N. E. 354 [1886]; *Rhodes v. Mummery*, 48 Ind.

may be found in the power of the state to compel railroad companies to fence their tracks, a power well recognized by judicial decisions and referable to the police power of the state.³ But

216 [1874]; *Bartlett v. Adams*, 43 Ind. 447 [1873]; *Cook v. Morea*, 33 Ind. 497 [1870]; *Brady v. Ball*, 14 Ind. 317 [1860]; *Haines v. Kent*, 11 Ind. 126 [1858]; *Myers v. Dodd*, 9 Ind. 290, 68 Am. Dec. 624; *Burek v. Davis*, 35 Ind. App. 648, 73 N. E. 192 [1905]; *McKeever v. Jenks*, 59 Ia. 300, 13 N. W. 295 [1882]; *Talbot v. Blacklege*, 22 Ia. 572 [1867]; *Wills v. Waters*, 5 Bush. (68 Ky.) 351; *Gilson v. Munson*, 114 Mich. 671, 72 N. W. 994 [1897]; *Odenwelder v. Frankenfield*, 153 Pa. St. 526, 26 Atl. 97; *Stalleup v. Bradley*, 43 Tenn. (3 Coldw.) 406 [1866]; *Carpenter v. Cook*, 67 Vt. 102, 30 Atl. 998 [1898].

³*Minneapolis & St. L. Ry. Co. v. Emmons*, 149 U. S. 364, 37 L. 769, 13 S. 870; *Minneapolis & St. L. Ry. Co. v. Beekwith*, 129 U. S. 26, 32 L. 585, 9 S. 207; *Johnson v. Oregon Short Line Co.*, 7 Ida. 355, 53 L. R. A. 744, 63 Pac. 112 [1900]; *Patrie v. Oregon Short Line R. Co.*, 6 Ida. 448, 56 Pac. 82; *Chicago, Milwaukee and St. Paul R. R. Co. v. Dumser*, 109 Ill. 402 [1884]; *Cairo and St. Louis R. R. Co. v. Peoples*, 92 Ill. 97, 34 Am. St. Rep. 112 [1879]; *Terre Haute & Logansport Ry. Co. v. Erdell*, 163 Ind. 348, 71 N. E. 960 [1904]; *Terre Haute & Logansport Ry. Co. v. Salmon*, 161 Ind. 131, 67 N. E. 918 [1903]; *Indianapolis and Cincinnati R. R. Co. v. Parker*, 29 Ind. 471 [1868]; *Terre Haute & L. Ry. Co. v. Earhart*, 35 Ind. App. 56, 73 N. E. 711 [1905]; *Titus v. Chicago, Milwaukee & St. Paul Ry. Co.*, 128 Ia. 194, 103 N. W. 343; *Small v. Chicago, R. I. & P. R. Co.*, 50 Ia. 338 [1879]; *Iola Electric R. Co. v. Jackson*, 70 Kan. 791, 79 Pac. 662; *Missouri Pacific R. Co. v. Harrelson*, 44 Kan. 253, 24 Pac. 465; *Parish v. Louisville & N. R. Co.*, — Ky. —,

78 S. W. 186, 25 Ky. L. R. 1524 [1904]; *Owensboro & N. R. Co. v. Townsend*, 107 Ky. 291, 53 S. W. 662; *Owensboro & N. R. Co. v. Todd*, 91 Ky. 175, 11 L. R. A. 285, 15 S. W. 56, 45 Am. & Eng. Railroad Cases, 461; *Cotton v. Wiscasset, Waterville & Farmington R. R. Co.*, 98 Me. 511, 57 Atl. 785 [1904]; *Wilder v. Maine Central R. R. Co.*, 65 Me. 332, 20 Am. Rep. 698 [1876]; *Eames v. Salem and Lowell R. R. Co.*, 98 Mass. 560, 96 Am. Dec. 676 [1868]; *Hathaway v. Detroit, T. & M. Ry. Co.*, 124 Mich. 610, 83 N. W. 598 [1900]; *Neversorry v. Duluth South Shore and Atlantic R. Co.*, 115 Mich. 146, 73 N. W. 125; *Mattes v. Great Northern Ry. Co.*, 95 Minn. 386, 104 N. W. 234 [1905]; *Marengo v. Great Northern Ry. Co.*, 84 Minn. 397, 87 Am. St. Rep. 369, 87 N. W. 1117 [1901]; *Croft v. Chicago Great Western Ry. Co.*, 72 Minn. 47, 74 N. W. 898, 80 N. W. 628 [1898]; *Winona and St. Peter R. R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100 [1866]; *Kingsbury v. Missouri, Kansas & Texas Ry. Co.*, 156 Mo. 379, 57 S. W. 547 [1900]; *Dickson v. Omaha and St. L. R. Co.*, 124 Mo. 140, 46 Am. St. Rep. 429, 25 L. R. A. 320, 27 S. W. 476; *Downey v. Mississippi River & B. T. Ry. Co.*, 94 Mo. App. 137, 67 S. W. 945; *Webb v. Southern Missouri & A. Ry. Co.*, 92 Mo. App. 53 [1902]; *Acord v. St. Louis Southwestern Ry. Co.*, 113 Mo. App. 84, 87 S. W. 537; *Sullivan v. Oregon Ry. and Nav. Co.*, 19 Or. 319, 24 Pac. 408; *Missouri, Kansas & Texas Ry. Co. of Texas v. Wetz*, 97 Tex. 581, 80 S. W. 988 [1904]; *Texas Central R. Co. v. Childress*, 64 Tex. 346; *Thorpe v. Rutland R. Co.*, 27 Vt. 140, 62 Am. Dec. 625; *Sanger v. Chesapeake & Ohio Ry. Co.*, 102 Va. 86, 45 S. E. 759 [1903]; *Brown*

while these analogous cases rest upon the police power the cases in which it has been held that the legislature may provide for the organization of fencing districts and for levying assessments to pay for the cost of such fencing treat such assessments as made on the theory of special benefits, and as being referable to the taxing power of the state, without discussion as to the power of the state under this theory to compel such improvement. Statutes of this sort are not common and but few cases have arisen under them, but where the question has been presented the courts have treated such statutes as constitutional and have upheld such assessments if otherwise valid.⁴ The difficulty of upholding such assessments is, however, no greater than in the case of ditches and drainage systems.⁵ In both fencing assessments and drainage assessments the power of the state to regulate the use and control of private property is somewhat difficult to explain, and yet is recognized by the courts. In justifying such assessments, we find that the courts prefer to dwell upon the advantage that enures to the property owner. "The general law requires a sufficient fence to be built and kept up around all cultivated land to protect it from the depredations of stock at a very great and unceasing expense, becoming the more onerous as the material used in its construction becomes scarcer and more costly. The enactment proposes to dispense with separate enclosures for each man's land and substitute a common fence around the county boundary to protect all agricultural lands from the inroads of stock from abroad, and a fencing in of stock within its limits. It creates a community of interest in upholding one barrier in place of separate and distinct barriers for each plantation and thus in the common burden lessens the weight that each culti-

v. Milwaukee and Prairie du Chien Ry. Co., 21 Wis. 39, 91 Am. Dec. 456 [1866].

⁴ Stiewel v. Fencing District No. 6 of Johnson County, 71 Ark. 17, 70 S. W. 308, affirmed on rehearing, 71 S. W. 247 [1902]; Commissioners of Chatham County v. Seaboard Air Line Railway Company, 133 N. C. 216, 45 S. E. 566 [1903]; Harper v. Commissioners of New Hanover County, 133 N. C. 106, 45 S. E. 526 [1903]; Hilliard v. City of Asheville, 118 N. C. 845, 24 S. E. 738 [1896];

City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; Bradshaw v. Board of Commissioners of Guilford County, 92 N. C. 278 [1885]; Commissioners of Greene County v. Commissioners of Lenoir County, 92 N. C. 180 [1885]; Shuford v. Commissioners of Gaston County, 86 N. C. 552 [1882]; Cain v. Commissioners of Davie County, 86 N. C. 8 [1882]; Simpson v. Commissioners, 84 N. C. 158.

⁵ See § 335 *et seq.*

vator of the soil must otherwise individually bear. As the greater burden is thus removed from the land-owner, he, as such, ought to bear the expense by which this result is brought about. The special interest benefited by the law is charged with the payment of the sum necessary in securing the benefit. This, and no more, is what the statute proposes to do, and in this respect is obnoxious to no just objection from the taxed land proprietor, as it is free from any constitutional impediments."⁶ It is really the public nature of such improvement that needs discussion and demonstration. In New York the validity of a statute authorizing assessments for fencing vacant lots in a city was assumed, though the particular assessment against the tract of land in question was held to be invalid as not being in the name of the true owner, and as it was not shown that the public officials were misled as to the ownership of the realty.⁷

§ 364. Union station.

It has been held that where a union station was erected by railway corporations and in connection therewith the city provided an access thereto by widening and improving certain streets, the city, if authorized by statute, might, in estimating the benefits in levying local assessments consider the increase in value of the neighboring realty caused by such station and street improvement and the increased public travel along such streets, caused by such improvement.¹ The fund raised by such assessment was, however, to be applied to the expense of the street improvement and not to the cost of building the station.

§ 365. Railroads.

A railroad constructed by a corporation organized for the profit of its members, and engaged in business as a common carrier combines a general benefit to the public at large with the private gain of the members of the corporation. The weight of authority holds that a railroad is operated for a purpose so

⁶ *Cain v. Commissioners of Davie County*, 86 N. C. 8. 16, 17 [1882]; quoted in *Harper v. Commissioners of New Hanover County*, 133 N. C. 106, 111, 45 S. E. 526 [1903].

⁷ *Paillet v. Youngs*, 6 N. Y. Superior Ct. (4 Sandf.) 59 [1850].

¹ *Wells v. Street Commissioners of Boston*, 187 Mass. 451, 73 N. E. 554; *Sears v. Street Commissioners of the City of Boston*, 180 Mass. 274, 62 L. R. A. 144, 62 N. E. 397 [1902].

far public in its nature that the legislature may authorize a public corporation to aid a railroad by means which will eventually result in the levy of general taxation,¹ though there is some partial and qualified dissent from this view.² The attempt to treat a railroad as an improvement of a public nature which confers a special and local benefit upon certain realty has rarely been made; but when made, it has been held not to be a purpose for which local assessments may be levied,³ the court observing that while it was very difficult to discriminate between improvements which conferred a local benefit and those which conferred a benefit solely upon the public at large, it was clear that taxation to aid a railroad must be justified as taxation for a purpose purely public in its nature if it was to be justified at all.⁴ It has been said that if a city acting under authority of statute were to construct a railroad within the city limits, it might levy an assessment, proportioned to and limited to the benefits conferred by such improvement, upon the realty thus benefited.⁵ This observation was, however, an *obiter*. The real

¹ Rogers v. City of Keokuk, 154 U. S. 546, 18 L. 74, 14 S. 1162; Rock Creek Township v. Strong, 96 U. S. 271, 24 L. 815; Oleott v. Fond du Lac County, 83 U. S. (16 Wall.) 678, 21 L. 382; People v. San Francisco, 27 Cal. 655; Society for Savings v. New London, 29 Conn. 174; Chicago, Danville & Vincennes R. R. Co. v. Smith, 62 Ill. 268, 14 Am. Rep. 99; Pittsburgh R. Co. v. Harden, 137 Ind. 486; 37 N. E. 324; Leavenworth County v. Miller, 7 Kan. 479, 12 Am. Rep. 425; Marion County v. Louisville and Nashville R. Co., — Ky. —, 78 S. W. 437, 25 Ky. L. R. 1600 [1904]; Bradley-Ramsay Lumber Co. v. Perkins, 109 La. 317, 33 So. 351; Vicksburg, S. & P. Ry. Co. v. Goodenough, 108 La. 442, 66 L. R. A. 314, 32 So. 404 [1902]; Commonwealth v. Inhabitants of Williamstown, 156 Mass. 70, 30 N. E. 472; Finlayson v. Vaughn, 54 Minn. 331, 56 N. W. 49; Colburn v. McDonald, 72 Neb. 431, 100 N. W. 961 [1904]; Knox County v. Nichols, 14 O. S. 260; Commonwealth

v. Pittsburg, 41 Pa. St. 278; Sharpless v. Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759; Red River Furnace Co. v. Tennessee Central Railway Co., 113 Tenn. 697, 87 S. W. 1016; Louisville and Nashville Railroad Company v. County Court of Davidson County, 33 Tenn. (1 Sneed.) 637, 62 Am. Dec. 424 [1854]; Nichol v. Mayor and Aldermen of Nashville, 28 Tenn. (9 Hump.) 252; City of Jefferson v. Jennings Banking and Trust Co., 35 Tex. Civ. App. 74, 79 S. W. 876 [1904]; Jennings Banking and Trust Co. v. City of Jefferson, 30 Tex. Civ. App. 534, 70 S. W. 1005 [1902].

² State v. Wapello County, 13 Ia. 388; Dodge v. Van Buren Circuit Judge, 118 Mich. 189, 76 N. W. 315; Whiting v. Sheboygan R. Co., 25 Wis. 167, 3 Am. Rep. 30.

³ Dyar v. Farmington Village Corporation, 70 Me. 515 [1878].

⁴ Dyar v. Farmington Village Corporation, 70 Me. 515, 527 [1878].

⁵ Hale v. City of Kenosha, 29 Wis. 599 [1872].

question decided in that case was that where the city subscribed in aid of the construction of a railroad extending beyond its limits, and to meet the cost of such subscription levied a tax upon all the lands in the city, this was held to be a tax as distinguished from a local assessment, and therefore subject to the constitutional requirement of uniformity.⁶

§ 366. Location of public buildings and institutions.

Whether the location of public buildings, institutions and the like can confer such a special benefit that an assessment can be levied therefor is a question which has been considered only incidentally. The location of a county seat at a given city has been said to be such a benefit to such city that the legislature might authorize the expense of the location to be laid upon the city.¹ So it has been held that the legislature may authorize a tax to be levied to reimburse citizens who have voluntarily advanced money for the construction of a courthouse, although there was no prior legal liability for such advances.² In these cases, however, the question was as to the power to impose the charge upon the public corporation, which was to be reimbursed by general taxation; and no attempt was made to pass upon the power of the legislature to assess such charge upon the property of individuals which was especially benefited thereby.

§ 367. Temporary improvements.

Whether a local assessment can be levied for an improvement of a purely temporary nature where a permanent improvement is possible is a question which has received but little consideration, as the question is rarely presented. In an Iowa case it was held that where the grade was fixed by resolution instead of being fixed, as it should have been, by a regular ordinance,¹ the city had, under its charter, no authority to assess abutting property for the expense of improving the street at such temporary and unauthorized grade.² Since the statute gave no authority to

⁶ *Hale v. Kenosha*, 29 Wis. 599.

¹ See § 862, § 863.

² *Schenck v. City of Jeffersonville*, 152 Ind. 204, 52 N. E. 212.

² *McMannus v. Harnaday*, 99 Ia. 507, 68 N. W. 812 [1896].

² *Commissioners v. Snyder*, 45 Kan. 636, 23 Am. St. Rep. 742, 26 Pac. 21 [1891].

assess for such an improvement, this case throws but little light on the power of the legislature to authorize assessments for such temporary improvements. Similar questions arise where the statute authorizes the construction of certain improvements and the levying of assessments therefor only if the grade has been fixed. Under such statutes an assessment is invalid if the grade has not been fixed as provided.³ Here again the nature of the statute prevents consideration of the constitutional questions involved. If no statute requires the grade to be fixed, an improvement made before such grade is fixed may be paid for by local assessment.⁴ So assessments may be levied for the construction of a sewer, though no general system of sewers is adopted.⁵ It would seem doubtful, however, whether such a power exists. An improvement of a more or less permanent type as far as its nature will permit, may and often does confer benefits for which assessments may be levied. An improvement of a temporary character as incident to an improvement of a permanent type may be upheld as a mere incident to the permanent improvement.⁶ Thus during the construction of a street, the owners of land to be assessed therefor may be charged with the cost of temporary drains and culverts to protect the street during such construction.⁷ But an improvement of such a character as a street avowedly intended as a mere temporary make-shift is clearly for the benefit of the public since the benefit to the property owner is no greater than if an improvement of a permanent type were constructed in the first instance. However, it has been held that if the grade and width of a street were established it might be planked before it was graded.⁸ Whether a city may levy a local assessment on adjoining realty to pay the expense of laying a temporary water-pipe to furnish water for less than a week to the camp of the soldiers' reunion was raised but not decided in a Wisconsin case,⁹

³ *City of Napa v. Easterby*, 61 Cal. 509 [1882]; *State of Minnesota ex rel. Shannon v. Judges of District Court of Eleventh Judicial District*, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122 [1892]; *City of De Soto v. Showman*, 100 Mo. App. 323, 73 S. W. 257 [1903].

⁴ *Chase v. Board of Aldermen of Springfield*, 119 Mass. 556 [1876].

⁵ *Inhabitants of Leominster v. Conant*, 139 Mass. 384, 2 N. E. 690

[1885]; *City of Duluth v. Dibblee*, 62 Minn. 18, 63 N. W. 1117 [1895]; *Fitzhugh v. City of Duluth*, 58 Minn. 427, 59 N. W. 1041.

⁶ See Chapter IX.

⁷ *Russell v. Adkins*, 24 Mo. App. 605 [1887].

⁸ *Knowles v. Seale*, 64 Cal. 377, 1 Pac. 159 [1883].

⁹ *Gilman v. City of Milwaukee*, 61 Wis. 588, 21 N. W. 640 [1884].

the decision turning on the point that while a temporary extension was petitioned for, such petition was acted upon as one for a permanent improvement.¹⁰

§ 368. Lighting streets.

The lighting of the city streets is undoubtedly a public benefit. Accordingly it is clearly settled that statutes which authorize municipal corporations to construct plants for lighting their streets and to pay for them by general taxation are valid,¹ as are statutes which authorize municipal corporations to pay the expense of operating such plant and of furnishing such light, by general taxation. Whether the expense of any of these items may be paid for by local assessments upon the property especially benefited thereby is a question which has received but little consideration, because statutes of this class are comparatively rare. Most rare of all are attempts to levy local assessments for the construction of a central plant to furnish light for the entire system. In Illinois it has been held that the cost of the power-house and generator plant of an electric lighting system and the engine, generator and appliances which are located at the power-house cannot be met by local assessment, since such an improvement is not a "local improvement" within the meaning of the constitution and statutes of Illinois.² The theory which this court had applied to water-works³ was expressly adopted and applied by analogy to this case of an electric lighting plant. The analogy is practically perfect. If the court is right in the one case it is in the other. The objections to the entire theory have been stated elsewhere.⁴ In Iowa it has been assumed without being decided that an assessment might be levied for such purpose.⁵ The question decided in this case, however, did not concern assessments directly. A suit was brought in equity to cancel a contract for the construction of an electric light plant entered into

¹⁰ See § 800.

¹ *Mitchell v. City of Negaunee*, 113 Mich. 359, 67 Am. St. Rep. 468, 38 L. R. A. 157, 71 N. W. 646 [1897].

² *Ewart v. Village of Western Springs*, 180 Ill. 318, 54 N. E. 478 [1899].

³ See § 351.

⁴ See § 330, § 351.

⁵ " . . . grant that the city had a right to levy a special assessment for the purpose of maintaining and operating an electric light plant . . ." *Windsor v. City of Des Moines*, 110 Ia. 175, 80 Am. St. Rep. 280, 81 N. W. 476 [1900].

by the city, and it was held that even if the city had the power to levy local assessments to pay for such improvement, it could not anticipate its revenues therefor and thus incur a debt in excess of the limit fixed by statute. More common are attempts to levy local assessments for the parts of a lighting plant which are designed to conduct the means of lighting to the premises benefited, and to furnish light thereto. Such appliances are generally held to be improvements of such sort that local assessments may be levied therefor. In Illinois it is held that poles, electric conductors, lamps and appliances connected therewith are local improvements within the meaning of the constitution and the statutes; and that local assessments may be levied therefor.⁶ In other cases this doctrine has been recognized, though the specific assessment has been held invalid for some defect. Thus lamp-posts and connections,⁷ electric lamp-posts, conduits, cables, switches and lamps,⁸ boulevard lamps⁹ and lamp tops, cables, lamp-posts and are lamps¹⁰ have been recognized as improvements for which local assessments might be levied, though the assessment was attacked on other grounds and often resisted successfully. In New York it seems to be recognized that an assessment for lamp-posts and lamps might be valid.¹¹ As this was an action for breach of a covenant of seizin in a deed and the case turned on whether a valid assessment and sale had been proved, this point was not specifically decided. In Michigan, on the other hand, it has been held that towers for electric lighting are not local improvements.¹² This case, however, did not involve the power of the legislature to authorize an assessment for such purpose, but turned on the power of the municipality under its charter. The question whether such towers were local improvements was involved because if local improvements for which a

⁶ *Lingle v. West Chicago Park Commissioners*, 222 Ill. 384, 78 N. E. 794 [1906]; *Ewart v. Village of Western Springs*, 180 Ill. 318, 54 N. E. 378 [1899].

⁷ *Otis v. City of Chicago*, 161 Ill. 199, 43 N. E. 715 [1896]; (the assessment in this case was held void for uncertainty in description).

⁸ *Smith v. City of Chicago*, 169 Ill. 257, 48 N. E. 445 [1897]; (the assessment was invalid since the as-

essment ordinance provided for lamp-posts only).

⁹ *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894].

¹⁰ *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901]; (the assessment was held valid in this case).

¹¹ *Kennedy v. Newman*, 3 N. Y. Sup. Ct. 187 [1848].

¹² *Putnam v. City of Grand Rapids*, 58 Mich. 416, 25 N. W. 330 [1885].

local assessment could be levied, the statutory restriction on incurring indebtedness would not apply. A fact to which the court seemed to attach considerable importance was that the general system of lighting was not owned by the municipality. Another question which has been rarely considered is whether a local assessment can be levied for the purpose of operating and maintaining a system of lighting. In Iowa such power was spoken of as one which possibly might exist.¹³ The question was not, however, presented for decision, as the real point involved was whether the city could incur the debt which it was attempting to incur by its contract for lighting; and it was held that it could not incur such debt under the statutory limitation upon its powers, even "granting that the city had right to levy a special assessment for the purpose of maintaining and operating an electric light plant."¹⁴ In Ohio such right seems to be recognized, though the specific assessment was held to be invalid.¹⁵

§ 369. Lighting railway crossings.

A statute authorizing a municipal corporation to require a railway company, which owns tracks running through the territory of municipal corporation to light street crossings where their tracks cross the streets of such municipality, and providing that on default of such railway company to light such crossings after proper notice, such municipal corporation may light such crossings and assess the cost of such lighting upon the railway company, has been held to be a valid provision under the police power of the state,¹ but such assessment has, however, been held not to be a local assessment within the meaning of the statute

¹³ Windsor v. City of Des Moines, 110 Ia. 175, 80 Am. St. Rep. 280, 81 N. W. 476 [1900].

¹⁴ Windsor v. City of Des Moines, 110 Ia. 175, 80 Am. St. Rep. 280, 81 N. W. 476 [1900].

¹⁵ Jonas v. City of Cincinnati, 18 Ohio, 318 [1849].

¹ Chicago, Indianapolis and Louisville Railway Company v. City of Crawfordsville, 164 Ind. 70, 72 N. E. 1025 [1904]; (modifying Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. City of Connersville, 147 Ind.

277, 62 Am. St. Rep. 418, 37 L. R. A. 175, 46 N. E. 579 [1896], and City of Shelbyville v. Cleveland, Chicago and St. Louis Railway Co., 146 Ind. 66, 44 N. E. 929 [1896]); Village of St. Marys v. Lake Erie and Western Railroad Company, 60 O. S. 136, 53 N. E. 795 [1899]; Cincinnati, Hamilton & Dayton R. R. Co. v. Village of Bowling Green, 57 O. S. 336, 41 L. R. A. 422, 49 N. E. 121 [1897]; Cincinnati, Hamilton and Dayton R. R. Co. v. Sullivan, 32 O. S. 152 [1877].

providing for collection.² This topic, also, is considered in connection with the question of the form of exaction which the assessment may assume.³

§ 370. Cleaning, sweeping and sprinkling streets.

Cleaning, sweeping and sprinkling the public streets of a city undoubtedly benefit the public at large. Disease is thereby prevented and the comfort of the public in using such streets is greatly increased. Accordingly it is clearly settled that the expense of cleaning, sweeping or sprinkling¹ the public streets of a city is work which may be done by the municipal corporation and the expense of which may be met by general taxation, even if some especial advantage may accrue to the owners of property abutting upon the streets thus cleaned.² Whether the local and especial benefit received by owners of property abutting on such street is of such a nature that a local assessment may be levied upon the property benefited thereby to pay the cost of such work, is a question upon which there is a conflict of authority arising from a difference as to the essential and fundamental characteristics of the nature of improvements for which local assessments may be levied. In some jurisdictions it is held that in order to justify any local assessment, the improvement for which it is levied must have some appreciable degree of permanency, and must benefit the property assessed by increasing its market value. In jurisdictions where this view of local as-

² Cincinnati, Hamilton and Dayton R. R. Co. v. Sullivan, 32 O. S. 152 [1877]; (therefore, it must be collected by suit and cannot be placed upon the tax duplicate).

³ See § 59.

¹ Maydwell v. City of Louisville, 116 Ky. 885, 105 Am. St. Rep. 245, 63 L. R. A. 655, 76 S. W. 1091 [1903]. "It cannot be successfully denied that the dust upon the streets of large cities is a fruitful source of disease as well as of annoyance to the citizens. The same principle which authorizes the streets to be cleaned for the purpose of preventing noisome odors and epidemics of disease authorizes them to be sprinkled." Maydwell v. City of Louisville, 116

Ky. 885, 889, 105 Am. St. Rep. 245, 63 L. R. A. 655, 76 S. W. 1091 [1903].

² "The owners of property abutting upon the highways sprinkled may get some local advantage distinguishable from that of the traveling public; but this always happens in the discharge of public duties. . . . All the citizens have a right to travel the public streets, and, in order that their health and convenience may be conserved, the city may provide that they are reasonably safe, clean and free from substances deleterious to the public health." Maydwell v. City of Louisville, 116 Ky. 885, 890, 105 Am. St. Rep. 245, 63 L. R. A. 655, 76 S. W. 1091 [1903].

assessments is taken, and where it is denied that cleaning, sweeping and sprinkling the public streets have any effect upon the market value of property abutting thereon, it is held that local assessments cannot be levied for cleaning, sweeping or sprinkling³ the public streets. In some of these cases the decision is expressly based on the fact that such an improvement is not permanent.⁴ In Illinois the decision is based on the theory that sprinkling streets is not a local improvement within the meaning of the constitution and statutes.⁵ In Missouri it is said not to be a proper subject for an assessment as being too intangible.⁶ So, in Montana, while the question decided was whether school property could be assessed to pay the expense of sprinkling the streets, the court in holding

³ *New York Life Co. v. Prest*, 71 Fed. 815 [1896]; *City of Chicago v. Blair*, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829 [1894]; *Kansas City v. O'Connor*, 82 Mo. App. 655 [1899]; *Pettit v. Duke*, 10 Utah, 311, 37 Pac. 568 [1894].

⁴ *New York Life Co. v. Prest*, 71 Fed. 815 [1896]; *Pettit v. Duke*, 10 Utah, 311, 37 Pac. 568 [1894]. "It could hardly be said, with reason, that running a sprinkling cart now and then in front of such a lot (*i. e.*, a vacant lot) adds to its market value; nor is there in such an occasional 'laying of the dust' any semblance of permanency. It is as evanescent as the early and the later dew, and, in my judgment, it is no more within the power of a municipality thus to create liens on the citizens' property than to hire a 'rain maker' to vex the skies for refreshing showers, and charge the lots adjacent to the raindrops with the cost thereof. As the sprinkling of the public highways of a city, like the cleaning thereof, contributes much to the comfort and enjoyment of the public, its cost should be made a general and not a special burden." *New York Life Co. v. Prest*, 71 Fed. 815, 818 [1896].

⁵ *City of Chicago v. Blair*, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829 [1894]. "It is, however, insisted that the sprinkling of the streets dur-

ing the summer months renders the occupation of adjacent property more enjoyable and comfortable, and that, therefore, the property is enhanced in value. Doubtless the same result would follow by placing vases at convenient points in the street to be filled every morning with fresh cut flowers, or by open air concerts in which music should be selected with reference to the taste of the adjacent dwellers. So the employment of an efficient police force, whereby greater safety was felt, would add to the enjoyment and comfort of persons residing upon the street. The proper watering and clipping of grass upon lawn and terrace, the removal of garbage from the premises, besides saving expense to the occupant would add to the enjoyment and possibly the healthfulness of the locality. These all might be improvements and increase, while they continued, the desirability of property in their locality. But they are not improvements, either of property or of the street, within the legislative contemplation when granting power to make local improvements by special assessment." *City of Chicago v. Blair*, 149 Ill. 310, 317, 318; 24 L. R. A. 412, 36 N. E. 829 [1894]; (quoted in *New York Life Co. v. Prest*, 71 Fed. 815, 817 [1896]).

⁶ *Kansas City v. O'Connor*, 82 Mo. App. 655 [1899].

such assessment invalid as levied on school property used language which intimated that such an improvement had not sufficient permanency to be the basis of a local assessment.⁷ In other jurisdictions it is held that such an improvement does confer an especial benefit upon realty abutting on and adjoining the streets thus cleaned, swept or sprinkled; and according it is held that local assessments may be levied for sprinkling,⁸ or for sprinkling and sweeping⁹ the public streets.¹⁰ Such work has been held in Minnesota to constitute a "local improvement" within the meaning of that term in the constitution.¹¹ The propriety of an assessment for such purposes has been recognized in cases in which the specific assessment has been held to be invalid,¹² or the sale for non-payment of such assessment has been held to be invalid.¹³ A statute authorizing an assessment for sprinkling, apportioned according to frontage without regard to benefits in fact has been held to be unconstitutional.¹⁴

⁷ *City of Butte v. School District No. 21*, 29 Mont. 336, 74 Pac. 869 [1904]; (citing *Witter v. Mission School District*, 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905 [1898]). "That which partakes of the nature of a luxury—is ephemeral in duration and evanescent in character—lasts but a single day and then disappears and leaves the property in the same condition it was before, is not such an improvement as justifies the expenditure of a school fund which the constitution says 'shall forever remain inviolate.'" *City of Butte v. School District No. 1*, 29 Mont. 336, 340, 341, 74 Pac. 869 [1904].

⁸ *Palmer v. Nolting*, 13 Ind. App. 581, 41 N. E. 1045 [1895]; *Corcoran v. Board of Aldermen of Cambridge*, — Mass. —, 85 N. E. 155 [1908]; *Stark v. City of Boston*, 180 Mass. 293, 62 N. E. 375 [1902]; *Trustees of Phillips Academy v. Inhabitants of Andover*, 175 Mass. 118, 48 L. R. A. 550, 55 N. E. 841, [1900]; *Sears v. Board of Aldermen of the City of Boston*, 173

Mass. 71, 43 L. R. A. 834, 1 Minn. Corp. Cas. 497, 53 N. E. 138 [1899]; *Hawes v. Fliegler*, 87 Minn. 319, 92 N. W. 223 [1902]; *Keigher v. City of St. Paul*, 69 Minn. 78, 72 N. W. 54 [1897]; *State of Minnesota ex rel. Stateler v. Reis*, 38 Minn. 371, 38 N. W. 97 [1888].

⁹ *Reinken v. Fuehring*, 130 Ind. 382, 30 Am. St. Rep. 247, 15 L. R. A. 624, 37 Am. & Eng. Corp. Cas. 354, 30 N. E. 414 [1891].

¹⁰ *Beaumont v. Wilkesbarre City*, 142 Pa. St. 198 [1891]; *Washington v. Mayor and Aldermen of Nashville*, 31 Tenn. (1 Swan) 177 [1851]; *Lumsden v. Cross*, 10 Wis. 282.

¹¹ *State of Minnesota ex rel. Stateler v. Reis*, 38 Minn. 371, 38 N. W. 97 [1888].

¹² *Dawley v. City of Antigo*, 120 Wis. 302, 97 N. W. 1119 [1904]; *Borgman v. City of Antigo*, 120 Wis. 296, 97 N. W. 936 [1904].

¹³ *Hawes v. Fliegler*, 87 Minn. 319, 92 N. W. 223 [1902].

¹⁴ *Stevens v. City of Port Huron*, 149 Mich. 536, 113 N. W. 291 [1907].

§ 371. Removal of ice and snow.

Whether the removal of ice and snow from the sidewalk in front of the land of the person to whom it is sought to charge with the cost of such removal, is a proper subject for which to levy a local assessment is a question on which, in obiter at least, there is a sharp divergence of judicial authority. As far as assessments for benefits are concerned the questions rests almost entirely in obiter. Statutes or ordinances which provide that the work shall be done by the public at the cost of the owner of the adjoining or abutting property are rare, and have scarcely ever been considered by the courts. The common form of ordinance, presented for judicial consideration, is one which requires the owner to remove the snow or ice and provides for the imposition of some fine or penalty in case of his refusal so to do. Questions arising under statutes or ordinances of this sort are considered in connection with the form of exaction which the assessment may assume.¹

§ 372. Removal of garbage.

The accumulation of garbage and filth is undoubtedly a menace to public health and the state may authorize municipal corporations or other public corporations to remove such garbage if the owner of the property upon which it accumulates does not, or to require the owners of the premises on which it has been allowed to accumulate to remove it. The legislature furthermore has power to require that it be removed by certain prescribed agencies,¹ and at the cost of the owners of the realty from which it is removed.² The city may forbid any person to remove filth or garbage unless he has obtained a license from the city so to do,³ and may grant to certain persons a monopoly of removing

¹ See § 58; *State v. McMahon*, 76 Conn. 97, 55 Atl. 591 [1903].

² *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U. S. 306, 26 S. 100 [1905]; (affirming 126 Fed. 29, 61 C. C. A. 91 [1903]; which affirmed *Sanitary Reduction Works v. California Reduction Co.*, 94 Fed. 693 [1899]); *State v. Payssan*, 47 La. Ann. 1029, 49 Am. St. Rep. 390, 17 So. 481; *People v. Gordon*, 81 Mich.

306, 21 Am. St. Rep. 524, 45 N. W. 658; *Iler v. Ross*, 64 Neb. 710, 97 Am. St. Rep. 676, 57 L. R. A. 895, 90 N. W. 869 [1902].

³ *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222, 28 L. R. A. 679, 37 N. E. 402, 39 N. E. 869 [1894]; *Vandine, Petitioner*, 23 Mass. (6 Pick.) 187, 17 Am. Dec. 351.

³ *State v. Orr*, 68 Conn. 101, 34 L. R. A. 279, 35 Atl. 770; *Boehm v. Mayor of Baltimore*, 61 Md. 259.

such materials.⁴ Thus where the land-owner was not forbidden to destroy the garbage upon his own premises without removing it, it was held that he might be forbidden to remove it, that the city might provide an exclusive agency for removing it, and that such removal be at the expense of the owner of the property from which it was removed.⁵ Such a charge, however, was said not to be a local assessment, because the charge was incurred only by the voluntary act of the owner of the realty in not destroying all the garbage on his realty, because the amount of the charge could not be determined until it was ascertained how much garbage the owner failed to destroy, and because the charge was not a lien upon the realty from which the garbage was removed. This case, it may be added, involved primarily the validity of the contract entered into by the city for the removal of garbage, and involved the validity of such charges, not directly, but only by way of determining that such contract was valid.⁶ The right of the public to have garbage and refuse destroyed at once, thus preventing disease, unpleasant odors and the like, is thus regarded as paramount to the property right of the owner thereof, even if such garbage might have a value for some purposes.⁷ On the other hand it has been held that the owner has a property right in garbage and the like, and that while he cannot allow it to become a nuisance, he has a right not only to destroy it upon the premises in a proper way, but to remove it himself, or through the agency of others, or to sell it and have it removed by the vendee.⁸ Thus, if a domestic animal dies,

⁴ *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U. S. 306, 26 S. 100 [1905]; (affirming 126 Fed. 29, 61 C. C. A. 91 [1903], which affirmed *Sanitary Reduction Works v. California Reduction Co.*, 94 Fed. 693); *City of Orray v. Corson*, 14 Colo. App. 345, 59 Pac. 876; *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222, 28 L. R. A. 679, 37 N. E. 402, 39 N. E. 869 [1894]; *Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269; *Coombs v. MacDonald*, 43 Neb. 632, 62 N. W. 41; *Smiley v. MacDonald*, 42 Neb. 5, 47 Am. St. Rep. 684, 27 L. R. A. 540, 60 N. W. 355.

⁵ *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222, 28 L. R. A. 679, 37 N. E. 402, 39 N. E. 869 [1894].

⁶ *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222, 28 L. R. A. 679, 37 N. E. 402, 39 N. E. 869 [1894].

⁷ *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U. S. 306, 26 S. 100 [1905]; (affirming 126 Fed. 29, 61 C. C. A. 91 [1903], which affirmed *Sanitary Reduction Works v. California Reduction Co.*, 94 Fed. 693 [1899]).

⁸ *Mann v. District of Columbia*, 22 App. D. C. 138 [1903].

the right of the owner thereof continues as a property right in the body, and he has a right to remove it himself or to sell it and the municipal authorities cannot remove it themselves at his expense without giving him a reasonable time in which to remove it or to have it removed.⁹ If a reasonable time is given to the owner to remove the body the city may provide for its removal by certain exclusive designated agencies.¹⁰ A city cannot, however, grant an exclusive privilege of removing refuse not in itself offensive which will not become a nuisance unless allowed to accumulate in large quantities.¹¹ While a board of health may abate a nuisance at the expense of the property owner,¹² and may require privy vaults to be cleaned and purified,¹³ it cannot have water closets and connections therefor constructed at the expense of the property owner without his consent.¹⁴ Some of the cases which deny the right of a municipal corporation to levy a special tax or local assessment upon the realty from which garbage is removed, for the cost of the removal thereof are based upon statutory construction and involve the question of the power of the municipality as defined by the legislature. Without statutory authority a city cannot levy a special tax or local assessment for such purpose.¹⁵

D.—REPAIRS.

§ 373. General principles involved in assessments for repairs.

If an improvement of a sort for the construction of which local assessments may be levied, is in such condition that repairs are

⁹ *Mann v. District of Columbia*, 22 App. D. C. 138 [1903]. For similar views as to the right of the owner of the dead body of an animal, see *State v. Morris*, 47 La. Ann. 1660, 18 So. 710; *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6 [1882]; (reversing 7 Mo. App. 345 [1879]); *Underwood v. Green*, 42 N. Y. 140 [1870].

¹⁰ *National Fertilizer Co. v. Lambert*, 48 Fed. 458; *Alpers v. San Francisco*, 32 Fed. 503; *City of Louisville v. Wible*, 84 Ky. 290, 1 S. W. 605.

¹¹ *Iler v. Ross*, 64 Neb. 710, 97 Am. St. Rep. 676, 57 L. R. A. 895, 90 N. W. 869 [1902].

¹² *Kennedy v. Board of Health*, 2 Pa. St. (2 Barr.) 366 [1845].

¹³ *Philadelphia v. Provident, etc., Trust Co.*, 132 Pa. St. 224, 18 Atl. 1114 [1890].

¹⁴ *Philadelphia v. Provident, etc., Trust Co.*, 132 Pa. St. 224, 18 Atl. 1114 [1890].

¹⁵ *Trephagen v. City of South Omaha*, 69 Neb. 577, 111 Am. St. Rep. 570, 96 N. W. 248 [1903].

necessary to enable it to serve its purpose, the question arises whether such repairs can be paid for by local assessments levied on the property which is benefited by such repairs. This involves the question whether, as a matter of law, any property can be said to receive a special local benefit from the maintenance of such improvement in good condition, or whether the benefit therefrom enures solely to the public at large. According to the weight of authority repairs of such improvements may confer a special local benefit, and local assessments can in such case be levied therefor.¹ However, "repairs," within the meaning of this rule, includes only those which are necessary when the assessment is levied, and not those which may become necessary in the future by reason of the subsequent deterioration of the improvement.² Whether the cost of future repairs for a given space of time can be included in the cost of original construction and the entire amount assessed against the property owners is

¹ *Carson v. Brockton Sewerage Commission*, 182 U. S. 398, 45 L. 1151, 21 S. 860 [1901]; (affirming *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]); *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898]; (affirming *Parsons v. District of Columbia*, 8 App. D. C. 39 [1896], which followed *Burgdorf v. District of Columbia*, 7 App. D. C. 405 [1896]); *Willard v. Willard*, 154 U. S. 568, 38 L. 1088, 14 S. 1215 [1870]; *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331 [1905]; *Village of Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846 [1888]; *Lux & Talbott Stone Company v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903]; *Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191 [1896]; *Yeomans v. Riddle*, 84 Ia. 147, 50 N. W. 886 [1891]; *Broadway Baptist Church v. McAttee*, 8 Bush. (71 Ky.) 508, 8 Am. Rep. 480 [1871]; *State ex rel. Woulfe v. St. Paul*, 107 La. 777, 32 So. 88 [1902]; *Lanning v. Palmer*, 117 Mich. 529, 76 N. W. 2 [1898]; *Shimmons v. City of Saginaw*, 104 Mich. 511, 62 N. W. 725 [1895]; *McMillen v. Board of*

County Commissioners of Freeborn County, 93 Minn. 16, 100 N. W. 384, 1125 [1904]; *State ex rel. Wheeler v. District Court of Ramsey County*, 80 Minn. 293, 83 N. W. 183 [1900]; *Estes v. Owen*, 90 Mo. 113, 2 S. W. 133; *McCormack v. Patchin*, 53 Mo. 33; *Gilmore v. City of Utica*, 131 N. Y. 26, 29 N. E. 841 [1892]; *Matter of Phillips*, 60 N. Y. 16; *People ex rel. Bull v. City of Buffalo*, 52 App. Div. (N. Y.) 157, 65 N. Y. Supp. 163 [1900]; (affirmed 166 N. Y. 604, 59 N. E. 1128 [1901]); *Taylor v. Crawford*, 72 O. S. 560, 69 L. R. A. 805, 74 N. E. 1065 [1905]; (reversing *Crawford v. Taylor*, 27 Ohio C. C. 245 [1905]); *Ladd v. City of Portland*, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654 [1898]; *Adams v. Fisher*, 75 Tex. 657, 6 S. W. 772 [1890]; *Rude v. Town of St. Marie*, 121 Wis. 634, 99 N. W. 460 [1904]; *Adams v. City of Beloit*, 105 Wis. 363, 47 L. R. A. 441, 81 N. W. 869 [1900].

² *Portland v. Bituminous Paving Co.*, 33 Or. 307, 72 Am. St. Rep. 713, 44 L. R. A. 527, 52 Pac. 28 [1898]; see § 516 *et seq.*

a question which involves the power of the legislature to levy such assessment only in jurisdictions in which repairs cannot be made the subject of local assessment.³ In other jurisdictions the question is a statutory one, turning entirely upon the question whether the legislature has authorized such assessment. The subject is considered elsewhere.⁴ It is difficult in some of the cases to decide whether the particular improvement is repair or reconstruction.⁵ Except in a few jurisdictions⁶ the constitutional questions involved are the same for the two kinds of improvement. The distinction between repair and reconstruction will be discussed in connection with the question of the power conferred by statute to make assessments.

§ 374. Repair of streets, roads and sidewalks.

In accordance with these principles, a public street may be repaired and the expense thereof paid for by local assessments.¹ "The power to grade and improve streets is a legislative power and a continuing one, unless there is some special restraint imposed in the charter of the corporation. The power to compel property owners to pave generally extends to compelling them to repair when required by the municipal authorities."² The validity of such assessments has been recognized where the specific assessment was held to be invalid as not levied in accord-

³ See § 377, § 378, § 516 *et seq.*

⁴ See § 516 *et seq.*

⁵ See *Adams v. Fisher*, 75 Tex. 657, 6 S. W. 772 [1890].

⁶ See § 379 *et seq.*

¹ *Willard v. Presbury*, 14 Wall. (81 U. S.) 676, 20 L. 719 [1869]; *Chicago and Northern Pacific Railroad Company v. City of Chicago*, 172 Ill. 66, 49 N. E. 1006 [1898]; *Lux & Talbott Stone Company v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903]; *Broadway Baptist Church v. McAttee*, 8 Bush. (71 Ky.) 508, 8 Am. Rep. 480 [1871]; *State ex rel. Woulfe v. St. Paul*, 107 La. 777, 32 So. 88 [1902]; *Shimmons v. City of Saginaw*, 104 Mich. 511, 62 N. W. 725 [1895]; *State ex rel. Wheeler v. District Court of Ramsey County*, 80 Minn. 293, 83 N. W. 183 [1900];

Estes v. Owen, 90 Mo. 113, 2 S. W. 133; *Farrar v. City of St. Louis*, 80 Mo. 379 [1883]; *Gilmore v. City of Utica*, 131 N. Y. 26, 29 N. E. 841 [1892]; *People ex rel. Markey v. City of Brooklyn*, 65 N. Y. 349 [1875]; In the Matter of the Petition of Peugnet to Vacate an Assessment, 5 Hun. 434 [1875]; In the Matter of the Petition of Lewis v. Mayor, etc., of the City of New York, 35 How. (N. Y.) 162 [1868]; *Ladd v. City of Portland*, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654 [1898]; *Adams v. Wisher*, 75 Tex. 657, 6 S. W. 772 [1890]; *Adams v. City of Beloit*, 105 Wis. 363, 47 L. R. A. 441, 81 N. W. 869 [1900].

² *Farrar v. City of St. Louis*, 80 Mo. 379 [1883]; quoted in *Estes v. Owen*, 90 Mo. 113, 115, 2 S. W. 133.

ance with the statute authorizing it.³ So an assessment may be levied for the repair of public roads.⁴ A local assessment may be levied for the repair of sidewalks.⁵

§ 375. Repair of sewers, drains, ditches and levees.

In accordance with the same general principles, local assessments may be levied for the repair of sewers.¹ On the same principle local assessments may be levied for the purpose of repairing ditches and drains,² and for the expense of cleaning drains and ditches so as to facilitate the flow of water through them,³ and for deepening and widening them,⁴ or for the repair of levees.⁵

§ 376. Repair of water-works system.

The principles applicable to repairs in general, control assessments for repairs to a system of water-works. If the original

³ *Blanchard v. Beideman*, 18 Cal. 261 [1861]; *Cook v. City of Portland*, 35 Or. 383, 58 Pac. 353 [1899].

⁴ *Barrow v. Hepler*, 34 La. Ann. 362 [1882].

⁵ *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331 [1905]; *Heman v. St. Louis Merchants' Land Improvement Company*, 75 Mo. App. 372 [1898]; *City of Marionville to the use of Ginbaugh v. Henson*, 65 Mo. App. 397 [1895]; *Lisbon Avenue Land Co. v. Town of Lake*, — Wis. —, 113 N. W. 1099 [1907].

¹ *Carson v. Brockton Sewerage Commission*, 182 U. S. 398, 45 L. 1151, 21 S. 860 [1901]; (affirming *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]); *Smith v. Mayor and Aldermen of Worcester*, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40 [1902].

² *Village of Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846 [1888]; *Roudenbush v. Mitchell*, 154 Ind. 616, 57 N. E. 510 [1900]; *Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191 [1896]; *Millikan v. Wall*, 133 Ind. 51, 32 N. E. 328 [1892]; *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953 [1892]; *Goff v. McGee*, 128 Ind. 394, 27 N. E. 754 [1891]; *Kirk-*

patrick v. Taylor, 118 Ind. 329, 21 N. E. 20 [1888]; *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600 [1887]; *Harris v. Ross*, 112 Ind. 314, 13 N. E. 873 [1887]; *Trimble v. McGee*, 112 Ind. 307, 14 N. E. 83 [1887]; *State ex rel. French v. Johnson*, 105 Ind. 463, 5 N. E. 553 [1885]; *Davison v. Campbell*, 28 Ind. App. 688, 63 N. E. 779 [1901]; *Morrow v. Geeting*, 15 Ind. App. 358, 41 N. E. 848, 44 N. E. 59; *Crawford v. Hedrick*, 9 Ind. App. 356, 36 N. E. 771 [1893]; *Yeomans v. Riddle*, 84 Ia. 147, 50 N. W. 886 [1891]; *McMillan v. Board of County Commissioners of Freeborn County*, 93 Minn. 16, 100 N. W. 384, 1125 [1904].

³ *Terre Haute and Logansport Railroad Company v. Soice*, 128 Ind. 105, 27 N. E. 429 [1890]; *Lanning v. Palmer*, 117 Mich. 529, 76 N. W. 2 [1898]; *Angell v. Cortright*, 111 Mich. 223, 69 N. W. 486 [1896]; *Taylor v. Crawford*, 72 O. S. 560, 69 L. R. A. 805, 74 N. E. 1065 [1905]; (reversing *Crawford v. Taylor*, 27 Ohio C. C. 245 [1905]).

⁴ *Rude v. Town of St. Marie*, 121 Wis. 634, 99 N. W. 460 [1904].

⁵ *Blake v. People for use of Caldwell*, 109 Ill. 504 [1884]; (under specific constitutional provision).

construction may be paid for by assessment, then in jurisdictions where assessments may be levied for repairs, assessments may be levied for the repair of such part of a system of water works. Thus a local assessment may be levied for the repair of the local pipes, of a water-works system,¹ or in some jurisdictions for repairs to parts of the system, such as the pumping station, the original construction of which could be paid for by local assessment in such jurisdictions.² A different result would be reached in jurisdictions in which assessments could not be levied for repairs.³

§ 377. Doctrine of repairs in Illinois.

In Illinois under an earlier provision of the constitution an assessment for repairing a street was treated as valid.¹ An ordinance imposing a penalty for failure to keep a sidewalk in repair was held to be invalid.² The objection to the latter type of ordinance, however, is rather its method of enforcing a duty by criminal proceedings than a want of power to levy local assessments.³ It has been held that under the present constitution authorizing local assessments for "local improvements" a "local" improvement involves an idea of permanency in the improvement.⁵ So the repair of a boulevard is not a local improvement within the meaning of the constitution or of a statute using the same language, since it has no element of permanency.⁶ A special provision of the constitution of Illinois⁷ authorizes local assessments for the repair of drains, ditches and levees. Under this provision local assessments may be made for the purpose of strengthening and repairing levees,⁸ or for the purpose of keep-

¹ *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898]; (affirming *Parsons v. District of Columbia*, 8 App. D. C. 391 [1896], which followed *Burgdorf v. District of Columbia*, 7 App. D. C. 405); *Batterman v. City of New York*, 65 App. Div. (N. Y.) 576, 73 N. Y. Supp. 44.

² See § 377, N. 10.

³ See § 377, § 378.

⁴ *Seammon v. City of Chicago*, 42 Ill. 192 [1866].

⁵ *City of Chicago v. Crosby*, 111 Ill. 538 [1885].

³ See Chapter IV.

⁴ See §§ 285, 286.

⁵ *Crane v. West Chicago Park Commissioners*, 153 Ill. 348, 26 L. R. A. 311, 38 N. E. 943 [1894]; *City of Chicago v. Blair*, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829 [1894]; see § 285.

⁶ *Crane v. West Chicago Park Commissioners*, 153 Ill. 348, 26 L. R. A. 311, 38 N. E. 943 [1894].

⁷ Art. IV., § 31; see § 257, § 258.

⁸ *Hosmer v. Hunt Drainage District*, 134 Ill. 360, 26 N. E. 584 [1891].

ing them in repair.⁹ So local assessments may be levied for the cost of repairing the pumping station of a sewer system, but not for the cost of running it,¹⁰ or for repairing drains and ditches.¹¹

§ 378. Doctrine of repair in Pennsylvania.

In Pennsylvania where local assessments cannot be levied for most forms of reconstruction¹ it is held that assessments cannot be levied for repairs of improvements, for which assessments can be justified only upon the theory of special benefits, such as streets.² On the other hand, it has been held that the construction and repair of sidewalks is referable to the police power, and that a local assessment may therefore be levied for the repair of sidewalks.³

E.—RECONSTRUCTION.

§ 379. Reconstruction where original improvement not subject for assessment.

If an improvement of any one of the classes for which local assessments may be levied has once been constructed, and subsequently the public corporation having charge of such improvement seeks to construct a new improvement in place of the old one, and to levy local assessments therefor, the question arises whether a statute authorizing such local assessment is constitutional. In determining this question it must first be noted that in jurisdictions in which local assessments cannot be levied for local improvements when originally constructed,¹ such assessments cannot of course be levied for a reconstruction of such improvement. Thus under the rule adopted by the courts of South Carolina it has been said that the cost of new sidewalks and drains made necessary solely by reason of a change of grade of the street cannot be assessed upon the abutting property.² This

⁹ *Hammond v. Carter*, 161 Ill. 621, 44 N. E. 274 [1896].

¹⁰ *McChesney v. Village of Hyde Park*, 151 Ill. 634, 37 N. E. 858 [1894].

¹¹ *Village of Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846 [1888].

¹ See § 382 *et seq.*

² *Washington Avenue*, 69 Pa. St. (19 P. F. Smith) 352, 8 Am. Rep. 255 [1871]; *Hammett v. Philadel-*

phia, 65 Pa. St. (15 P. F. Smith) 146, 3 Am. Rep. 615 [1870].

³ *Philadelphia to use v. Monument Cemetery Co.*, 147 Pa. St. 170, 23 Atl. 400 [1892]; *Smith v. Kingston Borough*, 120 Pa. St. 357, 14 Atl. 170 [1888].

¹ See § 118.

² *Mauldin v. City Council of Greenville*, 53 S. C. 285, 69 Am. St. Rep. 855, 43 L. R. A. 101, 31 S. E. 252 [1898].

case might have been placed upon the ground that the existing improvement was in good condition and still suitable for its original purpose, and was replaced by another for a purpose in which the public at large was interested and not the abutting property. If this had been the reason assigned, this case would have been in harmony with views held in some jurisdictions.³ It was, however, placed upon the broad ground, elsewhere discussed, that local assessments cannot be levied in South Carolina.⁴

§ 380. Reconstruction where original improvement is in bad condition.

In the next place we must consider the cases in which the original improvement has by use and by lapse of time become worn out, in bad condition, or unsuited for the uses for which it is intended, and it is sought to construct a new improvement to take the place of original improvement now worn out. In cases of this class the great weight of authority holds that if such an improvement combines the requirements of benefit to the public at large and especial local benefit to the property which it is sought to assess, the same considerations which make it proper to levy local assessments for the original improvement make it proper to levy such assessments for new improvements to take the place of the original ones. No reason is thought to exist, in these jurisdictions, for holding that the power of the state is exhausted by one local improvement of a given kind, and an assessment therefor, nor is it thought that the act of making such improvement and assessment therefor amounts to a contract with the property owners that the improvement shall when worn out be replaced at the public expense. Such assessments, therefore, are looked upon as proper if authorized by the legislature.¹

³ See § 387.

⁴ See § 118, § 302.

¹ Willard v. Willard, 154 U. S. 568, 38 L. 1088; 14 S. 1215; Wells v. Wood, 114 Cal. 255, 46 Pac. 96 [1896]; McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885 [1891]; Chicago and Northern Pacific Railroad Company v. City of Chicago, 172 Ill. 66, 49 N. E. 1006 [1898]; Cram v. City of Chicago, 139 Ill. 265, 28 N. E. 758

[1893]; Lux & Talbott Stone Company v. Donaldson, 162 Ind. 481, 68 N. E. 1014 [1903]; Yeakel v. City of Lafayette, 48 Ind. 116 [1874]; Koons v. Lucas, 52 Ia. 177, 3 N. W. 84 [1879]; Hackworth v. Louisville Artificial Stone Co., 106 Ky. 234, 50 S. W. 33 [1899]; Broadway Baptist Church v. McAttee, 8 Bush. (71 Ky.) 508, 8 Am. Rep. 480 [1871]; Bradley v. McAttee, 7 Bush. (70 Ky.) 667,

§ 381. Examples of reconstruction.

In accordance with these general principles we find that the reconstruction of a street is an improvement for which the legislature may authorize local assessments.¹ This includes the re-

- 3 Am. Rep. 309 [1870]; Schmitt v. City of New Orleans, 48 La. Ann. 1440, 21 So. 24 [1896]; Alberger v. Mayor and City Council of Baltimore, 64 Md. 1, 20 Atl. 988 [1885]; Hall v. Street Commissioners of Boston, 177 Mass. 434, 59 N. E. 68 [1901]; Auditor General v. Chase, 132 Mich. 630, 94 N. W. 178 [1903]; Williams v. Mayor, etc., of Detroit, 2 Mich. 560 [1853]; State ex rel. Wheeler v. District Court of Ramsey County, 80 Minn. 293, 83 N. W. 183 [1900]; Farrar v. City of St. Louis, 80 Mo. 379 [1883]; McCormack v. Patchin, 53 Mo. 33, 14 Am. Rep. 440 [1873]; Barber Asphalt Paving Company v. Muehenberger, 105 Mo. App. 47, 78 S. W. 280 [1903]; Dunker v. Stiefel, 57 Mo. App. 379 [1894]; O'Meara v. Green, 25 Mo. App. 198; Morley v. Carpenter, 22 Mo. App. 640 [1886]; O'Meara v. Green, 16 Mo. App. 118 [1884]; Mayor and Council of the City of Bayonne v. Morris, 61 N. J. L. 432 Vr.) 127, 38 Atl. 819 [1897]; Conde v. City of Schenectady, 164 N. Y. 258, 58 N. E. 130 [1900]; Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682 [1885]; Matter of Phillips, 60 N. Y. 21; In the Matter of the Petition of Sharp to Vacate an Assessment, 56 N. Y. 257, 15 Am. Rep. 415 [1874]; Hastings v. Columbus, 42 O. S. 585 [1885]; Ladd v. City of Portland, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654 [1898]; Adams v. City of Beloit, 105 Wis. 363, 47 L. R. A. 441, 81 N. W. 869 [1900]; Boyd v. City of Milwaukee, 92 Wis. 456, 66 N. W. 603 [1896]; Warner v. Knox, 50 Wis. 429, 7 N. W. 372 [1880]; Blount v. City of Janesville, 31 Wis. 648 [1872].
- ¹ Willard v. Willard, 154 U. S. 568, 38 L. 1088, 14 S. 1215; Willard v. Presbury, 14 Wall. (81 U. S.) 676, 20 L. 719 [1869]; McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885 [1891]; Blanchard v. Beideman, 18 Cal. 261 [1861]; Bush v. City of Peoria, 215 Ill. 515, 74 N. E. 797 [1905]; Le Moyne v. City of Chicago, 175 Ill. 356, 51 N. E. 718 [1898]; Chicago and Northern Pacific Railroad Company v. City of Chicago, 172 Ill. 66, 49 N. E. 1006 [1898]; Pike v. City of Chicago, 155 Ill. 656, 40 N. E. 567 [1895]; The Jacksonville Railway Company v. City of Jacksonville, 114 Ill. 562, 2 N. E. 478 [1886]; Gurnee v. City of Chicago, 40 Ill. 165 [1866]; Lux & Tallott Stone Company v. Donaldson, 162 Ind. 481, 68 N. E. 1014 [1903]; Yeakel v. City of Lafayette, 42 Ind. 116 [1874]; Koons v. Lucas, 52 Ia. 177, 3 N. W. 84 [1879]; Broadway Baptist Church v. McAtee, 8 Bush. (71 Ky.) 508, 8 Am. Rep. 480 [1871]; Schmitt v. City of New Orleans, 48 La. Ann. 1440, 21 So. 24 [1896]; Auditor General v. Chase, 132 Mich. 630, 94 N. W. 178 [1903]; Simmons v. City of Saginaw, 104 Mich. 511, 62 N. W. 725 [1895]; Wilkins v. City of Detroit, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427 [1881]; State ex rel. Wheeler v. District Court of Ramsey County, 80 Minn. 293, 83 N. W. 183 [1900]; Farrar v. City of St. Louis, 80 Mo. 379 [1883]; McCormack v. Patchin, 53 Mo. 33, 14 Am. Rep. 440 [1873]; Barber Asphalt Paving Company v. Muehenberger, 105 Mo. App. 47, 78 S. W. 280 [1903]; Dunker v. Stiefel, 57 Mo. App. 379 [1894]; O'Meara v. Green, 25 Mo. App. 198; Morley v. Carpenter, 22 Mo. App. 640 [1886]; O'Meara v. Green, 16 Mo. App. 118 [1884]; Conde v. City of Schenectady, 164 N. Y. 258, 58 N. E. 130 [1900];

paving of a street² and the regrading of a street,³ as well as the

Jones v. Town of Tonawanda, 158 N. Y. 438, 53 N. E. 280 [1899]; Genet v. Brooklyn, 99 N. Y. 296, 1 N. E. 777; Ladd v. City of Portland, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654 [1898]; Adams v. Fisher, 75 Tex. 657, 6 S. W. 772 [1890]; Adams v. City of Beloit, 105 Wis. 363, 47 L. R. A. 441, 81 N. W. 869 [1900]; Boyd v. City of Milwaukee, 92 Wis. 456, 66 N. W. 603 [1896]; Warner v. Knox, 50 Wis. 429, 7 N. W. 372 [1880].

² Willard v. Presbury, 81 U. S. (14 Wall.) 676, 20 L. 719 [1869]; Oakland Paving Co. v. Rier, 52 Cal. 270 [1877]; The Jacksonville Railway Company v. City of Jacksonville, 114 Ill. 562, 2 N. E. 478 [1886]; Gurnee v. City of Chicago, 40 Ill. 165 [1866]; Lux & Talbott Stone Company v. Donaldson, 162 Ind. 481, 68 N. E. 1014 [1903]; Schmitt v. City of New Orleans, 48 La. Ann. 1440, 21 So. 24 [1896]; Mayor and City Council of Baltimore v. Johns Hopkins Hospital, 56 Md. 1 [1880]; Auditor General v. Chase, 132 Mich. 630, 94 N. W. 178 [1903]; Wilkins v. City of Detroit, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427 [1881]; State ex rel. Wheeler v. District Court of Ramsey County, 80 Minn. 293, 83 N. W. 183 [1900]; Dunker v. Stiefel, 57 Mo. App. 379 [1894]; Farrar v. St. Louis, 80 Mo. 392; Smith v. Tobener, 32 Mo. App. 601 [1888]; O'Meara v. Green, 25 Mo. App. 198; Morley v. Carpenter, 22 Mo. App. 640 [1886]; Gibson v. Kayser's Executor, 16 Mo. App. 404 [1885]; State, Jeliff, Pros. v. Mayor and Common Council of the City of Newark, 48 N. J. L. (19 Vr.) 101, 2 Atl. 627 [1886]; affirmed Jeliff v. Newark, 49 N. J. L. (20 Vr.) 239, 12 Atl. 770; Conde v. City of Schenectady, 164 N. Y. 258, 58 N. E. 130 [1900]; Jones v. Town of Tonawanda, 158 N. Y. 438, 53 N. E. 280 [1899]; Voght v. City of Buffalo,

133 N. Y. 463, 31 N. E. 340 [1892]; Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682 [1885]; In the Matter of the Petition of Lord to Vacate an Assessment, 78 N. Y. 109 [1879]; In the Matter of the Petition of Willet to Vacate an Assessment, 70 N. Y. 490 [1877]; In the Matter of the Petition of Peugnet to Vacate an Assessment, 67 N. Y. 441 [1876]; People v. Brooklyn, 65 N. Y. 349; In the Matter of the Petition of Burke to Vacate an Assessment, 62 N. Y. 224 [1875]; Matter of Phillips, 60 N. Y. 21; In the Matter of the Petition of Sharp to Vacate an Assessment, 56 N. Y. 257, 15 Am. Rep. 415 [1874]; In the Matter of the Petition of Astor to Vacate an Assessment for Paving Forty-sixth Street with Trap Block Pavement, etc., 53 N. Y. 617 [1873]; Ten Eyck v. Rector and Inhabitants of the City of Albany in Communion with the Protestant Episcopal Church in the State of New York, 65 Hun. 194, 20 N. Y. Supp. 757 [1892]; In the Matter of the Petition of Welsh to Vacate an Assessment, 30 Hun. 372 [1883]; Moran v. City of Troy, 9 Hun. (N. Y.) 540 [1877]; In the Matter of the Petition of Serrill to Vacate an Assessment, 9 Hun. 233 [1876]; Tilden v. Mayor, Aldermen and Commonalty of the City of New York, 56 Barb. (N. Y.) 340 [1870]; In the Matter of the Petition of Lewis v. Mayor, etc., of the City of New York, 35 How. (N. Y.) 162 [1868]; Hastings v. Columbus, 42 O. S. 585 [1885]; Adams v. City of Beloit, 105 Wis. 363, 47 L. R. A. 441, 81 N. W. 869 [1900]; Boyd v. City of Milwaukee, 92 Wis. 456, 66 N. W. 603 [1896]; Warner v. Knox, 50 Wis. 429, 7 N. W. 372 [1880]; Blount v. City of Janesville, 31 Wis. 648 [1872].

³ McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885 [1891]; Brenn v. City of Troy, 41 How. (N. Y.) 475 [1871].

regrading and repaving of a street as one improvement,⁴ or regrading, repaving and recurbing a street.⁵ Even if the original improvement and assessment were under a statutory provision to the effect that the owner should not be assessed for a second improvement, such statute is not a contract, and if the legislature subsequently provides for constructing a second improvement at the expense of the owners of realty benefited thereby, such provision for a second assessment is constitutional.⁶ The rebuilding of a sidewalk is also an improvement for which a local assessment may be authorized. If a previously existing sidewalk becomes defective, unfit for use and worn out, a statute providing for the construction of a new sidewalk at the expense of the abutting property owners is valid.⁷ So if a sewer becomes defective or inadequate, a local assessment may be levied to construct another sewer to take its place,⁸ or to extend the old sewer so as to secure an adequate outlet.⁹ Under some statutes, however, a new sewer cannot be paid for by local assessments, but the old sewer should be rebuilt, if it is desired to levy assessments therefor.¹⁰

⁴ *Wells v. Wood*, 114 Cal. 255, 46 Pac. 96 [1896]; *Adams v. Fisher*, 75 Tex. 657, 6 S. W. 773 [1890].

⁵ *McSherry v. Wood*, 102 Cal. 647, 36 Pac. 1010 [1894]; *Alberger v. Mayor and City Council of Baltimore*, 64 Md. 1, 20 Atl. 988 [1885].

⁶ *Ladd v. City of Portland*, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654 [1898]; see, also, *Bradley v. McAttee*, 7 Bush. (70 Ky). 667, 3 Am. Rep. 309 [1870].

⁷ *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331 [1905]; *City of Chicago v. Wilson*, 195 Ill. 19, 57 L. R. A. 127, 62 N. E. 843 [1902]; *Hyman v. City of Chicago*, 188 Ill. 462, 59 N. E. 10 [1900]; *Wilkin v. Houston*, 48 Kan. 584, 30 Pac. 23 [1892]; *Hackworth v. Louisville Artificial Stone Co.*, 106 Ky. 234, 50 S. W. 33 [1899]; *State ex rel. City of St. Paul v. District Court of Ramsey County*, 89 Minn. 292, 94 N. W. 870 [1903]; *In the Matter of the Petition of Burmeister*

to Vacate an Assessment for regulating, etc., Forty-sixth Street between Eleventh Avenue and Hudson River in the City of New York, 56 How. (N. Y.) 416 [1879].

⁸ *Hall v. Street Commissioners of Boston*, 177 Mass. 434, 59 N. E. 68 [1901]; *Shannon v. City of Omaha*, 73 Neb. 507, 103 N. W. 53, 106 N. W. 592 [1905]; *Mayor and Council of the City of Bayonne v. Morris*, 61 N. J. L. (32 Vr.) 127, 37 Atl. 819 [1897]; *Wilson v. Cincinnati*, 7 Ohio Dec. 242.

⁹ *Mayor and Council of the City of Bayonne v. Morris*, 61 N. J. L. (32 Vr.) 127, 38 Atl. 819 [1897]; *State, Green, Pros. v. Hotaling*, 44 N. J. L. (15 Vr.) 347 [1882]; *State, Vanderbeck, Pros. v. Mayor and Common Council of Jersey City*, 29 N. J. L. (5 Dutch.) 441 [1861].

¹⁰ *State, Fiavere, Pros. v. Mayor and Common Council of Jersey City*, 34 N. J. L. (5 Vr.) 277 [1870].

§ 382. Pennsylvania doctrine as to reconstruction.

The contrary view of this question is taken in Pennsylvania. In that state it is held that when the original improvement has once been constructed the particular and especial benefits to the adjoining property are then and there received and enjoyed by such property, and that any attempt to levy local assessments for a second improvement, no matter how necessary it may be, by reason of the defective condition of the original improvement, is an attempt to assess for benefits which the property already is enjoying.¹ Accordingly it is held in Pennsylvania that for the reasons given, a local assessment for a second improvement cannot constitutionally be authorized or levied.² This view was originally expressed³ and has since been repeated⁴ in cases in which the original improvement was still in good and serviceable condition; and was destroyed to make room for another improvement of a different character to suit a change of plan made by the municipal corporation for the general benefit thereof. Thus where a good cobble-stone pavement was torn up and an expensive wooden pavement was put down to make a large public driveway,⁵ or a good curb was ordered to be replaced on account of a change in the nature of paving the street,⁶ or a change in

¹ *Hammett v. Philadelphia*, 65 Pa. St. (15 P. F. Smith) 146, 3 Am. Rep. 615 [1870].

² *Seranton City v. Sturges*, 202 Pa. St. 182, 51 Atl. 764 [1902]; *Harrisburg v. Funk*, 200 Pa. St. 348, 49 Atl. 992 [1901]; *City of Philadelphia v. Yewdall*, 190 Pa. St. 412, 42 Atl. 956 [1899]; *West Third Street Sewer*, Appeal of the City of Williamsport, 187 Pa. St. 565, 41 Atl. 476 [1898]; *Leake v. City of Philadelphia*, 171 Pa. St. 125, 32 Atl. 1110 [1895]; *Morewood Avenue*, Chamber's Appeal, 159 Pa. St. 20, 28 Atl. 123, 132 [1893]; *City of Erie v. Russell*, 148 Pa. St. 384, 23 Atl. 1102 [1892]; *Borough of Greensburg v. Laird*, 138 Pa. St. 533, 21 Atl. 96 [1890]; *City of Williamsport v. Beek*, 128 Pa. St. 147, 18 Atl. 329 [1889]; *Alcorn v. City of Philadelphia*, 112 Pa. St. 494, 4 Atl. 185 [1886]; *Wistar v. City of Phila-*

delphia, 111 Pa. St. 604, 4 Atl. 511 [1886]; *Appeal of the Protestant Orphan Asylum of Pittsburgh and Allegheny*, 111 Pa. St. 135, 3 Atl. 217 [1885]; *Wistar v. Philadelphia*, 80 Pa. St. 505, 21 Am. Rep. 112; *Hammet v. Philadelphia*, 65 Pa. St. (15 P. F. Smith) 146, 3 Am. Rep. 615 [1870]; *City of Chester v. Evans*, 32 Pa. Super. Ct. 641 [1907].

³ *Hammett v. Philadelphia*, 65 Pa. St. (15 P. F. Smith) 146, 3 Am. Rep. 615 [1870].

⁴ *Wistar v. City of Philadelphia*, 111 Pa. St. 604, 4 Atl. 511 [1886]; *Wistar v. Philadelphia*, 80 Pa. St. (30 P. F. Smith) 505, 21 Am. Rep. 112 [1876]; *Philadelphia v. Wistar*, 92 Pa. St. (11 Norris) 404.

⁵ *Hammet v. Philadelphia*, 65 Pa. St. (15 P. F. Smith) 146, 3 Am. Rep. 615 [1870].

⁶ *Wistar v. City of Philadelphia*, 111 Pa. St. 604, 4 Atl. 511 [1886].

the width of the sidewalk,⁷ it was held that a local assessment could not be levied for such new improvement. If the Pennsylvania rule were limited to cases of this class it would find support in other jurisdictions.⁸ It is not, however, so limited, but is applied in cases where it appears that the original improvement is worn out and must be replaced both for the needs of the public and for the benefit of the adjoining realty.⁹ Furthermore, while this view has been expressed in cases in which the original improvement was paid for by local assessments on abutting property,¹⁰ it is not limited to cases of this class. The true rule as laid down by the Pennsylvania courts is that where the cost of the original improvement may be assessed against the abutting or adjoining property,¹¹ the cost of a second improvement cannot be assessed against such property even if the original improvement was paid for by general taxation.¹² However, the fact that a street is regraded, but no part of the cost of regrading is included in the assessment for benefits, does not prevent the city from levying an assessment for paving a street.¹³

§ 383. Original construction of streets in Pennsylvania.

Accordingly, in this state the question whether an improvement of the street amounts to an original paving or not is of the highest importance, since if it is an original paving, no local assessment can be levied thereafter for a subsequent paving of such street, while if the improvement does not amount to an original paving, such local assessment can thereafter be levied for a later improvement which amounts to a paving. An original pavement in this sense is one which is either put down originally with the intention of changing the prior road or tract of

⁷ *Wistar v. Philadelphia*, 80 Pa. St. (30 P. F. Smith) 505, 21 Am. Rep. 112 [1876]; *Philadelphia v. Wistar*, 92 Pa. St. (11 Norris) 404.

⁸ See § 387 *et seq.*

⁹ *Scranton City v. Sturges*, 202 Pa. St. 182, 51 Atl. 764 [1902]; *City of Williamsport v. Beck*, 128 Pa. St. 147, 18 Atl. 329 [1889].

¹⁰ *Appeal of the Protestant Orphan Asylum of Pittsburgh and Allegheny*, 111 Pa. St. 135, 3 Atl. 217 [1885].

¹¹ *Borough of Greensburg v. Laird*, 138 Pa. St. 533, 21 Atl. 96 [1890]; *City of Williamsport v. Beck*, 128 Pa. St. 147, 18 Atl. 329 [1889].

¹² *Boyer v. Reading City*, 151 Pa. St. 185, 24 Atl. 1075; *City of Harrisburg v. Segelbaum*, 151 Pa. St. 172, 20 L. R. A. 834, 24 Atl. 1070 [1892]; *City of Williamsport v. Beck*, 128 Pa. St. 147, 18 Atl. 329 [1889].

¹³ *Amberson Avenue, Appeal of Childs*, 179 Pa. St. 634, 36 Atl. 354 [1897].

ground destined therefor into a street, or which is adopted subsequently for that purpose or acquiesced in with such intent.¹ Whether the prior improvement amounted to an original paving or not is a question of fact, depending on the nature of the improvement, the nature of the action of the municipal corporation in regard thereto, and the intention and purpose of such municipal corporation in making or adopting such prior improvement.² If the municipal corporation has itself improved the surface of the road the application of these principles will determine whether the improvement is an original pavement or not. Mere surfacing of the road, even if done carefully and expensively, will not amount to an original paving unless done with the intention of changing the road into a street.³ If the surface of a road is macadamized it is said that in larger towns it would not *prima facie* be an original paving within the meaning of this rule, while in a smaller town it would be.⁴ However, if the road is macadamized with the intention of converting it into a street, such macadamizing will be regarded as an original improvement,⁵ and local assessments cannot be levied for a subsequent asphalt pavement.⁶ Where the council has the sole right to determine what streets shall be paved and what the character of the paving shall be, the fact that the council appropriated money for the repair of a street and the highway department used such money in macadamizing such street, will not constitute such macadamizing an original paving⁷ and will not prevent the levy of a local assessment for a new pavement of vitrified brick.⁸

If the original improvement has been constructed by a private individual voluntarily without the consent and approval of the

¹ *Dick v. Philadelphia*, 197 Pa. St. 467, 47 Atl. 750 [1901]; *Philadelphia to Use of Mack v. Eddleman*, 169 Pa. St. 452, 32 Atl. 639 [1895].

² *Harrisburg v. Funk*, 200 Pa. St. 348, 49 Atl. 992 [1901]; *Dick v. Philadelphia*, 197 Pa. St. 467, 47 Atl. 750 [1901]; *In re Lincoln Avenue, Jenkinson's Appeal*, 193 Pa. St. 435, 44 Atl. 1102 [1899]; *Leake v. City of Philadelphia*, 171 Pa. St. 125, 32 Atl. 1110 [1895].

³ *Dick v. Philadelphia*, 197 Pa. St. 467, 47 Atl. 750 [1901].

⁴ *Dick v. Philadelphia*, 197 Pa. St. 467, 47 Atl. 750 [1901]; *Philadel-*

phia to Use of Mack v. Eddleman, 169 Pa. St. 452, 32 Atl. 639 [1895].

⁵ *Leake v. City of Philadelphia*, 171 Pa. St. 125, 32 Atl. 1110 [1895]; That macadamizing may amount to an original construction, see, *City of Harrisburg v. Segelbaum*, 151 Pa. St. 172, 20 L. R. A. 834, 24 Atl. 1070 [1892].

⁶ *Leake v. City of Philadelphia*, 171 Pa. St. 125, 32 Atl. 1110 [1895].

⁷ *Philadelphia to Use v. Dibeler*, 147 Pa. St. 261, 23 Atl. 567 [1892].

⁸ *Philadelphia v. Dibeler*, 147 Pa. St. 261, 23 Atl. 567 [1892].

municipal corporation, such improvement is not such an original paving that the city is precluded from levying local assessments thereafter for a new pavement.⁹ If, however, the improvement is constructed by the owner with the consent and approval of the municipal corporation, it is regarded as an original improvement and local assessments cannot be levied for second improvements.¹⁰ Thus if an owner of realty has set curb-stones in front of his land in a proper manner in conformity with the requirements then in force he cannot be compelled to pay for new curb-stones made necessary because the width of the sidewalk has been increased by ordinance,¹¹ or because the paving of the street has been changed from cobble-stones to Belgian block.¹² If the improvement has been constructed before the municipal corporation acquires control of the street, the question then turns on whether the municipal corporation adopted such improvement or not. Mere failure to destroy such improvement at once, and merely allowing it to be used does not constitute an adoption.¹³ Thus repairing a road with broken limestone¹⁴ or repairing the planking of a plank road¹⁵ or regrading a plank road after acquiring it free from the right to take toll,¹⁶ does not in either case amount to an adoption of such improvement. If a street has been paved in part and in part left unpaved,¹⁷ as where a strip in the center has been left unpaved for use as a market place,¹⁸ or for planting trees and shrubbery,¹⁹ and such unpaved part is thereafter paved, an assessment may be levied upon the abutting property for the expense of such improvement, since it concerns a part of the street not originally improved. If, how-

⁹ *Leake v. Phila.*, 150 Pa. St. 643, 24 Atl. 351 [1892]; *Philadelphia to Use v. Baker*, 140 Pa. St. 11, 21 Atl. 238 [1891].

¹⁰ *Wistar v. City of Philadelphia*, 111 Pa. St. 604, 4 Atl. 511 [1886]; *Wistar v. Philadelphia*, 80 Pa. St. (30 P. F. Smith) 505, 21 Am. Rep. 112 [1876]; *Philadelphia v. Wistar*, 92 Pa. St. (11 Norris) 404.

¹¹ *Wistar v. Philadelphia*, 80 Pa. St. (30 P. F. Smith) 505, 21 Am. Rep. 112 [1876].

¹² *Wistar v. City of Philadelphia*, 111 Pa. St. 604, 4 Atl. 511 [1886].

¹³ *Harrisburg v. Funk*, 200 Pa. St. 348, 49 Atl. 992 [1901]; *In re Lin-*

coln Avenue, Jenkinson's Appeal, 193 Pa. St. 435, 44 Atl. 1102 [1899].

¹⁴ *Harrisburg v. Funk*, 200 Pa. St. 348, 49 Atl. 992 [1901].

¹⁵ *East Street, Evans' Appeal*, 210 Pa. St. 539, 60 Atl. 154 [1904].

¹⁶ *Dick v. Philadelphia*, 197 Pa. St. 467, 47 Atl. 750 [1901].

¹⁷ *Philadelphia to Use v. Evans*, 139 Pa. St. 483, 21 Atl. 200 [1891]; *Alcorn v. City of Philadelphia*, 112 Pa. St. 494, 4 Atl. 185 [1886].

¹⁸ *Philadelphia to Use v. Evans*, 139 Pa. St. 483, 21 Atl. 200 [1891].

¹⁹ *Alcorn v. City of Philadelphia*, 112 Pa. St. 494, 4 Atl. 185 [1886].

ever, a street is widened an assessment may be levied for paving such part of the street as was unpaved before, but cannot be levied for paving such part of the street as was paved before.²⁹

§ 384. Reconstruction of sewers.

The principles applicable in Pennsylvania to assessments for the reconstruction of streets have been said to be applicable to assessments for the reconstruction of sewers.¹ If a sewer has been constructed² either by assessments levied upon realty benefited thereby,³ or even if paid for out of funds raised by general taxation,⁴ a local assessment cannot be levied to pay for the expense of a reconstruction thereof.

§ 385. Reconstruction of sidewalks.

A different principle is applied in case of the reconstruction of sidewalks, however. This improvement is referred to the police power, not to the taxing power. Accordingly it is held that the owner may be compelled to reconstruct a new sidewalk in place of a former one if the earlier improvement is in such condition that it must be replaced.¹ This principle is extended to allow assessments for repairs of sidewalks.²

§ 386. Illinois doctrine as to reconstruction.

While in Illinois a repair is looked upon as so lacking in permanency as not to be a "local improvement" within the meaning of the constitutional provision authorizing an assessment for

²⁹ *City of Philadelphia v. Yewdall*, 190 Pa. St. 412, 42 Atl. 956 [1899].

¹ *City of Erie v. Russell*, 148 Pa. St. 384, 23 Atl. 1102 [1892].

² *City of Erie v. Russell*, 148 Pa. St. 384, 23 Atl. 1102 [1892].

³ *City of Erie v. Russell*, 148 Pa. St. 384, 23 Atl. 1102 [1892].

⁴ *West Third Street Sewer. Appeal of the City of Williamsport*, 187 Pa. St. 565, 41 Atl. 476 [1898]; *Philadelphia v. Meighan*, 27 Pa. Super. Ct. 160 [1905]; However in *Mitchner v. City of Philadelphia*, 118 Pa. St. 535, 12 Atl. 174 [1888]; it was held that an owner of land might be assessed for a sewer even though he

had paid part of the cost of sewers previously constructed and in fact adequate to the needs of the community. *Hammet v. Philadelphia*, 65 Pa. St. (15 P. F. Smith) 146, 3 Am. Rep. 615 [1870]; *Washington Avenue*, 69 Pa. St. (19 P. F. Smith) 352, and *Wistar v. Philadelphia*, 80 Pa. St. (30 P. F. Smith) 505, 21 Am. Rep. 112 [1876]; were there reviewed and distinguished.

¹ *Wilksburg Bor. v. Home for Aged Women*, 131 Pa. St. 109, 6 L. R. A. 531, 18 Atl. 937 [1890]; *Smith v. Kingston Borough*, 120 Pa. St. 357, 14 Atl. 170 [1888].

² See §§ 373-378.

“local improvements,”¹ a reconstruction is regarded as so permanent in its nature that it is a “local improvement” within the meaning of such constitutional provision.²

§ 387. Reconstruction where original construction is in good condition—Theory that court can review.

Another class of new improvements remains for consideration. Cases are found in which the original improvement is in good and substantial condition, capable of serving the purpose for which it was originally constructed. However, the public corporation, often for some purpose of its own, having nothing to do with the special interests of the adjoining property holders, such as a change of grade to conform to some grade established elsewhere in the municipality, a different idea of the proper effect to be obtained from the appearance of the completed improvement and the like, may decide to destroy such useful and substantial improvement and construct another one serving the same purpose as the one which has been destroyed, but better adapted to the wishes of those who are, for the time being, officers of the public corporation. Can the adjoining or abutting property owners be assessed for the expense of such new improvement? In a case like this, whatever the benefit to the general public, the especial benefit to the adjoining property is reduced to a minimum. The real object of such improvement is to benefit the public.¹ Naturally statutes providing specifically for improvements of this sort are not common, and the cases presenting this problem are usually cases involving ordinances passed under

¹ See § 377.

² *Bush v. City of Peoria*, 215 Ill. 515, 74 N. E. 797 [1905]; *Field v. City of Chicago*, 198 Ill. 224, 64 N. E. 840 [1902]; *City of Chicago v. Wilson*, 195 Ill. 19, 57 L. R. A. 127, 62 N. E. 843 [1902]; *Le Moyne v. City of Chicago*, 175 Ill. 356, 51 N. E. 718 [1898]; *Chicago and Northern Pacific Railroad Company v. City of Chicago*, 172 Ill. 66, 49 N. E. 1006 [1898]; *Pike v. City of Chicago*, 155 Ill. 656, 40 N. E. 567 [1895]; *Cram v. City of Chicago*, 139 Ill. 265, 28 N. E. 758 [1893]; *The Jacksonville Railway Company v. City*

of Jacksonville, 114 Ill. 562, 2 N. E. 478 [1886]; *Gurnee v. City of Chicago*, 40 Ill. 165 [1866].

¹ “Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be so imposed when the improvement is either expressed or appears to be for general public benefit” *Hammett v. Philadelphia*, 65 Pa. St. (15 P. F. Smith) 146, 157, 3 Am. Rep. 615 [1870].

statutes conferring in general terms power to pave and repave. In some jurisdictions it is held that if the existing improvement is in good condition, such an ordinance is so unreasonable and oppressive as to be void.² Thus if a street is in good condition it has been held that a new street cannot be constructed at the cost of the abutting property owners,³ as where the attempt was made to replace a good cedar block street with a paving of brick⁴ or to replace a new macadam street with asphalt,⁵ or to replace with asphalt a macadam street, not new, but in good condition.⁶ So an ordinance requiring a curbing which is in good condition to be removed and a new combined curb and gutter substituted has been held void as unreasonable and oppressive.⁷ So an ordinance which requires the destruction of an existing street which is in good condition, in order to replace it with a wider street for the benefit of the public and not for the benefit of the property owners,⁸ or to replace it with an expensive wooden pavement

² *Lamb v. City of Chicago*, 219 Ill. 229, 76 N. E. 343 [1906]; *City of Chicago v. Brown*, 205 Ill. 568, 69 N. E. 65 [1903]; *McFarlane v. City of Chicago*, 185 Ill. 242, 57 N. E. 12 [1900]; *Hawes v. City of Chicago*, 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373 [1895]; *Wreford v. City of Detroit*, 132 Mich. 348, 93 N. W. 876 [1903]; *Dickinson v. City of Detroit*, 111 Mich. 480, 69 N. W. 728 [1897]; *Philadelphia to Use of Parker v. Henry*, 161 Pa. St. 38, 28 Atl. 946 [1894]; *Pittsburg v. Shaffer*, 66 Pa. St. (16 P. F. Smith) 454 [1870]; *Hammett v. Philadelphia*, 60 Pa. St. (15 P. F. Smith) 146, 3 Am. Rep. 615 [1870]; "If while the pavement is good and stands in no need of repair, the city may tear it up, relay and charge the owner again with one excessively costly, that would be exaction, not taxation." *Wistar v. Philadelphia*, 80 Pa. St. (30 P. F. Smith) 505, 512, 21 Am. Rep. 112 [1876]. In this state however the courts have gone far beyond this restriction and hold that as a broad and general rule no local assessment can be levied for a second improvement. See also

Case of Isle of Ely, 10 Rep. 141a.

³ *Lamb v. City of Chicago*, 219 Ill. 229, 76 N. E. 343 [1906]; *City of Chicago v. Brown*, 205 Ill. 568, 69 N. E. 65 [1903]; *McFarlane v. City of Chicago*, 185 Ill. 242, 57 N. E. 12 [1900]; *Wreford v. City of Detroit*, 132 Mich. 348, 93 N. W. 876 [1903]; *Hammett v. Philadelphia*, 65 Pa. St. (15 P. F. Smith) 146, 3 Am. Rep. 615 [1870].

⁴ *McFarlane v. City of Chicago*, 185 Ill. 242, 57 N. E. 12 [1900].

⁵ *City of Chicago v. Brown*, 205 Ill. 568, 69 N. E. 65 [1903].

⁶ *Field v. Barber Asphalt Pav. Co.* 117 Fed. 925 [1902].

⁷ *Lamb v. City of Chicago*, 219 Ill. 229, 76 N. E. 343 [1906]; (Whether such ordinance is unreasonable or not is a question of fact.)

⁸ *Wreford v. City of Detroit*, 132 Mich. 348, 93 N. W. 876 [1903].

"The principle upon which abutting owners are charged with the expense of paving the street in the first instance is that their property is benefited by the pavement. After the improvement has once been made, its care belongs to the entire public; and it must be kept in repair and

to make a great public driveway,⁹ each has been held to be invalid. However, if it is necessary either to repair a street in a substantial manner or to repave it, the determination of the city to repave it seems to be regarded as final.¹⁰ An agreement between counsel for the city and counsel for the property owners that the city should repair the pavement instead of repaving, made at an informal presentation of the question to the county judge and not made a matter of record does not prevent the city from repaving such street subsequently at the cost of the property owners.¹¹ So if an existing sidewalk is in good condition and the municipal corporation requires that it be replaced by a sidewalk of another type or of another width or on another grade, such ordinance is unreasonable, unjust, oppressive and void.¹² However, one whose sidewalk is in bad condition, needing to be replaced, cannot resist an assessment on the ground that the ordinance is oppressive as to other property owners whose sidewalks are in good condition.¹³ So, if land is drained sufficiently by existing sewers, it has been held that no assessment can be levied for the construction of a new sewer.¹⁴ In order to prevent the public corporation from levying an assessment for a new improvement while the old improvement is in good condition, the old improvement must have been constructed by the public corporation, or authorized by it, or adopted by it. The voluntary act of a private individual in constructing an improvement near to or adjoining his property cannot prevent the public corporation from making such improvement as it sees

in condition or widened or improved in any manner, by the public and not at the expense of the owners. It is difficult to imagine what benefit accrues to abutting owners where, as in this instance, their shade trees are cut down, the grass plots in front of their property removed and the travel upon the street with its dust and noise, brought nearer to their dwellings. Such improvements are clearly not for the benefit of private owners, but for the benefit of the public." *Wreford v. City of Detroit*, 132 Mich. 348, 93 N. W. 876 [1903].

⁹ *Hammett v. Philadelphia*, 65 Pa.

St. (15 P. F. Smith) 146, 3 Am. Rep. 615 [1870].

¹⁰ *Howe v. City of Chicago*, 224 Ill. 95, 79 N. E. 421 [1906].

¹¹ *Howe v. City of Chicago*, 224 Ill. 95, 79 N. E. 421 [1906].

¹² *Hawes v. City of Chicago*, 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373 [1895]; *Philadelphia to Use of Parker v. Henry*, 161 Pa. St. 38, 28 Atl. 946 [1894].

¹³ *Hyman v. City of Chicago*, 188 Ill. 462, 59 N. E. 10.

¹⁴ *Potter v. Village of Norwood*, 21 Ohio C. C. 461 [1901]; *Miller v. Toledo*, 7 Ohio N. P. 477 [1900].

fit, and levying assessments therefor.¹⁵ This principle has been applied to street assessments,¹⁶ and to sewer assessments.¹⁷

§ 388. Theory that determination of city is final.

In other jurisdictions it is held that if the improvement is one which the council may order in a proper case, the question of the necessity of a new improvement is one to be determined by the council, and that the courts cannot interfere. Accordingly, if the council thinks it wise to destroy an improvement and replace it with a new one, a local assessment levied for such new improvement is, under this theory, held to be valid.¹ A similar view has been expressed by the Michigan courts: "It is true that sound policy should have placed some check on the power to repave without necessity. But if the other provisions of the charter are faithfully carried out that abuse will be reasonably restrained. In such matters something must be left to the good faith of the public agencies."² This remark was possibly an obiter, as it seems likely that in this case the new improvement was reasonably necessary, but it sets forth the theory held by some jurisdictions, that the action of the city authorities is final and conclusive in a clear and concise statement. This view seems to be adopted in Kansas, where it has been held that the municipal authorities may in their discretion levy local assessments for widening and reconstructing a sidewalk.³ So where a side-

¹⁵ *Lux & Talbott Stone Company v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903]; *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605 [1891]; *City of St. Joseph v. Owen*, 110 Mo. 445, 19 S. W. 713 [1892]; *Parsons v. City of Columbus*, 50 O. S. 460, 34 N. E. 677 [1893]; *Philadelphia to Use v. Baker*, 140 Pa. St. 11, 21 Atl. 238 [1891].

¹⁶ *Parsons v. City of Columbus*, 50 O. S. 460, 34 N. E. 677 [1893]; *Philadelphia to Use v. Baker*, 140 Pa. St. 11, 21 Atl. 238 [1891].

¹⁷ *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605 [1891]; *City of St. Joseph v. Owen*, 110 Mo. 445, 19 S. W. 713 [1892].

¹ *City of Kokomo v. Mahan*, 100 Ind. 242 [1884]; *Yeakel v. City*

of Lafayette, 48 Ind. 116 [1874]; *City of Lafayette v. Fowler*, 34 Ind. 140 [1870]; *Wilkins v. City of Detroit*, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427 [1881]; *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853]; *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440 [1873].

² *Wilkins v. City of Detroit*, 46 Mich. 120, 122, 8 N. W. 701, 9 N. W. 427 [1881].

³ *Wilkin v. Houston*, 48 Kan. 584, 30 Pac. 23 [1892]; (This improvement was made under a statute which provided for the reconstruction of such sidewalks as are in the judgment of the council worn out and unfit for repair, and making assessments therefor).

walk made of plank, in fairly good condition, was destroyed to construct one of stone, it was said that the determination of the mayor and council was final.⁴ A qualified form of this rule is entertained in some jurisdictions where it is held that the wisdom of making the new improvement is primarily a question within the discretion of the municipal corporation, and that the courts will interfere only when it appears that such discretion has clearly been abused and that the property owners involved have been prejudiced thereby.⁵ Under either theory it is held that if it is necessary in the reasonable management of the property involved, to construct a new improvement, a local assessment may be levied for such new improvement even if some use might have been made of it for some time longer. Thus if a street has been paved with cedar blocks for eight years, but it has become necessary to take up such pavement and lay a more durable one, a local assessment may be levied for a new pavement of asphalt.⁶ So uneven and badly worn plank sidewalks may be replaced with cement sidewalks twenty feet wide, where the property is a very valuable one and is in an excellent business and residence locality.⁷ So an ordinance which provided that in a specified district in St. Louis any sidewalk, which becomes out of repair shall be replaced by a stone pavement, was held to be valid even in a case where a brick sidewalk was in bad condition, but could be repaired for seven dollars, while the stone pavement to replace it would cost three hundred dollars.⁸ So a macadamized street which is somewhat worn but not in bad condition, may be surfaced with asphalt at the expense of the adjoining property.⁹ The property owner who wishes to object to the construction of a new sidewalk at his expense on the ground that the old sidewalk is in good condition must do so before the new sidewalk is constructed.¹⁰ So if a new sewer confers a benefit upon realty, such realty may be assessed even though an

⁴ *Seward v. Rheiner*, 2 Kan. App. 95, 43 Pac. 423 [1895].

⁵ *Regenstein v. City of Atlanta*, 98 Ga. 167, 25 S. E. 428 [1896].

⁶ *Galt v. City of Chicago*, 174 Ill. 605, 51 N. E. 653 [1898].

⁷ *City of Chicago v. Wilson*, 195 Ill. 19, 57 L. R. A. 127, 62 N. E. 843 [1902].

⁸ *Skinker v. Heman*, 148 Mo. 349,

49 S. W. 1026 [1898]; (reversing *Skinker v. Heman*, 64 Mo. App. 441 [1895]).

⁹ *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 48 L. 1142, 24 S. 784 [1904]; (modifying *Field v. Barber Asphalt Paving Co.*, 117 Fed. 925 [1902]).

¹⁰ *Heman v. Ring*, 85 Mo. App. 231 [1900].

existing sewer furnished satisfactory drainage.¹¹ So it has been held to be within the discretion of village trustees to determine whether an old culvert should be removed and replaced by a new one, and if so whether it was practicable to make use of the material of the culvert.¹² Questions of this sort are more often discussed in considering whether the contract for the new improvement operates as a fraud upon the property owners,¹³ or whether under the authority conferred by the statute the municipal corporation may levy such assessment¹⁴ than upon constitutional grounds.

§ 389. Nature of assessment involved.

The questions here discussed involve the very nature of the assessment for benefits and of the power of the legislature with reference thereto. Under the true theory of such assessments¹ it would seem that if the new improvement does in fact confer a benefit upon the property assessed greater than that conferred by the original improvement in the condition in which it was when the new improvement was made, an assessment should be allowed, if the legislature authorizes it, for the difference in amount between the benefits conferred by the new improvement and the benefits so conferred by the original improvement. This amount may be exacted under the theory of assessments. To exact more would be confiscation.² The reasons which have moved the courts to hold such assessments either valid or invalid, really apply to the determination of the amount of such assessment rather than to its inherent validity.

F.—LOCATION OF IMPROVEMENTS.

§ 390. Location of improvement—Land in which public has interest.

Whether the general public or the adjoining or abutting property owners receive any benefit from a given improvement de-

¹¹ *Park Ecclesiastical Society v. City of Hartford*, 47 Conn. 89 [1879]. For somewhat similar facts see; *In the Matter of the Contract for the Fifth Avenue Sewer*, in the *City of Pittsburg*, 4 Brewster (Pa.) 364 [1870]; a case which seems to be out of harmony with the general

trend of Pennsylvania cases. See § 384.

¹² *Shannon v. Village of Hinsdale*, 180 Ill. 202, 54 N. E. 181 [1899].

¹³ See §§ 484-486.

¹⁴ See §§ 462-464.

¹ See § 11.

² See § 118, Chapter XIII.

pends not only upon the nature of the improvement itself, but also upon the ownership of the property upon which such improvement is located. If the improvement is constructed upon land in which the municipal corporation or other public corporation has either a fee or an easement of such a character that it has a right to make use of such land for that purpose, it is evident that neither the general public nor the adjoining or abutting property owner can be prevented by the arbitrary action of any third person from making use of such improvement according to its nature. Accordingly, if the improvement is of such a kind that local assessments could be levied to pay for the cost of its construction, its location upon land on which the public has an interest of this sort assures the public and the property owner of the benefit from such improvement and renders the property benefited liable to assessment.¹ As long as the interest of the public corporation is of such a character as to enable it and the adjoining and abutting property owners to make use of the improvement constructed, it makes no difference what that interest is or how it is acquired.² Under a statute providing that on appeal no question of fact shall be tried which may arise prior to the making of contract for the improvement, the fact that the third person claimed title to the ground on which such improvement was constructed cannot be interposed as a defense.³

§ 391. Interest acquired by eminent domain.

The interest of the public in the land upon which the improvement is located may be acquired by eminent domain.¹ If the proceedings in eminent domain are before a court having jurisdiction and are regular in form, no serious question can arise about the right to assess for such improvement as far as it concerns

¹ Prescott v. City of Chicago, 60 Ill. 121 [1871]; Jackson v. Smith, 120 Ind. 520, 22 N. E. 431 [1889].

² Huelfield v. Covington. — (Ky.) —, 60 S. W. 296 [1901]; Bagg v. City of Detroit, 5 Mich. 336 [1858]; State, Parker, Pros. v. Mayor, etc., of the City of New Brunswick, 30 N. J. L. (1 Vr.) 395 [1863].

³ McGill v. Bruner, 65 Ind. 421 [1879].

¹ South Chicago City Railway Company v. City of Chicago, 196 Ill. 490, 63 N. E. 1046 [1902]; Gage v. City of Chicago, 146 Ill. 499, 34 N. E. 1034 [1893]; Carpenter v. City of St. Paul, 23 Minn. 232 [1876]; City of St. Louis v. Annex Realty Company, 175 Mo. 63, 74 S. W. 961 [1903].

the location of the improvement. If the proceedings in eminent domain are brought before a court having jurisdiction, but are irregular or erroneous, the judgment rendered in such a proceeding is valid as against collateral attack; and it is a form of collateral attack to set up irregularities or errors in the original proceedings in eminent domain as an objection to levying and collecting assessments for such improvement. A public improvement located on land acquired by such a proceeding is therefore one for which a local assessment may be levied.² If, however, by a direct attack upon an irregular or erroneous judgment in eminent domain the judgment has been set aside or vacated, the fact that such judgment has been so set aside or vacated may be shown in a proceeding to levy or collect an assessment and will constitute a valid objection thereto.³ If the court before which proceedings in eminent domain were brought had no jurisdiction, its judgment is a nullity and void, and this fact may be shown by way of collateral attack. Accordingly, if a public improvement is located upon land in which the public corporation has not acquired any interest other than by this means, the lack of jurisdiction may be shown in a proceeding to levy and collect an assessment for such improvement.⁴

§ 392. Interest acquired in other ways.

If the improvement is located upon property which has been dedicated to the public use for a purpose which includes improvements of the kind in question, such location is no objection to the validity of an assessment therefor.¹ If an interest

² *Bass v. People ex rel. Raymond*, 203 Ill. 206, 67 N. E. 806 [1903]; *Royal Insurance Company v. South Park Commissioners*, 175 Ill. 491, 51 N. E. 558 [1898]; *Bass v. South Park Commissioners*, 171 Ill. 370, 49 N. E. 549 [1898]; *Carpenter v. City of St. Paul*, 23 Minn. 232 [1876]; *City of St. Louis v. Annex Realty Company*, 175 Mo. 63, 74 S. W. 961 [1903]; *Merritt v. Village of Port Chester*, 29 Hun. (N. Y.) 619 [1883].

³ *Hennessy v. City of St. Paul*, 44 Minn. 306, 46 N. W. 353 [1890]; *Butler v. Board of Commissioners of the Town of Keyport*, 64 N. J. L. (35 Vr.) 181, 44 Atl. 849 [1899];

Meredith v. City of Perth Amboy, 63 N. J. L. (34 Vr.) 523, 44 Atl. 1101 [1899].

⁴ *Brush v. City of Detroit*, 32 Mich. 43 [1875]; *Smith v. City of St. Paul*, 69 Minn. 276, 72 N. W. 104, 72 N. W. 210 [1897]; *Leslie v. City of St. Louis*, 47 Mo. 474 [1871]; *State v. Kerrigan, Pros. v. Township of West Hoboken*, 37 N. J. L. (8 Vr.) 77 [1874]; See *Gage v. City of Chicago*, 146 Ill. 499, 34 N. E. 1034 [1893]; for effect of insufficient description of realty taken in eminent domain.

¹ *City of Seattle v. Kelleher*, 195 U. S. 351, 25 S. 44 [1904]; *City of Meriden v. Camp*, 46 Conn. 284

either in fee or by way of easement has been conveyed to the public corporation by deed, a public improvement located on land thus conveyed is one the benefit of which is assured both to the public and to the adjoining and abutting property owners and an assessment may be levied therefor.² If the public corporation has acquired an interest in realty by prescription, and by its adverse user has acquired a right to construct and maintain an improvement of the kind in question, a local assessment may be levied for such an improvement located on land in which an interest has been acquired by this means.³ If the owner of realty has acted in such way that he is estopped to deny the right of the public to construct and maintain a public improvement upon his realty, and the right of the adjoining or abutting owners to make proper use of it, a case exists in which the public and the adjoining or abutting owners cannot be deprived of the benefit of such improvement, and accordingly a local assessment may be levied therefor.⁴ If a public improvement is constructed on land which the owner has agreed to convey to the public corporation by a valid and subsisting contract, the corporation may compel the performance of such contract, and accordingly the benefits to the public and to the adjoining and abutting property holders may be secured, without the necessity of any other or further consent thereon on the part of the owner of such property. Accordingly, in case of this sort a local assessment may be levied for such improvement.⁵

[1878]; *Terrell v. Hart*, — Ky. —, 90 S. W. 953, 28 Ky. L. R. 901 [1906]; *Warren v. City of Grand Haven*, 30 Mich. 24 [1874]; *Skrainka v. Allen*, 2 Mo. App. 387 [1876]; *State, Felix, Pros. v. City Council of Atlantic City*, 34 N. J. L. (5 Vr.) 99 [1869]; *State, Moran, Pros. v. City of Hudson*, 34 N. J. L. (5 Vr.) 25 [1869]; *State v. Dean*, 23 N. J. L. (3 Zab.) 335 [1852]; *City of Toledo for Use of Horan v. Barnes*, 1 Ohio N. P. 187 [1894]; *Schenley v. Commonwealth for the Use of the City of Allegheny*, 36 Pa. St. 29, 78 Am. Dec. 359 [1859].

² *Leeds v. City of Richmond*, 102 Ind. 372, 1 N. E. 711 [1885].

³ *Speir v. Town of New Utrecht*, 121 N. Y. 420, 24 N. E. 692 [1890];

(modifying *Speir v. Town of New Utrecht*, 49 Hun. (N. Y.) 294, 2 N. Y. S. 526 [1888]).

⁴ *Village of Hyde Park v. Borden*, 94 Ill. 726 [1897]; *City of St. Louis to the Use of the Saxton National Bank v. Landis*, 54 Mo. App. 315 [1893]; *Hawver v. City of Omaha*, 52 Neb. 734, 73 N. W. 217 [1897]; *Mayor and Common Council of Newark v. State, Batten, Pros.*, 32 N. J. L. (3 Vr.) 453 [1865]; *In the Matter of the Petition of McGown to Vacate an Assessment*, 18 Hun. (N. Y.) 434 [1879]; *Wilson v. City of Cincinnati*, 5 Ohio N. P. 68 [1897].

⁵ *Sears v. Street Commissioners of the City of Boston*, 180 Mass. 274, 62 L. R. A. 144, 62 N. E. 397 [1902].

§ 393. Improvement on land in which public has no interest.

A different situation arises where a public improvement is constructed upon land in which the public has acquired neither the fee nor an easement nor any other interest. In cases of this sort it is evident that the owner of the land may, if he chooses, exclude the public and the owners of adjoining or abutting property from any use of such improvement unless by means of proceedings in eminent domain, he can be compelled against his will to part with his interest in such property. In some jurisdictions at least we find that a distinction is made between cases in which the public can acquire an interest by proceedings in eminent domain instituted after the public improvement is constructed, and the cases in which under the laws in force the public has no opportunity or power to secure such interest by proceedings in eminent domain. If an interest can be taken against the will of the owner by proceedings in eminent domain, it is said in some jurisdictions that the benefit of the public and of the adjoining and abutting property owners is secured fully, since the owner of the realty on which the improvement is constructed cannot prevent the use thereof, and the parties interested are not dependent on securing his consent to such use.¹ In the earlier Illinois cases, language was used implying that a local assessment could not be levied unless the public had acquired an estate or easement in the property on which the improvement was located when such assessment was levied;² but that such defense could not be made, as was attempted in this case, on an application for judgment for sale of

¹ People ex rel. Raymond v. Talmadge, 194 Ill. 67, 61 N. E. 1049 [1901]; Payne v. Village of South Springfield, 161 Ill. 285, 44 N. E. 105 [1896]; Boynton v. People ex rel. Kern, 159 Ill. 553, 42 N. E. 842 [1896]; Maywood Co. v. Village of Maywood, 140 Ill. 216, 29 N. E. 704 [1893]; Cochran v. Village of Park Ridge, 138 Ill. 295, 27 N. E. 939 [1893]; Burhans v. Village of Norwood Park, 138 Ill. 147, 27 N. E. 1088 [1892]; Goodwillie v. City of Lake View, 137 Ill. 51, 27 N. E. 15 [1892]; Lehman v. City of Lake View, 131 Ill. 388, 23 N. E. 346 [1890]; Hunerberg v. Village of

Hyde Park, 130 Ill. 156, 22 N. E. 486 [1890]; Holmes v. Village of Hyde Park, 121 Ill. 128, 13 N. E. 540 [1889]; Village of Hyde Park v. Borden, 94 Ill. 26 [1879]; Johnson v. Duer, 115 Mo. 366, 21 S. W. 800; State, Vanderbeck, Pros. v. Mayor and Common Council of Jersey City, 29 N. J. L. (5 Dutch.) 441 [1861]; Moore v. City of Albany, 98 N. Y. 396 [1885]; People etc., ex rel. Butts v. Common Council of the City of Rochester, 5 Lans. (N. Y.) 142 [1871].

² Lehmer v. People ex rel. Miller, 80 Ill. 601 [1875].

the property to pay such assessment, the proper place to make it being on application for confirmation of such assessment.³ This language was obiter as the court held that the assessment was valid as there was no evidence tending to show that the city had not acquired such interest or easement. Accordingly this language was disapproved in a later Illinois case⁴ in which it was expressly held that if the city has power to acquire private property for public use it is not necessary that this power should be exercised before the city levies a local assessment to pay the expense of constructing a public local improvement upon such private property. This case also expressly disapproves language in a case decided a short time before,⁵ in which it was intimated that failure on the part of the city to acquire the private property might be a defense to a local assessment. A statute passed in 1897 provided⁶ that no special assessment could be levied for a local improvement "until the land necessary therefor shall be acquired and in possession of the municipality." It has been held under such statute that if the municipality has not acquired such land, the objection may be raised on application to confirm the judgment, but that it is too late to make it upon application for judgment of sale, since it restricts the power of the city in levying the assessment but does not oust the county court of its jurisdiction to confirm.⁷ The presumption is that the city is not constructing a public improvement upon private property, and the burden of proof rests upon the party alleging such fact.⁸ It has been held that the question whether land which it is sought to condemn is already a highway by prescription or not, is not a question which can be submitted to a jury in eminent domain and assessment proceedings since by statute the only questions upon which the jury is to pass concern compensation and benefits.⁹ In jurisdictions which take this view there is some divergence of judicial opinion as to the remedy to be pursued if the assessment is levied and the public corporation does not proceed to institute

³ See § 918, § 986 *et seq.*

⁴ *People ex rel. Kochersperger v. Sass*, 171 Ill. 357, 49 N. E. 501 [1898].

⁵ *Boynton v. People, ex rel. Kern*, 159 Ill. 553, 42 N. E. 842 [1896].

⁶ § 53 of such act.

⁷ *People ex rel. Raymond v. Talmadge*, 194 Ill. 67, 61 N. E. 1049 [1901].

⁸ *Cline v. People ex rel. Barlow*, 224 Ill. 360, 79 N. E. 663 [1906].

⁹ *Thomas v. City of Chicago*, 204 Ill. 611, 68 N. E. 653 [1903].

proceedings in eminent domain, and thereby acquire an interest in such realty. It has been suggested that proceedings to levy and collect such assessment might be enjoined until the necessary interest in the property on which the improvement is located was acquired by eminent domain.¹⁰ It has also been suggested that the remedy of the property owner against whom the assessment is levied is to pay his assessment, and by proceedings in mandamus to compel the public corporation to acquire the necessary interest in the realty on which such improvement is located.¹¹ Furthermore, it has been held that if the public corporation agrees to bring proceedings in eminent domain and thus induces the owner of the property assessed to withdraw his objections to the assessment and to allow it to be confirmed, and the public corporation subsequently dismisses all proceedings in eminent domain and repeals the ordinance which it has passed for the appropriation of such realty, the confirmation of the assessment which has thus been secured must be set aside.¹² In other jurisdictions the rule is laid down, often in general terms, that a local assessment cannot be levied for a public improvement upon private property.¹³ In some of these cases the question of the right of the public corporation to bring proceedings in eminent domain, and thus subsequently to acquire the necessary interest in the property in question, does not seem to be considered.¹⁴ In other jurisdictions the court seem to take the view that the property owner cannot be assessed while he is dependent upon the future action of the public corporation to secure for him by proceedings in eminent domain an indisputable right to the benefit of such improvements.¹⁵ These cases, however, are affected by local statutes

¹⁰ *Burhans v. Village of Norwood Park*, 138 Ill. 147, 27 N. E. 1088 [1892]; *Holmes v. Village of Hyde Park*, 121 Ill. 128, 13 N. E. 540 [1889].

¹¹ *People ex rel. Koehersperger v. Sass*, 171 Ill. 357, 49 N. E. 501 [1898]; *Barnert v. Board of Aldermen of the City of Paterson*, 69 N. J. L. (40 Vr.) 122, 54 Atl. 227 [1903].

¹² *Dempster v. City of Chicago*, 175 Ill. 278, 51 N. E. 710 [1898].

¹³ *State ex rel. McKune v. District Court of Ramsey County*, 90 Minn.

540, 97 N. W. 425 [1903]; *Miller v. Anheuser*, 2 Mo. App. 168 [1876].

¹⁴ *Holliday v. City of Atlanta*, 96 Ga. 377, 23 S. E. 406 [1895].

¹⁵ *Barker v. Board of Commissioners of Wyandotte County*, 45 Kan. 681, 26 Pac. 585 [1891]; *De Grilleau v. Frawley*, 48 La. Ann. 184, 19 So. 151 [1896]; *Mayor and City Council of Baltimore v. Hook*, 62 Md. 371 [1884]; *Carroll v. City of St. Louis*, 4 Mo. App. 191 [1877]; *Lorenz v. Armstrong*, 3 Mo. App. 574; *City of Philadelphia to Use v. Ball*, 147 Pa. St. 243, 23 Atl. 564 [1892].

which in effect provide for the improvement of "public roads," "public streets," and the like, and thus restrict the power of assessment to improvements on property in which the public has already acquired an interest.¹⁶ This objection cannot, however, be interposed on appeal where by statute no question of fact may be tried which may arise prior to the making of the contract.¹⁷ While there is some conflict of authority as to the power to levy assessments where the improvement is situated on property which at the time is private property, but which can be taken by proceedings in eminent domain, there is no question that if the law gives no method of acquiring an interest in such property by eminent domain no local assessment can be levied for such improvement, since both the public and the adjoining property owners are at the mercy of the owner of the realty upon which such improvement is situated. He may make any terms, no matter how hard, for his assent to the use of such public improvement, or he may withhold such assent altogether. Accordingly, as a matter of law, under circumstances like this, no benefit to the general public or to the abutting property owner can be said to exist.¹⁸

§ 394. Location of street—Land acquired by eminent domain.

Under the general principles already set forth¹ a street otherwise public in its character, cannot be treated as a public improvement if situated on private property in which the public neither has an easement nor can acquire one. Such an improvement cannot enure to the benefit of the general public since the owner of the private property may, if he chooses, prevent them from making use of such improvement; nor can it confer any

¹⁶ See § 455.

¹⁷ *McGill v. Bruner*, 65 Ind. 421.

¹⁸ *Carpenter v. Board of County Com'rs of Hennepin County*, 56 Minn. 513, 45 Am. St. Rep. 494, 58 N. W. 295 [1894]; *State, Kerrigan, Pros. v. Township of West Hoboken*, 37 N. J. L. (8 Vr.) 77 [1874]; In the Matter of the Petition of Cheesebrough, to Vacate an Assessment, 78 N. Y. 232 [1879]; *Olmsted v. Dennis*, 77 N. Y. 378 [1879]; In the Matter of the Petition of Rhineland to Vacate an Assessment, 68

N. Y. 105 [1877]; *People ex rel. Williams v. Haines*, 49 N. Y. 587 [1872]; In the Matter of One Hundred Twenty-Seventh Street, 56 How. (N. Y.) 60 [1878]; The New York cases above cited are recognized as correct but are distinguished in *Moore v. City of Albany*, 98 N. Y. 396 [1885]; decided under a statute which permitted the property on which the public improvement was located to be taken by subsequent proceedings in eminent domain.

¹ See §§ 390-393.

benefit on the adjacent property for like reasons. For these reasons no local assessment can be levied for a street laid out on private land, over which the general public and the adjoining property owners have no easement and cannot acquire one. At the same time if the public and the adjoining owner are given a legal right as against the owner of such private property it makes no difference as affecting the validity of the assessment how such right is acquired.² If proceedings in eminent domain have been instituted to acquire either a fee or an easement in such property, mere irregularities or errors in such proceedings will not affect the validity of an assessment for such street improvement if the court had jurisdiction of the subject-matter and the parties.³ Such an objection to the validity of the assessment is a collateral attack upon the judgment in eminent domain and cannot be permitted. Thus in a proceeding involving the validity of the assessment the judgment in eminent domain cannot be attacked on the ground that the certificate of publication of the notice was defective in failing to state the last day of its insertion,⁴ or on the ground that the judgment did not assess any benefits to the public against the city,⁵ or on the ground that in the condemnation proceedings the realty was not described with sufficient accuracy⁶ since such irregularities do not affect the validity of the judgment. So the fact that a land-owner entitled to damages in a condemnation proceeding has not been paid the amount of such damages does not invalidate an assessment levied for the improvement of such realty,⁷ at least as long as the fail-

² Jackson v. Smith, 120 Ind. 520, 22 N. E. 431 [1889].

³ South Chicago City Railway Company v. City of Chicago, 196 Ill. 490, 63 Ill. 1046 [1902]; Gage v. City of Chicago, 146 Ill. 499, 34 N. E. 1034 [1893]; Prescott v. City of Chicago, 60 Ill. 121 [1871]; Carpenter v. City of St. Paul, 23 Minn. 232 [1876]; City of St. Louis v. Annex Realty Company, 175 Mo. 63, 74 S. W. 961 [1903]; Michael v. City of St. Louis, 112 Mo. 610, 20 S. W. 666 [1892]; Merritt v. Village of Port Chester, 29 Hun. (N. Y.) 619 [1883].

⁴ Prescott v. City of Chicago, 60 Ill. 121 [1871].

⁵ City of St. Louis v. Annex Realty Company, 175 Mo. 63, 74 S. W. 961 [1903].

⁶ Gage v. City of Chicago, 146 Ill. 499, 34 N. E. 1034 [1893].

⁷ Boynton v. People ex rel. Kern, 159 Ill. 553, 42 N. E. 842 [1896]; Louisville Steam Forge Co. v. Mehler, 112 Ky. 438, 64 S. W. 396, 652, 23 Ky. L. R. 1335 [1901]; Barfield v. Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. R. 128 [1901]; McQuiddy v. Smith, 67 Mo. App. 205 [1896]; City of Springfield to the Use of Tuttle v. Baker, 56 Mo. App. 637 [1894]; See also as presenting somewhat similar facts, though probably there was no encroachment on

ure to pay such damages does not prevent the city from acquiring the property condemned or an easement therein. A different question is presented when a party to the proceeding in eminent domain has, by proceeding in error, appeal or certiorari in the nature of a direct attack upon the judgment, succeeded in having such judgment reversed, set aside or vacated. Under such circumstances the original judgment is of no validity whatever. Indeed to claim it as still valid would be in the nature of a collateral attack upon the judgment of the reviewing court. Accordingly in such cases an assessment cannot be levied for such street improvement.⁸ Under such circumstances a property owner who has not attacked the judgment whereby land was taken may take advantage of the fact that another property owner whose land is taken by such judgment has defeated such proceeding by prosecuting certiorari.⁹ If an appeal from the judgment in eminent domain has been taken and the city has no right to enter the realty condemned by the judgment appealed from, it cannot levy an assessment for such an improvement without giving such bond.¹⁰ If, however, there is a jurisdictional defect in the proceedings in eminent domain, the property owner whose land it is sought to take by such proceedings is not bound thereby and may insist on his rights in such land notwithstanding such judgment. Accordingly the public has acquired no interest in this realty by the proceedings in eminent domain; nor have the adjoining property owners, as a result of such proceedings, acquired any new right of access to their property. Under these circumstances therefore no local assessment can be levied for such a street improvement.¹¹

private property, *City of Indianapolis v. Gilmore*, 30 Ind. 414 [1868].

⁸ *Butler v. Board of Commissioners of the Town of Keyport*, 64 N. J. L. (35 Vr.) 181. 44 Atl. 849 [1899]; *Meredith v. City of Perth Amboy*, 63 N. J. L. (34 Vr.) 523. 44 Atl. 1101 [1899].

⁹ *Butler v. Board of Commissioners of the Town of Keyport*, 64 N. J. L. (35 Vr.) 181. 44 Atl. 849 [1899].

¹⁰ *Hennessy v. City of St. Paul*, 44 Minn. 306, 46 N. W. 353 [1890].

¹¹ *Brush v. City of Detroit*, 32 Mich. 43 [1875]; *Smith v. City of St. Paul*, 69 Minn. 276, 72 N. W.

104, 210 [1897]; *Leslie v. City of St. Louis*, 47 Mo. 474 [1871]; *Longwell v. Kansas City*, 69 Mo. App. 177 [1896]; *State, Kerrigan, Pros. v. Township of West Hoboken*, 37 N. J. L. (8 Vr.) 77 [1874]; *State, Grant, Pros. v. Mayor and Common Council of Newark*, 28 N. J. L. (4 Dutch.) 491 [1860]; *Carron v. Martin*, 26 N. J. L. (2 Dutch.) 594, 69 Am. Dec. 584 [1857]; (reversing *Martin v. Carron*, 26 N. J. L. (2 Dutch.) 228 [1857]); *Astor v. Mayor, Aldermen and Commonalty of the City of New York*, 37 N. Y. Sup. Ct. 539 [1874].

"If the condemnation judgment is

except in jurisdictions in which assessments may be levied for improvements on private property.¹² Thus if the real owner of the land sought to be taken in eminent domain is not made a party to the proceeding,¹³ or is not properly notified,¹⁴ or if some jurisdictional condition precedent such as an attempt to agree with the property owner as to the terms of purchase before instituting proceedings in eminent domain,¹⁵ or a petition in writing by three-fourths of the owners of land lying on the road or street to be opened¹⁶ is omitted, the owner of realty against which an assessment is sought to be levied may resist such levy. So if the statute in force has taken from the council the power to lay out streets, and subsequently the council does lay out a street, a property owner may resist an assessment to pay for the land so taken.¹⁷ However it has been held that the omission to make a mortgagee a party to a proceeding to condemn land for street purposes does not deprive the court of jurisdiction in eminent domain, if there is enough land left to satisfy the mortgage, and the city actually takes possession of the street as condemned. Under such special circumstances, therefore, a property owner cannot take advantage of such defect in the proceedings in eminent domain.¹⁸ In an-

entered without jurisdiction it may be collaterally attacked in the proceeding to confirm the special assessment." *Bass v. The People ex rel. Raymond*, 203 Ill. 206, 208, 67 N. E. 806 [1903]; (citing *Dickey v. City of Chicago*, 152 Ill. 468, 38 N. E. 932 [1894]; *Ayer v. City of Chicago*, 149 Ill. 262, 37 N. E. 57; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]).

However in the case of *Dashiell v. Mayor and City Council of Baltimore*, use of Hax, 45 Md. 615 [1876]; the property owner who was resisting an assessment objected to the introduction in evidence of the record of proceedings for the opening and condemnation of that part of the street in question, on the ground that the record did not show on its face that sixty days notice of the application for the condemnation ordinance had been given and that no evidence of such notice was given. The court held that such no-

tice was essential to the validity of the condemnation ordinance, raised but did not decide the question whether such invalidity would be a defense to the assessment, and held that if it were a defense the burden was on the party resisting the assessment to show that such notice was not given.

¹² See § 393.

¹³ *Smith v. City of St. Paul*, 69 Minn. 276, 72 N. W. 104, 210 [1897].

¹⁴ *Brush v. City of Detroit*, 32 Mich. 43 [1875].

¹⁵ *Leslie v. City of St. Louis*, 47 Mo. 474 [1871].

¹⁶ *Carron v. Martin*, 26 N. J. L. (2 Dutch.) 594, 69 Am. Dec. 594 [1857]; (reversing *Martin v. Carron*, 26 N. J. L. (2 Dutch.) 228 [1857]).

¹⁷ *State, Grant, Pros. v. Mayor and Common Council of Newark*, 28 N. J. L. (4 Dutch.) 491 [1860].

¹⁸ *Smith v. City of Detroit*, 120 Mich. 572, 79 N. W. 808 [1899].

other jurisdiction it has been said that a mortgagee is not a necessary party in proceedings to condemn land for a street.¹⁹

Not affecting the principle in question but limiting its application is the rule which is subsequently discussed at length²⁰ that if an opportunity is afforded at a certain stage of assessment proceedings, such as confirmation, to interpose a certain defense, a failure to interpose a given defense at such stage operates as a waiver thereof. If a judgment of confirmation is entered by a court of competent jurisdiction it cannot be attacked collaterally thereafter.²¹ Accordingly in such jurisdictions it has been held that a judgment of confirmation which is not attacked directly will preclude the parties on whose property such assessment has been levied from subsequently interposing as a defense the fact that the court which rendered the judgment in eminent domain was without jurisdiction.²² So if a mortgage lien upon property taken for a street is not satisfied, it may be possible to interpose the existence of such lien to prevent confirmation of the assessment and entry of judgment, but if such objection is not made then it is waived.²³ If the ordinance authorizing condemnation is to take effect only in case certain realty is dedicated by the owner no proceedings can be had under such ordinance unless such dedication is made.²⁴

§ 395. Location of street on land acquired in other manner.

If the street has been dedicated by the prior owner of such realty, so that the public has acquired either the fee thereof or an easement therein, an assessment for the improvement of such street may of course be levied.¹ Dedication after suit was brought

¹⁹ *Schumaker v. Toberman*, 56 Cal. 508 [1880].

²⁰ See § 910 *et seq.*, § 986 *et seq.*

²¹ See § 910 *et seq.*

²² *Bass v. People ex rel. Raymond*, 203 Ill. 206, 67 N. E. 806 [1903]; *People ex rel. Raymond v. Talmadge*, 194 Ill. 67, 61 N. E. 1049 [1901].

²³ *Morey v. City of Duluth*, 75 Minn. 221, 77 N. W. 829 [1899].

²⁴ *City of St. Louis v. Cruikshank*, 16 Mo. App. 495 [1885].

¹ *City of Seattle v. Kelleher*, 195 U. S. 351, 25 S. 44 [1904]; *City of Meriden v. Camp*, 46 Conn. 284

[1878]; *Terrell v. Hart*, — Ky. —, 90 S. W. 953, 28 Ky. L. R. 901 [1906]; *Siebert v. Allen*, 61 Mo. 482 [1876]; *Skrainka v. Allen*, 2 Mo. App. 387 [1876]; *State, Pros. v. City Council of Atlantic City*, 34 N. J. L. (5 Vr.) 99 [1869]; *State, Moran, Pros. v. City of Hudson*, 34 N. J. L. (5 Vr.) 25 [1869]; *Mayor and Common Council of New-ark v. State, Batten, Pros.*, 32 N. J. L. (3 Vr.) 453 [1865]; *State v. Dean*, 23 N. J. L. (3 Zab.) 335 [1852]; *Neff v. Bates*, 25 O. S. 169 [1874]; *Schenley v. Commonwealth*

on the assessment and before trial has been held sufficient.² The property owners who have dedicated such street are not thereby relieved from assessment on property retained by them.³ If land properly dedicated as a street has been vacated without authority of the law, an assessment subsequently levied for improving the street so vacated is not invalid by reason of such vacation. Thus where surveyors of highways have no authority to vacate streets,⁴ they attempted to vacate a street. Subsequently an assessment was levied for improving such street; and it was held that the assessment was not void by reason of the attempted vacation of the street.⁵ If a street is not dedicated when the original assessment is levied, but it is dedicated subsequently and a re-assessment is levied, such re-assessment may be valid.⁶ If the street has been acquired by the public by purchase, so that the public has either a fee or an easement therein, an assessment for the improvement of such street may be levied. It is not necessary that a formal conveyance should have been made to the city passing the legal title to the property to be used as a street. If a valid and subsisting contract has been entered into between the city and the owner of the property to be used as a street, whereby the owner of such property agrees to convey it to the city for such use, an assessment for a street improvement constructed upon such land before such conveyance has been made is held to be invalid.⁷ The form which such purchase assumes is not material as long as either fee or easement passes to the public. Thus by a statute passed in 1857 the power of laying out public streets in the City of Newark, New Jersey, was taken from the common council and vested in a board of commissioners. Under such statute an ordinance laying out a new street passed by the mayor and council

for the Use of the City of Allegheny, 36 Pa. St. (12 Casey) 29, 78 Am. Dec. 359 [1859].

² City of Toledo for the Use of Horan v. Barnes, 1 Ohio N. P. 187 [1894]; *contra* Spaulding v. Wesson, 115 Cal. 441, 47 Pac. 249 [1896].

³ State, Moran, Pros. v. City of Hudson, 34 N. J. L. (5 Vr.) 25 [1869]; State v. Dean, 23 N. J. L. (3 Zab.) 335 [1852].

⁴ Holmes v. Jersey City, 12 N. J. Eq. (1 Beas.) 299.

⁵ Mayor and Common Council of Jersey City v. State, Howeth, Pros., 30 N. J. L. (1 Vr.) 521 [1863].

⁶ City of Toledo v. Barnes, 1 Ohio N. P. 187.

⁷ Sears v. Street Commissioners of the City of Boston, 180 Mass. 274, 62 L. R. A. 144, 62 N. E. 397 [1902].

after such statute took effect was void.⁸ It appeared, however, in another case based on a similar ordinance that the owners of such realty had agreed to transfer it to the city for use as a street, and that such ordinance was passed in performance of such agreement. It was held, accordingly, that an assessment for the improvement of such street was valid.⁹ If the public has acquired an easement in realty by prescription, it has a right to make such use of the property which it has thus acquired without the consent of the property owner. Accordingly an assessment may be levied for improving a street upon land in which the public has acquired an easement for use as a street by prescription.¹⁰ If the owner of property taken for a street has by his conduct estopped himself from denying that it is a public street, owners of property assessed for the improvement of such street cannot resist assessments on the ground that such land had not been acquired as a street, since by the force of the estoppel both the public and the adjoining land-owners will receive as much benefit from the street as though such land had been acquired regularly.¹¹ Thus A. attempted to dedicate certain land as a public street. Subsequently B., who succeeded A. in interest, allowed the village to improve such street under a contract by which the contractor agreed to receive the assessments in full satisfaction, the village to be under no liability whatever. B. knew that the improvement was to be paid for by such assessments. It was held that B. was estopped from resisting payment of such assessments to the contractor on the ground that the land taken for a street was not legally dedicated.¹² So A.'s land was taken for a street by proceedings in eminent domain. Subsequently A. brought suit against the city to recover the value of the land thus taken on the ground that the prior proceedings in eminent domain were void for want of jurisdiction. A. recovered judgment in

⁸ *State, Grant, Pros. v. Mayor and Common Council of Newark*, 28 N. J. L. (4 Dutch.) 491 [1860].

⁹ *Mayor and Common Council of Newark v. State, Batten, Pros.*, 32 N. J. L. (3 Vr.) 453 [1865].

¹⁰ *Speir v. Town of New Utrecht*, 121 N. Y. 420, 24 N. E. 692 [1890]; (modifying *Speir v. Town of New Utrecht*, 49 Hun. (N. Y.) 294, 2 N. Y. S. 426 [1888]).

¹¹ *Grimm v. Shickle*, 4 Mo. App. 585 (appendix); *Hawver v. City of Omaha*, 52 Neb. 734, 73 N. W. 217 [1897]; *Neff v. Bates*, 25 O. S. 169 [1874]; *Darlington v. Commonwealth for the Use of the City of Allegheny*, 41 Pa. St. (5 Wright) 68 [1861].

¹² *Neff v. Bates*, 25 O. S. 169 [1874].

such suit. Subsequently an assessment for improving such street was levied upon A.'s abutting property. It was held that A., by his election to recover the value of the land taken for use as a street, was estopped from denying the right of the city to such easement, and that A. could not, therefore, resist such assessment on the ground that the proceedings in eminent domain were void.¹³ So deeds given by the property owner resisting the assessment, whereby he conveyed other realty on the street in question, in which deeds he recognized the existence of such street, may be considered as bearing on the fact of the existence of such street.¹⁴ So owners of property which abuts on a strip of land which has for years been used by the property owners and the city as a street, cannot resist assessments for improving such street on the ground that the city has no title thereto.¹⁵

§ 396. Location of street on land in which public has no interest.

If a municipal corporation attempts to construct a street on realty in which it has neither the fee nor the easement, the question of the validity of an assessment for such an improvement is one upon some phases of which there is a conflict of authority. Without considering the effect of future acquisition, by proceedings in eminent domain, of the right to make use of such land for a street, it may be said that the general rule, supported by the great weight of authority is that an assessment cannot be levied for a street improvement to be constructed on land in which the public has neither the fee or the easement.¹ This principle is rec-

¹³ *Hawver v. City of Omaha*, 52 Neb. 734, 73 N. W. 217 [1897].

¹⁴ *Darlington v. Commonwealth for the Use of the City of Allegheny*, 41 Pa. St. (5 Wright) 68 [1861].

¹⁵ *Mason v. City of Sioux Falls*, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770 [1892].

¹ *Spaulding v. Wesson*, 115 Cal. 441, 47 Pac. 249 [1896]; *Cook v. Sudden*, 94 Cal. 443, 29 Pac. 949 [1892]; *Spaulding v. Bradley*, 79 Cal. 449, 22 Pac. 47 [1889]; *Pacific Bridge Co. v. Kirkham*, 54 Cal. 558 [1880]; *Snyder v. Foster*, 77 Ia. 638, 42 N. W. 506; *Dulaney v. Figg*, — Ky. —, 29 Ky. Law Rep. 678, 94

S. W. 658 [1906]; *De Grilleau v. Frawley*, 48 La. Ann. 184, 19 So. 151 [1896]; *Philbrook v. Inhabitants of the County of Kennebec*, 17 Me. 196 [1840]; *Mayor and City Council of Baltimore v. Hook*, 62 Md. 371 [1884]; *Morse v. Stocker*, 83 Mass. (1 All.) 150 [1861]; *People on the Relation of Butler v. Board of Supervisors of Saginaw County*, 26 Mich. 22 [1872]; *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366; *Carroll v. City of St. Louis*, 4 Mo. App. 191 [1877]; *Lorenz v. Armstrong*, 3 Mo. App. 574 (appendix); *Speir v. Town of New Utrecht*, 121 N. Y. 420, 24 N. E. 692 [1890];

ognized even where the question is not properly presented, and the defense is therefore ineffectual.² Occasionally, however, we find it held that no owner except the true owner can resist an assessment on the ground that the land on which the street is located is private property.³ The difficult questions that are presented in this connection are those arising out of the possibility of the public's acquiring by proceedings in eminent domain after the levy of an assessment, an interest in the land on which the street in question has been constructed. According to some authorities an assessment in such cases is invalid even if it might be possible to secure a fee or easement in such realty by subsequent proceedings in eminent domain.⁴ This holding is based on the theory that the adjoining property owner receives no real and present benefit from such improvement; but that there is at best a mere possibility that he may at some time in the future receive a benefit if the municipal corporation proceeds to attempt to appropriate the property by proceedings in eminent domain, and if it is successful in such attempt. In other cases the same result is reached where the statute or ordinance under which the assessment is made provides that the street shall be first dedicated or properly opened.⁵ So an assessment for improving a private alley in which only the abutting property owners had easements was held to be invalid under a statute providing for levying an assessment for the improvement of a "street or part thereof" since such alley was not a street within the meaning of the statute.⁶ In such case there is no legislative authority for the ordinance and the question of power to authorize is not involved.

(modifying *Speir v. Town of New Utrecht*, 49 Hun. (N. Y.) 294, 2 N. Y. S. 426 [1888]); *Western Pennsylvania Railway Company v. City of Allegheny*, 92 Pa. St. (11 Norris) 100 [1879].

² *Moberry v. City of Jeffersonville*, 38 Ind. 198 [1871].

³ *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410 [1903].

⁴ *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283 [1895]; *Spaulding v. Bradley*, 79 Cal. 449, 22 Pac. 47 [1889]; *Bodley v. Finley's Exr.*, 111 Ky. 618, 64 S. W. 439, 23 Ky. L. Rep. 851 [1901]; *Mayor and City*

Council of Baltimore v. Hook, 62 Md. 371 [1884]; *Carroll v. City of St. Louis*, 4 Mo. App. 191 [1877]; *Lorenz v. Armstrong*, 3 Mo. App. 574 (appendix); *State, Grant, Pros. v. Mayor and Common Council of Newark*, 28 N. J. L. (4 Dutch.) 491 [1860]; *McKeesport Boro., to Use of McKeesport City v. Busch*, 166 Pa. St. 46, 31 Atl. 49 [1895].

⁵ *City of Philadelphia to Use v. Ball*, 147 Pa. St. 243, 23 Atl. 564 [1892].

⁶ *De Grilleau v. Frawley*, 48 La. Ann. 184, 19 So. 151 [1896].

Even in jurisdictions holding that such an assessment cannot be levied, it is held that a property owner who has paid assessments for the improvement of such a street may, under some circumstances, compel the municipal corporation to bring proceedings to condemn such realty for public use as a street. Thus a street was opened by virtue of a statute which required an assessment of damages and benefits to property along the line of the street to be opened. No assessment of either damages or benefits was made against a tract of land owned by a railroad which such street crossed. A., an abutting property owner paid an assessment for opening such street, and subsequently paid another assessment for grading, curbing and guttering such street. Later, on learning that no assessment had been made for damages or benefits against such tract belonging to the railroad company A. applied to the board of aldermen to take the necessary steps to open such street. An ordinance for that purpose was introduced but failed to pass. A. then applied for a writ of mandamus to compel the municipal corporation to open such street. The court held that the objection that the discretion of the board of aldermen could not be controlled by mandamus was a formidable one, but that it might not be fatal, and that as the question should be put in form to permit of a decision in the court of last resort, an alternative writ of mandamus should be awarded.⁷ In jurisdictions which take a similar view of the rights of the owner of realty which has been assessed to pay for improving a street in which the public has neither a fee nor an easement it has been held that under such circumstances the fact that the owner of the realty on which the street is situated has dedicated it to the public after the assessment is levied does not make such assessment valid.⁸ In other jurisdictions it is held that if the municipal corporation has power to appropriate the land on which the street is constructed by subsequent proceedings in eminent domain, an assessment for a street improvement is valid though the public has neither a fee nor an easement in the land on which such street is situated.⁹ Thus, where a street embankment was

⁷ *Barnert v. Board of Aldermen of the City of Paterson*, 69 N. J. L. (40 Vr.) 122, 54 Atl. 227 [1903].

⁸ *Spaulding v. Wesson*, 115 Cal. 441, 47 Pac. 249 [1896]; *contra City*

of Toledo for the Use of Horan v. Barnes, 1 Ohio N. P. 187 [1894].

⁹ *Allen v. City of Chicago*, 176 Ill. 113, 52 N. E. 33 [1898]; *Royal Insurance Company v. South Park*

sloped so as to extend over upon private ground, it was held that an assessment for the improvement of the street was not invalidated by such use of private property, since there was a means provided by law by which such easement could be acquired by proceedings in eminent domain.¹⁰ The earlier Illinois cases appear to recognize the doctrine that a public improvement like a street cannot be constructed on private property,¹¹ even in cases where such objection could not be raised; as where the objection was made on application for judgment on the special assessment, and it was held that it should have been made before the

Commissioners, 175 Ill. 491, 51 N. E. 558 [1898]; *Bass v. South Park Commissioners*, 171 Ill. 370, 49 N. E. 549 [1898]; *People ex rel. Kochersperger v. Sass*, 171 Ill. 357, 49 N. E. 501 [1898]; (overruling contrary observations in *Boynton v. People ex rel. Kern*, 159 Ill. 553, 42 N. E. 842 [1896]; and disapproving the language used in *Lehmer v. People ex rel. Miller*, 80 Ill. 601 [1875]); *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]; *Leman v. City of Lake View*, 131 Ill. 388, 23 N. E. 346 [1890]; *Hunerberg v. Village of Hyde Park*, 130 Ill. 156, 22 N. E. 486 [1890]; *Holmes v. Village of Hyde Park*, 121 Ill. 128, 13 N. E. 540 [1889]; *Moore v. City of Albany*, 98 N. Y. 396 [1885]; (distinguishing *In the Matter of the Petition of Cheesebrough to Vacate an Assessment*, 78 N. Y. 232 [1879]; and *In the Matter of the Petition of Rhinelander, to Vacate an Assessment*, 68 N. Y. 105 [1877]; which were cases holding that an assessment could not be levied for a sewer on private land, as being cases decided under a statute which gave no means for the public to acquire title thereafter.) In *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410 [1903] it was said that an abutting property owner who claims no interest in the land used as an alley can-

not resist an assessment for opening such alley on the ground that the land does not belong to the city. There was neither discussion nor citation of authorities on this point and it does not appear whether the objection went to the jurisdiction of the court in eminent domain or not.

¹⁰ *Moore v. City of Albany*, 98 N. Y. 396 [1885]. Furthermore in this case such an embankment was held to be a benefit to the abutting property owners since they would undoubtedly wish to grade their lots to the level of the street, and this embankment would save them that amount of grading and filling. A similar question was presented in *Dixon v. City of Cincinnati*, 11 Ohio C. C. 629, 5 Ohio C. D. 301 [1894], but was not specifically passed on by the court. It appeared, however, that the owners of the property occupied by the sloping embankment were willing to accept damages for such use of their property without formal condemnation proceedings. The objection of the property owners was to the inclusion of such damages in the amount of the assessment. The court held that such inclusion was proper as the cost of a retaining wall which would otherwise have been necessary would have been much greater.

¹¹ *Fagan v. City of Chicago*, 84 Ill. 227 [1876]; *Lehmer v. People ex rel. Miller*, 80 Ill. 601 [1875].

assessment was confirmed.¹² So it was held that the owner who was assessed for benefits for opening a street could not interpose the objection that he had been allowed to keep one and ninety-five one-hundredths of a foot of land in the line of such street, since if there was any wrong done it was to his advantage.¹³ The later cases have repudiated this doctrine however,¹⁴ and it is held that it cannot be interposed as a defense even at confirmation that the municipal corporation had not acquired title to the land to be used as a street.¹⁵ The modern Illinois doctrine seems to be that if the power of eminent domain exists, whereby the public may acquire either a fee or an easement in the property to be improved if it wishes to acquire it, an assessment may be levied before such public right may be acquired.¹⁶ This court has said that if there is any probability that the municipal corporation would not acquire title to the street, a court of equity would enjoin the proceeding until the title is acquired.¹⁷ If the law does not provide a valid method of appropriating land for public use as a street, an assessment for such street improvement is invalid.¹⁸ Such an assessment is said to be invalid because "there is no provision that the street or way shall ever be made a public way, or that any use of it shall ever be secured to the person who is compelled to contribute to its construction."¹⁹ Thus when the statute in force gave no means of assessing damages to the owners of land taken for public use, an assessment ordinance for damages

¹² *Lehmer v. People ex rel. Miller*, 80 Ill. 601 [1875].

¹³ *Fagan v. City of Chicago*, 84 Ill. 227 [1876].

¹⁴ *People ex rel. Kochersperger v. Sass*, 171 Ill. 357, 49 N. E. 501 [1898] disapproving the language used in *Lehmer v. People ex rel. Miller*, 80 Ill. 601 [1875] as far as it intimates that such defense might be interposed at confirmation, and overruling the language used in *Boynton v. People, ex rel. Kern*, 159 Ill. 553, 42 N. E. 842 [1896].

¹⁵ *Holmes v. Village of Hyde Park*, 121 Ill. 128, 13 N. E. 540 [1889]; (following *Village of Hyde Park v. Borden*, 94 Ill. 26 [1879]).

¹⁶ *Allen v. City of Chicago*, 176 Ill. 113, 52 N. E. 33 [1898]; *Royal Insurance Company v. South Park*

Commissioners, 175 Ill. 491, 51 N. E. 558 [1898]; *Burhans v. Village of Norwood Park*, 138 Ill. 147, 27 N. E. 1088 [1892]; *Leman v. City of Lake View*, 131 Ill. 388, 23 N. E. 346 [1890]; *Hunerberg v. Village of Hyde Park*, 130 Ill. 156, 22 N. E. 486 [1890]; *Holmes v. Village of Hyde Park*, 121 Ill. 128, 13 N. E. 540 [1889].

¹⁷ *Holmes v. Village of Hyde Park*, 121 Ill. 128, 13 N. E. 540 [1889]; To the same effect see *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892].

¹⁸ *Morse v. Stocker*, 83 Mass. (1 All.) 150 [1861]; *State, Kerrigan, Pros. v. Township of West Hoboken*, 37 N. J. L. (8 Vr.) 77 [1874].

¹⁹ *Morse v. Stocker*, 83 Mass. (1 All.) 150, 159 [1861].

and benefits based on such law was passed. It was held that as the provision for assessing damages was without authority, the assessment of benefits was also invalid.²⁰

§ 397. Improvement of toll road.

If a toll road or part thereof is taken into the city, a statute which authorizes such municipal corporation to improve such road and to assess the cost of such improvement upon the property especially benefited thereby is upheld as valid, since the owners of such property have a right to use such street and the benefit of such improvement cannot be denied to them.¹ The right to levy such assessment exists even though it may be doubtful whether as against the toll road company the city had a right to make such improvement. If the improvement is in fact made, whether rightfully or not, the owners who receive the benefit thereof must pay the assessment for such benefits, and cannot set up the violation of the rights of the toll road company as a defense.² Thus where it was doubted whether the power to change the grade existed it was held that the power to pave undoubtedly existed, and such grading as was merely incidental to paving could be made at the expense of the property benefited.³ A statute authorizing a municipal corporation to assess a plank road company for improving the land on which such road is located has been upheld.⁴ The cases denying or doubting the right to levy such assessment do so on the ground that the statute controlling in such cases does not provide for such assessment.⁵ Upon this ground assessments

²⁰ State, *Kerrigan, Pros. v. Township of West Hoboken*, 37 N. J. L. (8 Vr.) 77 [1874].

¹ *Huelfeld v. Covington*, — (Ky.) —, 60 S. W. 296 [1901]; *Bagg v. Detroit*, 5 Mich. 336 [1858]; State, *Parker, Pros. v. Mayor, etc., of the City of New Brunswick*, 30 N. J. L. (1 Vr.) 395 [1863]; State, *Townsend, Pros. v. Mayor and Common Council of Jersey City*, 26 N. J. L. (2 Dutch.) 444 [1857]; See also *McHenry v. Salvage*, 99 Ky. 232, 35 S. W. 645.

² *Bagg v. City of Detroit*, 5 Mich. 336 [1858]; State, *Parker, Pros. v.*

Mayor, etc., of the City of New Brunswick, 30 N. J. L. (1 Vr.) 395 [1863].

³ State, *Parker, Pros. v. City of New Brunswick*, 32 N. J. L. (3 Vr.) 548 [1867].

⁴ *People of the State of New York ex rel. Cayadutta Plank Road Company v. Cummings*, 166 N. Y. 110, 59 N. E. 703 [1901].

⁵ *Philadelphia to use v. Gowen*, 202 Pa. St. 453, 52 Atl. 3 [1902]; *Breed v. City of Allegheny*, 85 Pa. St. (4 Norris) 214 [1877]; *Wilson v. Allegheny City*, 79 Pa. St. (29 P. F. Smith) 272 [1875].

for grading⁶ or widening⁷ a private toll road, which the city has not sought to condemn and in which it has not acquired an easement, have been held invalid. It has been held that a city may improve a plank road and assess the road company for the benefits thus conferred.⁸

§ 398. Appropriation by mistake.

If the city has made no attempt as a public corporation to appropriate land for use as a street, but its officials have made a genuine mistake concerning the location of the boundary line and under such mistake have encroached upon A.'s land, A. cannot on account of such encroachment enjoin an assessment for such improvement nor can he otherwise resist such assessment. His sole remedy is an action for damages.¹

§ 399. Location of sidewalks and roads.

Other applications of the general principles already discussed are found in cases of other public improvements like streets in their general nature. If a sidewalk has been laid on A.'s private property and no formal or regular steps are taken by the public corporation to acquire title thereto, A. cannot be excluded by any person from the enjoyment of such improvement and his property is therefore benefited thereby, and is accordingly liable to local assessment.¹ Conversely the fact that A. has constructed his building over the line of his property so that the sidewalk cannot be constructed of the width specified in the ordinance does not invalidate the assessment.² No assessment can be levied for improving as a public road a strip of land in which the public has not acquired any title.³

⁶ *Wilson v. Allegheny City*, 79 Pa. St. (29 P. F. Smith) 272 [1875].

⁷ *Breed v. City of Allegheny*, 85 Pa. St. (4 Norris) 214 [1877].

⁸ *People ex rel. Cayadutta Plank Road Co. v. Cummings*, 166 N. Y. 110, 59 N. E. 703 [1901].

¹ *Dixon v. City of Cincinnati*, 11 Ohio C. C. 629, 5 Ohio C. D. 301 [1894]; *Davis v. Silvertown*, 47 Or. 171, 82 Pac. 16 [1905]; This is especially true if the city has the power to acquire title by eminent domain to the property so occupied.

Moore v. City of Albany, 98 N. Y. 396 [1885].

² *Boynton v. People ex rel. Kern*, 159 Ill. 553, 42 N. E. 842 [1896]; *City of Indianapolis v. Gilmore*, 30 Ind. 414 [1868].

³ *Hyman v. City of Chicago*, 188 Ill. 462, 59 N. E. 10 [1900].

⁴ *Barker v. Board of Commissioners of Wyandotte County*, 45 Kan. 681, 26 Pac. 585 [1891]; *Pierce v. County Commissioners of Franklin County*, 63 Me. 252 [1872]; *Philbrook v. Inhabitants of the County*

§ 400. Location of sewers.

If a sewer is constructed over private property under such circumstances that the owner of such private property is estopped to deny the right of the public and the abutting property owners to make use of the same, no objection can be interposed to the validity of the assessment on the ground that the sewer is built on private property.¹ Thus if the owner of such private property knows that the sewer is being built on his property as a public sewer, and if he makes no objection thereto² or acquiesces therein,³ or consents thereto,⁴ he is estopped from denying the right of the public to use such sewer and no objection to an assessment can be interposed on the ground that the sewer is constructed on private property. If a sewer is built through private property under a contract with the owner thereof, by which he is bound to permit such public use to continue, no objection to such assessment can be interposed on the ground that the sewer is situated on private property.⁵ If, however, the contract merely provides for the laying and maintenance of such sewer, and does not provide that adjoining property owners may have the right to connect with such sewer upon such private property, no assessment therefor can be levied upon property which cannot be connected with such sewer except across such private property.⁶ If a sewer is constructed which runs in whole or in part through private property, the question of the validity of a local assessment for the

of Kennebec, 17 Me. 196 [1840]; *Copeutt v. City of Yonkers*, 59 Hun. (N. Y.) 212, 13 N. Y. Supp. 452 [1891]. The question involved in the above cases are, however, largely statutory, depending on the power of the legislature to levy assessments under statutes authorizing improvements on "public roads," or on "county roads."

¹ *Village of Hyde Park v. Borden*, 94 Ill. 26 [1879]; *City of St. Joseph to the Use of the Saxton National Bank v. Landis*, 54 Mo. App. 315 [1893]; *In the Matter of the Petition of McGown to Vacate an Assessment*, 18 Hun. (N. Y.) 434 [1879]; *Wilson v. City of Cincinnati*, 5 Ohio N. P. 68 [1897].

² *Village of Hyde Park v. Borden*, 94 Ill. 26 [1879]; *In the Matter of the Petition of McGown to Vacate an Assessment*, 18 Hun. (N. Y.) 434 [1879].

³ *Wilson v. City of Cincinnati*, 5 Ohio N. P. 68 [1897].

⁴ *City of St. Joseph to the Use of the Saxton National Bank v. Landis*, 54 Mo. App. 315 [1893].

⁵ *Kramer v. City of Los Angeles*, 147 Cal. 668, 82 Pac. 334 [1905]; *Leeds v. City of Richmond*, 102 Ind. 372, 1 N. E. 711 [1885]; *City of St. Joseph to the Use of the Saxton National Bank v. Landis*, 54 Mo. App. 315 [1893].

⁶ *State ex rel. McKune v. District Court of Ramsey County*, 90 Minn. 540, 97 N. W. 425 [1903].

cost of such sewer is determined by the general considerations already discussed. If the municipal corporation has in any way acquired the right to lay and maintain the sewer upon the private property on which it has in fact been laid, and, if necessary, the right to authorize abutting property owners to make connections therewith on such private property, the authorities are practically unanimous in holding that the fact that such sewer is located upon private property is no objection to an assessment therefor. If the sewer is laid in realty dedicated to the public for a street, such dedication renders such land subject to be appropriated for any or all of the uses to which public streets are devoted to meet the wants and convenience of the general public. Among these uses is included the laying of sewers in public streets.⁷ Accordingly if a sewer is laid in a public street neither the public nor the abutting property owners can be prevented by the former owner of such realty from making use of such sewer; and an assessment may be levied for the cost of such sewer.⁸ Accordingly if the owner of land conveys a part of it reserving a right of way for owners of other lots along a platted street which has never been opened by the city, and permits the public to use such street as a highway, such acts amount to a dedication to public use, and the city may lay a sewer in such street and levy an assessment therefor.⁹ So if land has been dedicated by parol dedication for use as a sewer, the city may lay a sewer therein and levy an assessment therefor, even if the city has made an ineffectual attempt to appropriate such land by eminent domain.¹⁰ So if a sewer is ordered in a private way, but before the sewer is built such private way is dedicated as a street, an assessment for such sewer cannot be resisted on the ground that the sewer as originally ordered was situated in a private way.¹¹ If the municipal corporation or other public corporation has not acquired the right to lay and maintain a sewer upon the private property upon which it has in fact been laid, we find as in cases of other im-

⁷ *Warren v. City of Grand Haven*, 30 Mich. 24 [1874].

⁸ *Cone v. City of Hartford*, 28 Conn. 363 [1859]; *Warren v. City of Grand Haven*, 30 Mich. 24 [1874].

⁹ In the *Matter of the Petition of Ingraham to Vacate an Assessment on Eighty-eighth and Ninety-first*

Streets, 4 Hun. (N. Y.) 495 [1875]; (affirmed In the *Matter of the Petition of Ingraham to Vacate an Assessment*, 64 N. Y. 310 [1876]).

¹⁰ *Creamer v. Allen*, 3 Mo. App. 545 [1877].

¹¹ *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692 [1887].

provements, some conflict of authority.¹² In some jurisdictions it is held that local assessments cannot, under such circumstances, be levied for the expense of constructing the sewer,¹³ and a statute which authorizes an assessment for such an improvement has been held to be invalid.¹⁴ In some of these cases the possibility of acquiring a public easement for the sewer by subsequent proceedings in eminent domain is not referred to.¹⁵ The validity of such assessment has been denied even where the owner of the land taken has subsequently sued for damages for the taking of his land, and recovered them.¹⁶ The presumption, however, is that the city has acquired a right to make use of such land for sewer purposes; and the party resisting such assessment must show affirmatively that the city has not acquired such right.¹⁷ If a part of the sewer runs through A.'s land which has been regularly taken for sewer purposes by proceedings in eminent domain, and part of it runs through A.'s land which has not been so taken, it has been held that an assessment may be levied on A.'s land for that part of the sewer running through the land which has been regularly condemned, since no one can keep A. from using the sewer, but that an assessment cannot be levied for that part of the sewer which runs through land not condemned.¹⁸ Where the city made a mistake in pointing out to the contractor the lines of the street so that the sewer is constructed in part on private property, it has been held that the owners of land drained by such sewer must pay for at least so much thereof as is in the public street. In such a case it is possible to rebuild, in the street, that part of the sewer outside of the street lines, and thus the use of such improvement can be secured to the owners of land drained

¹² See § 393, § 396.

¹³ *Holliday v. City of Atlanta*, 96 Ga. 377, 23 S. E. 406 [1895]; *State ex rel. McKune v. District Court of Ramsey County*, 90 Minn. 540, 97 N. W. 425 [1903]; *Anderson v. Lower Merion Township*, 217 Pa. St. 369, 66 Atl. 1115 [1907].

¹⁴ *Anderson v. Lower Merion Township*, 217 Pa. 369, 66 Atl. 1115 [1907].

¹⁵ *State ex rel. McKune v. District Court of Ramsey County*, 90 Minn. 540, 97 N. W. 425 [1903].

¹⁶ *Holliday v. City of Atlanta*, 96 Ga. 377, 23 S. E. 406 [1895]; Furthermore in this case a curative statute had been passed subsequently authorizing such re-assessment. Such statute was, however, held unconstitutional. See Ch. XVII.

¹⁷ *Cline v. People ex rel. Barlow*, 224 Ill. 360, 79 N. E. 663 [1906].

¹⁸ *Miller v. Anheuser*, 2 Mo. App. 168 [1876]. The latter part of this holding depends in part on the statute under which such assessment was levied, and does not involve the constitutional question directly.

thereby.¹⁹ If the location of the private property through which the sewer runs is such that A. cannot make use of such sewer without trespassing on such private land, A. may resist an assessment therefor, even if the city has an easement to maintain the sewer.²⁰ This, however, involves not the nature of the improvement but the benefit to the land assessed and is discussed elsewhere.²¹ In some jurisdictions it is held that if a sewer is laid in private property and if under the law it is possible to acquire a public easement in such property by subsequent proceedings in eminent domain, the fact that the sewer is laid in private property is no defense to an assessment therefor, since the easement may be acquired as well before making the improvement as after; and it will be presumed that the public corporation will do its duty, while ordinarily means will exist for compelling it to do its duty.²² Still, even in jurisdictions taking this view, there is some authority for holding that if the municipal corporation secures confirmation of the assessment by means of an agreement to condemn, and subsequently, after the objections of the property owners have been withdrawn and a confirmation has been had, the city repeals the ordinance to condemn the property and dismisses its proceedings for that purpose, the property owners may have the confirmation set aside.²³ If, however, there is no way provided for by law by which the land on which the sewer has been constructed can be taken in eminent domain, it is evident that the public and the owners of land which such sewer is intended to drain are at the mercy of the owner of the land on which the sewer has been constructed. No use of it can be had unless his consent is in some way obtained. Accordingly it is held that in contemplation of the law, the owners of land to be drained by such sewer receive no benefit from such improvement and accordingly local assessments

¹⁹ *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800 [1892].

²⁰ *State ex rel. McKune v. District Court of Ramsey County*, 90 Minn. 540, 97 N. W. 425 [1903]; *contra Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163 [1901].

²¹ See § 563.

²² *Maywood Co. v. Village of Maywood*, 140 Ill. 216, 29 N. E. 704 [1893]; *Holmes v. Village of Hyde Park*, 121 Ill. 128, 13 N. E. 540 [1889]; *Village of Hyde Park v.*

Borden, 94 Ill. 26 [1879]; *State, Vanderbeck, Pros. v. Mayor and Common Council of Jersey City*, 29 N. J. L. (5 Dutch.) 441 [1861].

²³ *Dempster v. City of Chicago*, 175 Ill. 278, 51 N. E. 710 [1898]; But see for the theory that the remedy of the property owner is to pay the assessment and bring suit to compel the city to proceed with the condemnation proceedings, § 393, N. 11; § 1468 *et seq.*

cannot be levied therefor.²⁴ This view has been taken where the land through which the drain is constructed is the land sought to be assessed.²⁵ In Rhode Island it has been held that if a sewer is constructed in a private road, not regularly laid out as a street, nor dedicated by the owner and accepted by the public, no assessment can be levied therefor, even if such land is subsequently laid out as a street.²⁶ This holding, however, is based on the local statute under which such assessment was levied, which authorized assessments for sewers "made in any of the streets."

§ 401. Sewer without outlet.

If an outlet to the sewer has not in fact been obtained, but if under the law such outlet can be obtained, as by proceedings in eminent domain,¹ it has been held that an assessment for the construction of a sewer is valid, though the outlet therefor is still to be obtained across private property,² or along a highway outside of the limits of the village.³ Thus where a company had filled a river and thus reclaimed land it was held that an assessment could be levied for a sewer to pass through such reclaimed land to secure an outlet since if the company had a right to make such accretion there was "ample power in the city to open a way to the river."⁴ If the ordinance provides a sufficient outlet on its face, objections to the sufficiency of such outlet do not affect

²⁴ In the Matter of the Petition of Cheesbrough to Vacate an Assessment, 78 N. Y. 232 [1879]; In the Matter of the Petition of Rhineland to Vacate an Assessment, 68 N. Y. 105 [1877]; While the court in the Matter of the Petition of Ingraham to Vacate an Assessment, 64 N. Y. 310 [1876] at first observed that one property owner could not complain of trespass to another in laying a sewer on the land of such other, it finally held on application for a rehearing that the question of the validity of the assessment would depend on the question whether the land had been dedicated for a street or not; and if not, whether the owner of the property had assented to the laying of the sewer on his land.

²⁵ In the Matter of One Hundred Twenty-Seventh Street, 46 How. (N. Y.) 60 [1878]. This, however, depends in part upon statutory construction.

²⁶ Bishop v. Tripp, 15 R. I. 466. 8 Atl. 692 [1887].

¹ See §§ 393, 400.

² Harney v. Benson, 113 Cal. 314, 45 Pac. 687 [1896]; Payne v. Village of South Springfield, 161 Ind. 285, 44 N. E. 105 [1896]; South Highland Land & Improvement Company v. Kansas City, 172 Mo. 523, 72 S. W. 944 [1902].

³ Cochran v. Village of Park Roads, 138 Ill. 295, 27 N. E. 939 [1893].

⁴ South Highland Land & Improvement Company v. Kansas City, 172 Mo. 523, 72 S. W. 944 [1902].

the validity of the ordinance.⁵ So if an outlet is in the form of another sewer with which connection is to be made, the assessment is not invalid because such sewer has not as yet been constructed.⁶ If an ordinance provides for the outlet of a sewer "at the north branch of the Chicago river," it will be assumed that the real bed of the stream is intended even if by another ordinance the "north branch" of such river is fixed at a point some four hundred feet east of its actual location.⁷ It has, however, been intimated that the assessment, while not invalid, should not be collected until the right to construct an outlet over private property has been secured by eminent domain or otherwise, and that proceedings to assess benefits might be enjoined until such outlet is thus secured.⁸ If the ordinance shows on its face that no outlet exists it is invalid.⁹ In other jurisdictions it has been said that if an extension to secure an outlet is contemplated when the assessment for the construction of the sewer was levied and if such extension is in fact made, no objection to the assessment can be interposed on the ground that the outlet was not secured when the assessment was levied.¹⁰ If no method of securing an outlet exists, the sewer cannot be used without the consent of owners of private property and an assessment therefor is invalid.¹¹ It is essential under the laws governing some cities in Missouri that a sewer be so constructed as to have an outlet either into a public sewer, district sewer or natural drainage.¹² Such connection may be through an intermediate sewer over which the city has control,¹³

⁵ *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096 [1900].

⁶ *Ryder's Estate v. City of Alton*, 175 Ill. 94, 51 N. E. 821 [1898].

⁷ *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096 [1900].

⁸ *Burhans v. Village of Norwood Park*, 138 Ill. 147, 27 N. E. 1088 [1892].

⁹ *Gage v. City of Chicago*, 191 Ill. 210, 60 N. E. 896.

¹⁰ *Wilson v. City of Cincinnati*, 5 Ohio N. P. 68, 9 Low. Dec. (Ohio) 242 [1897].

¹¹ In the Matter of the Petition of Brainerd to Vacate an Assessment for Sewers in Tenth Avenue, 51 Hun. (N. Y.) 380; 3 N. Y. Supp. 889 [1889].

¹² *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800 [1892]; *City of Kansas City to the Use of the Frear Stone & Pipe Manufacturing Company v. Swope*, 79 Mo. 446 [1883]; *City of St. Joseph ex rel. Danaher v. Dillon*, 61 Mo. App. 317 [1895]; *City of St. Joseph ex rel. Danaher v. Wilshire*, 47 Mo. App. 125 [1891]; *Bayha v. Taylor*, 36 Mo. App. 427 [1889]; *Kansas City v. Ratekin*, 30 Mo. App. 416.

¹³ *Eyerman v. Blakesley*, 78 Mo. 145 [1883]; (affirming *Eyer mann v. Blakesley*, 9 Mo. App. 231 [1880]); *Heman v. Payne*, 27 Mo. App. 481 [1887].

even if it has not been established by ordinance.¹⁴ Such requirement is made by statute in that state and the question, therefore, turns on the construction of such statutes and will be considered elsewhere in detail.¹⁵

§ 402. Outlet in stream.

If a sewer has an outlet in a stream, lake or river, the water of which is polluted by the sewage thus discharged into it, in violation of statute, it has been held that such fact does not prevent an assessment from being levied for the construction of such sewer,¹ at least if the outlet is in fact used for the discharge of sewage. This holding has been placed on the theory that such statute provides against pollution of streams but does not prevent such disposal of sewage unless it is in fact pollution.² An assessment has been upheld where it was shown that the discharge of sewage into a stream might be a nuisance but there was no evidence to show that the discharge was in fact a nuisance, nor was it shown that the owners of land through which the stream ran had not consented to such use.³ Accordingly a city ordinance which provides for discharging sewage into Lake Michigan has been said not to be so far against public policy as to be void.⁴

§ 403. Location of drains and ditches.

The application of these general principles to drains and ditches is substantially the same as their application in case of sewers. A drain may be located in a public street, since this purpose is one for which it must be considered that land is taken when acquired for purposes of a street.¹ If land has been appropriated for a drain by proceedings in eminent domain, mere irregularities not affecting the jurisdiction of the court to enter a judgment appropriating such land can defeat an assessment for such drain.² If land has been conveyed as a right of way for a ditch

¹⁴ *Akers v. Kolkmeier & Company*, 97 Mo. App. 520, 71 S. W. 536 [1902].

¹⁵ See §§ 444-448.

¹ *Cleneary v. Norwood*, 137 Fed. 962 [1905]; *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893].

² *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893].

³ *Cone v. City of Hartford*, 28 Conn. 363 [1859].

⁴ *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894].

¹ *Steele v. Village of River Forest*, 141 Ill. 302, 30 N. E. 1034 [1893].

² *Laverty v. State ex rel. Hill*, 109 Ind. 217, 9 N. E. 774 [1886]; *Laubach v. O'Meara*, 107 Mich. 29, 64 N. W. 865 [1895]. A different rule, of course, applies in direct attack upon the proceedings in eminent domain. See *Scott v. Brackett*, 89

and such deeds are defective in form, but are sufficient to pass an equitable title, at least in connection with the fact that the county has taken possession of such land and has constructed such drain. such defect is not a sufficient ground for resisting an assessment for the cost of such ditch.³ On the other hand if a drain is located on private land, and there is no method provided under the law for acquiring an interest in such land by proceedings in eminent domain, no assessment can be levied for such an improvement.⁴ A revocable license from the owner of the land, permitting the public to make temporary use of such drain is insufficient to make an assessment therefor valid.⁵ If a method of securing a permanent right of way for a drain by proceedings in eminent domain exists, an assessment may be levied for a drain over private land.⁶

§ 404. Location of other improvements.

An assessment cannot be levied for the cost of constructing a bridge which is in part situated on private property, if the owner of such property will be able to prevent the public and the owners or occupants of the property assessed for such improvement from using it.¹ However in some jurisdictions, if the public can acquire an interest in the realty on which the improvement is located, by means of proceedings in eminent domain, without the consent of the owner of such property a local assessment may be levied for a bridge constructed on such private property.² Like considerations apply in case of an assessment to pay for an improvement

Ind. 413, as distinguished in *Lavery v. State ex rel. Hill*, 109 Ind. 217, 9 N. E. 774 [1886].

³ *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902].

⁴ *People on the Relation of Butler v. Board of Supervisors of Saginaw County*, 26 Mich. 22 [1872]; In the Matter of the Petition of Cheeseborough to Vacate an Assessment, 78 N. Y. 232 [1879]; *Olmsted v. Dennis*, 77 N. Y. 378 [1879]; *People ex rel. Williams v. Haines*, 49 N. Y. 587 [1872]; In the Matter of the Petition, Church Wardens and Vestrymen of the Church of Holy Sepulcher to Vacate an Assessment, 61 How. (N. Y.) 315 [1880].

⁵ *Olmsted v. Dennis*, 77 N. Y. 378 [1879].

⁶ *Iroquois and Crescent Drainage District No. 1 v. Harroun*, 222 Ill. 489, 78 N. E. 780 [1906]; *Moore v. City of Albany*, 98 N. Y. 396 [1885].

¹ *Pacific Bridge Co. v. Kirkham*, 54 Cal. 558 [1880]. A tax cannot be levied for the cost of a bridge situated in what is not a legal highway: *Manning v. City of Devil's Lake*, 13 N. D. 47, 112 Am. St. Rep. 652, 99 N. W. 51 [1904].

² *People, etc., ex rel. Butts v. Common Council of the City of Rochester*, 5 Lans. (N. Y.) 142 [1871].

which is intended to promote and facilitate navigation. Thus, an improvement of Lake Minnetonka was provided for by statute. The waters of this lake varied in height from time to time with a variation of six feet between the two extremes, and the proposed improvement was designed to keep the water of the lake at a uniform and steady level intermediate between the two extremes. No provision was made for compensating the owners of land which, as matters stood were covered with water a part of the time only, but which after the improvement was constructed would be submerged all the time; and it was held that since no compensation was provided for, there was no way of acquiring the right to flood their lands; and that therefore since the benefit of such improvement could not be secured to the adjoining property owners, no assessment could be levied.³

§ 405. Presumption of validity of public acts.

If an assessment is resisted on the ground that the improvement is on private land, the ordinary presumption that public officials are performing their duty and acting in compliance with the law¹ applies, and it will be presumed in the absence of evidence to the contrary that the public has an estate or easement in the realty upon which the improvement is situate sufficient to protect the rights of the public and to secure to them the use of such improvement irrespective of the wishes of private individuals.² Accordingly the burden of proof is upon the person who resists the assessment and claims that the improvement is on private ground.³ Thus if it is shown that a sewer is located in a street and that the

¹ *In re Minnetonka Lake Improvement*, *Carpenter v. Board of County Com'rs. of Hennepin County*, 56 Minn. 513, 45 Am. St. Rep. 494, 58 N. W. 295 [1894].

² See § 1279.

³ *Cline v. People ex rel. Barlow*, 224 Ill. 360, 79 N. E. 663 [1906]; *Aldis v. South Park Commissioners*, 171 Ill. 424, 49 N. E. 565 [1898]; *Prescott v. City of Chicago*, 60 Ill. 121 [1871]; *State, Society for Establishing Useful Manufactures, Pros. v. City of Paterson*, 40 N. J. L. (11 Vr.) 250 [1878].

⁴ *Cline v. People ex rel. Barlow*,

224 Ill. 360, 79 N. E. 663 [1906]; *Royal Insurance Company v. South Park Commissioners*, 175 Ill. 491, 51 N. E. 558 [1898]; *Bass v. South Park Commissioners*, 171 Ill. 370, 49 N. E. 549 [1898]; *Prescott v. City of Chicago*, 60 Ill. 121 [1871]; *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431 [1889]; *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071 [1899]; *Dashiell v. Mayor and City Council of Baltimore, Use of Hax*, 45 Md. 615 [1876]; *State, Society for Establishing Useful Manufactures, Pros. v. City of Paterson*, 40 N. J. L. (11 Vr.) 250 [1878].

city has acquired title to but one lateral half of the street it will be assumed in the absence of proof that the sewer was located in the city's half of such street.⁴ The fact that a plan of the sewer shows its course across a tract of land which constitutes a subdivision and is platted into lots is not enough to show that the city has not acquired the right to use such property for a sewer.⁵

G.—TIME OF MAKING IMPROVEMENTS WITH REFERENCE TO ASSESSMENT.

§ 406. Assessments for pre-existing improvements—General nature.

Whether an assessment can be levied for an improvement which was constructed before such assessment was levied is a question which has received some consideration from the courts, but upon which there is an unfortunate lack of harmony. The questions involved are in part constitutional questions involving the power of the legislature to levy assessments or to authorize public corporations to levy them, and in part, statutory questions involving the power of the public corporation as determined by the construction of the statutes conferring such power. These questions will be considered in detail.

§ 407. Assessments for pre-existing improvements held valid.

Statutes in some jurisdictions, provide that assessments may be levied for the cost of pre-existing public improvements which have been already constructed under circumstances such that, but for the particular statute under discussion, no assessment could be levied for such improvement. Whether the legislature has power to authorize an assessment for an improvement constructed before the public corporation decided to pay for it by assessment, the benefits of which have already been received and enjoyed by the property to be assessed, is a question upon which there is comparatively little authority. When the question has been presented for decision some courts have held that in the absence of some specific constitutional provision the legislature has the power

⁴In the matter of the Petition of Ingraham to Vacate an Assessment, 64 N. Y. 310 [1876]; (affirming In the matter of the Petition of Ingraham to Vacate an Assessment

on Eighty-Eighth and Ninety-First Streets, 4 Hun. (N. Y.) 495 [1875]).

⁵Cline v. People ex rel. Barlow, 224 Ill. 360, 79 N. E. 663 [1906].

to authorize local assessments for such public improvements.¹ An analogy to this rule is to be found in the principle that a general tax may be levied to pay a pre-existing debt of the public corporation levying such tax. The power to levy local assessments is ordinarily regarded as a branch of the taxing power² and governed by many of the principles that control ordinary taxation. Another and closer analogy is to be found in the power of the legislature to authorize re-assessments if for any reason the original assessment proves invalid.³ Both of these analogies have been pointed out by the Supreme Court of the United States. "The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say for a public work already done. If this were not so it might be hard to justify re-assessments."⁴

§ 408. Statutes authorizing assessments for improvements made when no statutory authority for assessment exists.

Improvements are sometimes made when there is no statutory authority for levying local assessments therefor, and when accordingly no assessment can be levied.¹ Subsequently the legislature has passed a statute authorizing an assessment for improvements of this sort, and either the terms of such statute are broad enough

¹ *City of Seattle v. Kelleher*, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904]; *Lombard v. West Chicago Park Commissioners*, 181 U. S. 33, 45 L. 731, 21 S. 507 [1901]; (affirming *Cummings v. West Chicago Park Commissioners*, 181 Ill. 136, 54 N. E. 941 [1899]); *Boul v. The People ex rel. Baker*, 127 Ill. 240, 20 N. E. 1 [1890]; *Warren v. Street Commissioners of the City of Boston*, 187 Mass. 290, 72 N. E. 1022 [1905]; *Hall v. Street Commissioners of Boston*, 177 Mass. 434, 59 N. E. 68 [1901]; *Alcorn v. Hamer*, 38 Miss. 652 [1860]; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508 [1854]; *Howard Savings Institution v. Mayor and Common Council of City of Newark*, 52 N. J. L. (23 Vr.) 1, 18 Atl. 672 [1889]; *Matter of Cullen*, 119 N. Y. 628, 23 N. E. 1144; (affirming 53 Hun. 534, 6 N. Y. S.

625); *In the Matter of the Petition of Roberts to Vacate an Assessment*, 81 N. Y. 62 [1880]; *In the Matter of the Confirmation of the Report of the Commissioners of Assessment for Grading, Paving and Otherwise Improving Sackett, Douglas and De Graw Streets in the City of Brooklyn*, 74 N. Y. 95 [1878]; *In re Hollister*, 98 App. Div. 501, 89 N. Y. Supp. 518 [1904]; (affirmed in 180 N. Y. 518, 72 N. E. 1143); *Wetmore v. Campbell*, 4 N. Y. Sup. 341 [1849]; *Doughty v. Hope*, 3 Den. (N. Y.) 249 [1846]; *Bellows v. Weeks*, 41 Vt. 590; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578 [1872].

² See § 8; § 89.

³ See Chapter XVII.

⁴ *Seattle v. Kelleher*, 195 U. S. 351, 359, 49 L. 232, 25 S. 44 [1904].

¹ See Chapter VI., § 775.

to include improvements already made, or by express terms they include such pre-existing improvements. The power of the legislature to impose upon the owners of property benefited by such improvement a burden which up to the time of the passage of such statute devolved upon the entire community has been recognized in some jurisdictions.² The courts which take this view do so on the theory already stated, that the principles of assessment are not those of contract, and that an assessment may be levied for an executed consideration. This view was expressed in a case in which planking was laid down at a time when under the law it was to be paid for by general taxation. A subsequent statute authorized the levy of assessments to pay for such improvements, and assessments were thereupon levied. The Supreme Court of the United States held that such statute and assessment were valid, pointing out that while it was doubtful if the planking was originally authorized, the improvement had been adopted by the city and presumably paid for.³ So it has been held that the legisla-

² *City of Seattle v. Kelleher*, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904]; *Alcorn v. Hamer*, 38 Miss. 652 [1860]; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508 [1854]; *Zahn v. Borough of Rutherford*, 72 N. J. L. (43 Vr.) 446, 60 Atl. 1123 [1905]; *Brown v. Town of Union*, 65 N. J. L. (36 Vr.) 601, 48 Atl. 562 [1900]; *City of Elizabeth v. State, Meker, Pros.*, 45 N. J. L. (16 Vr.) 157 [1883]; In the Matter of the Confirmation of the Report of the Commissioners of Assessment for Grading, Paving and Otherwise Improving Sackett, Douglass and De Graw Streets in the City of Brooklyn, 74 N. Y. 95 [1878]; *Howell v. City of Buffalo*, 37 N. Y. 267; *Matter of Van Antwerp*, 1 N. Y. Supr. Ct. 423; *Butler v. City of Toledo*, 5 O. S. 225 [1855]; *Cleveland v. Tripp*, 13 R. I. 50 [1880]. The validity of such legislation has been recognized where the specific assessment is not within the terms of the statute; *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205 [1869].

³ *City of Seattle v. Kelleher*, 195 U. S. 351, 49 L. 232, 25 S. 44

[1904]. Upon this question the court said: "The answer to the other objections may be made in a few words. If, as said, planking was not authorized under the word 'side-walks' in Ordinance No. 1285, the city has done or adopted the work and presumably has paid for it. At the end the benefit was there, on the ground, at the city's expense. The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say, for a public work already done. *Bellows v. Weeks*, 41 Vermont 590, 599, 600; *Mills v. Charleton*, 9 Am. Rep. 578 29 Wisconsin, 400, 413 [1872]; *Hall v. Street Commissioners*, 177 Massachusetts 434, 439. If this were not so it might be hard to justify re-assessments. See *Norwood v. Baker*, 172 U. S. 269, 293, 19 S. 187, 43 L. 443 [1898]; *Williams v. Supervisors of Albany*, 122 U. S. 154, 30 L. 1088, 7 S. 1244; *Frederick v. City of Seattle*, 13 Washington 428, 43 Pac. 364 [1896]; *Cline v. City of Seattle*, 13 Washington 444, 43 Pac. 367 [1896]; *Bacon v. City of Seattle*, 15 Wash.

ture could adopt and sanction an improvement which it could have authorized in advance; and could provide for an assessment to pay therefor after the improvement was constructed.⁴ So it has been said that a statute authorizing an assessment for levees, and providing that part of such assessment shall be expended for levees which have already been built and shall be applied to paying such pre-existing debts is valid.⁵ So an assessment was levied for a street improvement, based on the preliminary estimate of the cost. Such assessment proved to be insufficient to pay the cost of such improvement. At that time there was no statutory authority for a supplementary assessment and the excess of the cost of the improvement over the amount of the assessment was to be borne by the city. After the improvement was constructed a statute was passed authorizing supplementary assessments in case of deficiency and applying to improvements already constructed. The court held that such statute as applying even to pre-existing improvements was valid.⁶ So it has been held that where a private

ington 701. 47 Pac. 1102; Cooley, Taxation, 3d. ed. 1280. The same answer is sufficient if it be true that when the work was done the cost of planking could not be included in the special assessment, which again depends on the meaning of the words 'sidewalk' and 'pave' in the old Charter Sec. 8, taken with the special provision for planking in Section 7, Laws of 1885-1886, pp. 238-241. The charge of planking on the general taxes was not a contract with the land-owners, and no more prevented a special assessment being authorized for it later than silence of the laws at the same time as to how it should be paid for would have. In either case the legislature could do as it thought best. Of course, it does not matter that this is called a re-assessment. A re-assessment may be a new assessment. Whatever the legislature could authorize if it were ordering an assessment for the first time it equally could authorize, notwithstanding a previous invalid attempt to assess. The previous attempt left the city free 'to take such steps as were within its power to

take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property' in any constitutional way. *Norwood v. Baker*, 172 U. S. 269, 293; *McNamee v. Tacoma*, 24 Washington, 591; *Annie Wright Seminary v. Tacoma*, 23 Washington 109." *City of Seattle v. Kelleher*, 195 U. S. 351, 359-360, 49 L. 232, 25 S. 44 [1904].

⁴In the Matter of the Confirmation of the Report of the Commissioners of Assessment for Grading, Paving and Otherwise Improving Sackett, Douglass and De Graw Streets in the City of Brooklyn, 74 N. Y. 95 [1878].

⁵*Alcorn v. Hamer*, 38 Miss. 652 [1860]; (citing *Williams v. Cammaek*, 27 Miss. 209, 61 Am. Dec. 508 [1854]).

⁶*Butler v. City of Toledo*, 5 O. S. 225 [1855]. A complication existed in the fact that in the meantime the property had been sold to a third person. The court said: "Here the property of the complainant had reaped the benefit of a local improve-

sewer is constructed and is subsequently bought by a public corporation, assessments may be levied for the purchase price thereof.⁷ This may, however, be explained on the theory that the extinguishing of the rights of the former owners of such sewers was a new benefit. So some courts hold that extinguishing the rights of the owners of a private toll road is a new benefit for which assessments may be levied.⁸ Conversely if an improvement is begun to be paid for by local assessments, the legislature may by subsequent statute make such improvement a charge upon the public corporation, to be paid for out of general taxation.⁹

§ 409. Such statutes held invalid.

The courts are not, however, unanimous in upholding such statutes. There are some jurisdictions which seem to hold that a statute authorizing a local assessment for an improvement already constructed under circumstances which did not make the adjoining or abutting property liable to assessment for such improvement, is unconstitutional.¹ If no statute authorized special assessments when the improvement was made, none could then have been levied. The property owners received full benefit from the construction of the improvement. To levy assessments at a later time, under a statute passed subsequently is to charge them for a benefit which they possess already. Accordingly in some jurisdic-

ment, for the making of which the property was originally and justly liable to contribute. By a mistake in the preliminary estimate of cost—a thing of no rare occurrence, and affording no presumption of fraud—the fund first assessed proved to be insufficient. It is but just that he should contribute ratably to supply the deficiency, and if he refuses, it is but just to compel him. Nor do we see how any vested right is impaired by the fact of his purchase intermediate the assessment and re-assessment. He voluntarily purchased lots in a young and thriving city, to the prosperity and growth of which, assessments for purposes of local improvement were absolutely essential, and which, as a reasonable being, he must have anticipated. He pur-

chased his lots subject to any burden which the state might lawfully impose, and we cannot perceive how the vested rights of complainant are any more impaired than are those of every recent purchaser of real estate in Ohio, whose estate is now yearly taxed for the payment of interest and principal on a state debt contracted long before his purchase." *Butler v. City of Toledo*, 5 O. S. 225, 231-233 [1855].

⁷ *Slocum v. Selectmen of Brookline*, 163 Mass. 23, 39 N. E. 351 [1895].

⁸ See § 412.

⁹ *O'Neill v. City of Hoboken*, 72 N. J. L. (43 Vr.) 67, 60 Atl. 50 [1905].

¹ *Holliday v. City of Atlanta*, 96 Ga. 377, 23 S. E. 406 [1895].

tions it is held that such statutes are invalid as far as they apply to previous work.² Thus a street was constructed while a statute was in force which did not authorize a local assessment for the cost of the intersections. Subsequently a statute was passed authorizing a local assessment for the cost of the intersections. It was held that such statute, as far as it authorized assessments for work already done, was invalid.³ Assessments levied to pay pre-existing debts have been held invalid.⁴ In these cases, however, the legislature had not authorized such assessments. Constitutional questions were not involved. The view was expressed, however, that if the statute authorized the levy of assessments upon land outside of the limits of the municipality making the improvement at the time that such improvement was made, such statute would be unconstitutional.⁵ If an improvement has been begun, to be paid by general taxation, the city cannot subsequently levy an assessment therefor.⁶

§ 410. Assessments for improvement under invalid contract.

If the improvement was made under a contract which is invalid and imposes no liability upon the city, or if it is made under other circumstances which leave no liability of any kind enforceable against the city, there are authorities which hold that no assessment can thereafter be levied therefor.¹ Thus it has been held that no assessment can be levied for work done two or three

² Kelly v. Luning, 76 Cal. 309, 18 Pac. 335 [1888]; District No. 110 v. Feek, 60 Cal. 403 [1882]; Reclamation District No. 3 v. Kennedy, 58 Cal. 124 [1881]; In the Matter of Opening and Grading Market Street, 49 Cal. 546 [1875]; Gilmore v. Norton, 10 Kan. 491 [1872].

³ Kelly v. Luning, 76 Cal. 309, 18 Pac. 335 [1888]; (citing Brady v. King, 53 Cal. 44 [1878], and People of the State of California v. Lynch, 51 Cal. 15, 21 Am. Rep. 677 [1875]).

⁴ First National Bank of Sterling v. Drew, 93 Ill. App. 630 [1900]; In the Matter of the Assessments of Lands in the Town of Flatbush for the Extension of Prospect Park in the City of Brooklyn, 60 N. Y. 398 [1875].

⁵ In the Matter of the Assessments of Lands in the Town of Flatbush for the Extension of Prospect Park in the City of Brooklyn, 60 N. Y. 398 [1875].

⁶ Bennett v. City of Emmetsburg, — Ia. —, 115 N. W. 582 [1908].

¹ De Haven v. Berendes, 135 Cal. 178, 67 Pac. 780 [1901]; In the Matter of Opening and Grading Market Street, 49 Cal. 546 [1875]; Dorathy v. City of Chicago, 53 Ill. 79 [1869]; City of Chicago v. Rosenfeld, 24 Ill. 495 [1860]; Peck v. City of Chicago, 22 Ill. 578; Pease v. City of Chicago, 21 Ill. 500; Gilmore v. Norton, 10 Kan. 491 [1872]; Keane v. Klausman, 21 Mo. App. 485 [1886]; Rcilly v. City of Philadelphia, 60 Pa. St. (10 P. F. Smith) 467 [1869].

years before under an invalid contract.² If improvements are made by private persons and subsequently adopted by the city, it is held that the city cannot levy assessments therefor.³ In these cases, however, it does not appear that the city paid for the improvement, except voluntarily and without authority. No statutory authority for making such payments or levying such assessments seems ever to have been granted. The city might have omitted from assessment the property in front of which the owners thereof had made such improvements,⁴ but it could not assess other property owners for the cost of such improvement. Accordingly where the improvement was made by the city itself or at its expense, without levying an assessment therefor, and subsequently after such improvement is completed, an assessment is levied, such assessment has been held to be valid.⁵ There is, however, some authority for holding that even express authority from the legislature to enforce such assessments would be invalid.⁶ A street was constructed voluntarily by certain persons and subsequently the city levied an assessment to pay therefor. Such assessment was held to be invalid, even though the legislature had expressly authorized it.⁷

Some cases, however, have gone to an extreme in the opposite direction. Thus it has been held that after an improvement has been constructed under a contract and the contract price paid therefor, the legislature may authorize an assessment in order to pay a gratuity to the contractor and thus reimburse him for his loss under the contract.⁸ Cases of this sort seem like taking private property without compensation, in order to make a present of it to a third person. The purpose is not one for which general taxation could be justified, even in much stronger cases,⁹ and no

²In the Matter of Opening and Grading Market Street, 49 Cal. 546 [1875].

³Creote v. City of Chicago, 56 Ill. 422 [1870]; Dorathy v. City of Chicago, 53 Ill. 79 [1869]; City of Chicago v. Rosenfeld, 24 Ill. 495 [1860]; Peck v. City of Chicago, 22 Ill. 578; Pease v. City of Chicago, 21 Ill. 500.

⁴See § 646.

⁵Ricketts v. Village of Hyde Park, 85 Ill. 110 [1877]; (distinguishing as cases where the improvement was made by private persons on their own account not under contract with the

city; Peck v. City of Chicago, 22 Ill. 578; Pease v. City of Chicago, 20 Ill. 500).

⁶Gilmore v. Norton, 10 Kan. 491 [1872].

⁷Gilmore v. Norton, 10 Kan. 491 [1872].

⁸Brewster v. City of Syracuse, 19 N. Y. 116 [1859].

⁹State v. Osawkee, 14 Kan. 418, 19 Am. Rep. 99; Lowell v. City of Boston, 111 Mass. 454, 15 Am. Rep. 39; Deering v. Peterson, 75 Minn. 118, 77 N. W. 568.

reason appears why local assessments for such purpose should be in any better position than general taxation. The lower courts of New York have taken a different view of such statutes. Thus an assessment and contract were held void.¹⁰ A curative statute authorizing a contract with the specifically named contractor and providing that such work done by him before the passage of the act should be regarded as performance was characterized as a "very remarkable legislative enactment,"¹¹ and held invalid.¹²

§ 411. Purchase of private improvement.

If a private person has constructed an improvement of a kind which the public might have constructed and for which it is permitted to levy local assessments, a statute authorizing the public corporation to buy such improvement and to levy an assessment to pay for the cost of such purchase is valid as long as such assessment is not levied upon the land of owners who had previously acquired a vested right to make use of such improvement while it was owned by such private person.¹ Thus a city may be authorized to buy a private sewer and to levy an assessment to pay the cost thereof upon the owners of abutting property, as long as such owners had not acquired fixed rights to use such sewer.²

§ 412. Conversion of toll road into public road.

The acquisition of the rights of the owners of a toll road therein, and the conversion of such road into a public road is a public purpose, the expense of which may be met by general taxation.¹

¹⁰ *Hersee v. City of Buffalo*, 1 Sheldon Sup. Ct. (N. Y.) 445 [1874].

¹¹ *Granger v. City of Buffalo*, 6 Abb. N. C. (N. Y.) 238, 243 [1879].

¹² The court said: "To say that one man's property can by special law be taken or incumbered in a manner and by proceedings that do not apply to all is tyranny and revolting to the theory and sentiment of republican equality. If it is competent for the legislature thus to express its will in regard to property situated upon the line of one of our highways why is it not competent for it to prescribe laws differing from the general laws governing the rest of society as to the personal privi-

leges and liberties of those who own that same property and wherein would then consist the assured safety and permanence of the constitutional rights of property or liberty? Such an enactment is more like revolution than the administration of just and equal laws and has no warrant in the law or in the customs of our fathers." *Granger v. City of Buffalo*, 6 Abb. (N. C.) 238, 245, 246 [1879].

¹ *Slocum v. Selectmen of Brookline*, 163 Mass. 23, 39 N. E. 351 [1895].

² *Slocum v. Selectmen of Brookline*, 163 Mass. 23, 39 N. E. 351 [1895].

¹ *Warder v. Commissioners*, 38 O. S. 639 [1883].

The difficulty in upholding assessments for this purpose lies in finding a special or peculiar benefit to the adjoining property. If the abutting property owners have in fact, access to their property over a turnpike or toll road, and it is proposed to appropriate or to purchase such road for use as a public road or street, the question is presented whether such use as a public road gives the abutting property owner any additional benefit over and above that which he already possessed. Upon this point the authorities are few and divergent. In New Jersey it is held that such proceedings confer no benefit to the adjacent land-owner, as he has no additional right of access; and the land upon which such road is situated is still subject to the easement in favor of the public. It is held therefore that it is neither a case of opening a street nor one of vacating a street and the assessment for the cost of such acquisition is accordingly invalid.² In Ohio the courts have held that if a toll road within the city limits has been appropriated by the city in eminent domain, an assessment for the cost of such proceedings less two per cent. which the statute provided should be paid by the city might be assessed upon the abutting property owners.³ The Circuit Court in its opinion reached this conclusion with reluctance as upholding an assessment which was unjust but constitutional. Probably a different result would be reached under later Ohio decisions which hold that local assessments cannot be levied for paying for the cost of opening a street.⁴ In jurisdictions where local assessments may be levied for acquiring land for a public road or street⁵ it is difficult to see why the acquisition of an existing road which could be used only upon payment of compensation therefor is not a benefit to the property dependent thereon for access. The fact that some form of access, upon payment of consideration, already existed should, it would seem, affect only the amount of the assessment, and not the power of levying assessments for such purpose.

² So held in cases where the public purchased such toll road; *State, Aldridge, Pros. v. Essex Public Road Board*, 48 N. J. L. (19 Vr.) 366, 5 Atl. 784 [1886]; *State, Speer, Pros. v. Essex Public Road Board*, 47 N. J. L. (18 Vr.) 101 [1885]; *State v. Laverack*, 34 N. J. L. (5 Vr.) 207; *Carter v. Wright* (3 Dutch.) 207.

³ *Winslow v. City of Cincinnati*, 2

Ohio Dec. 291; same result reached on appeal in *Winslow v. City of Cincinnati*, 10 Ohio C. C. 191, 6 Ohio C. D. 150 [1894]; the latter case affirmed by the Supreme Court without report in *Winslow v. City of Cincinnati*, 53 O. S. 665, 44 N. E. 1150 [1895].

⁴ See § 308.

⁵ See § 308.

§ 413. Assessments without valid ordinance.

Under many of the statutes on the subject of local assessments, the ordinance providing for the public improvement must show the determination of the public corporation that such improvement shall be paid for by local assessment, or else it will be impossible by subsequent ordinance to levy assessments to pay for such improvements. Questions of this class involve statutory construction, do not involve any constitutional questions and are elsewhere discussed in detail.¹ Here it may be observed that under such statutes, if the city constructed an improvement without an ordinance for such improvement, a subsequent assessment therefor is invalid, in the absence of a prior statute providing that the omission of such prior ordinance shall have some other and different effect, and in the absence of some subsequent curative statute.² Thus, if the resolution for construction of a sewer provides that its cost shall be paid out of the general fund of the city, the city cannot after the work is completed, on finding that the city is indebted beyond the constitutional limit, assess the owners of property benefited by such sewer for the cost thereof.³

§ 414. Re-assessments held valid.

Objections of this sort are, however, chiefly statutory. If the legislature has provided specifically concerning the effect of the

¹ See Chapter XV.

² *De Haven v. Berendes*, 135 Cal. 178, 67 Pac. 786 [1901]; *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082 [1893]; *Donnelly v. Howard*, 60 Cal. 291 [1882]; *City of Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853 [1903]; *Connecticut Mutual Life Insurance Company v. City of Chicago*, 185 Ill. 148, 56 N. E. 1071 [1900]; *Pells v. City of Paxton*, 176 Ill. 318, 52 N. E. 64 [1898]; *Davis v. City of Litchfield*, 155 Ill. 384, 40 N. E. 354 [1895]; *Freeport Street Railway Company v. City of Freeport*, 151 Ill. 451, 38 N. E. 137 [1894]; *City of East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934 [1894]; *Weld v. People ex rel. Kern*, 149 Ill. 257, 36 N. E. 1006 [1894]; *City of Carlyle v. The County of Clinton*, 140 Ill. 512, 30 N. E. 782 [1893]; *City of Alton v. Foster*, 74 Ill. App. 511 [1897]; *Zalesky v. City of Cedar*

Rapids, 118 Ia. 714, 92 N. W. 657 [1902]; *Lux & Talbott Stone Company v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903]; *Newman v. City of Emporia*, 32 Kan. 456, 4 Pac. 815 [1884]; *Second Municipality of New Orleans v. Botts*, 8 Rob. (La.) 198 [1844]; *Brown v. Mayor and Aldermen of Fitchburg*, 128 Mass. 282 [1880]; *Diekey v. Holmes*, 109 Mo. App. 721, 83 S. W. 982 [1904]; *Smith v. Small*, 50 Mo. App. 401 [1892]; *Donohue v. Brotherton*, 7 Ohio N. P. 367 [1900]; *Folz v. City of Cincinnati*, 2 Handy (Ohio), 261 [1855]; *Appeal of Harper*, 109 Pa. St. 9, 1 Atl. 791 [1885]; *Reilly v. City of Philadelphia*, 60 Pa. St. (10 P. F. Smith) 467 [1869]; *Buckley v. City of Tacoma*, 9 Wash. 253, 37 Pac. 441 [1894].

³ *Spaulding v. Baxter*, 25 Ind. App. 485, 58 N. E. 551 [1900].

omission to pass a valid ordinance before an assessment is made, and such specific provision declares in express terms or in effect that such assessment is valid, full effect is given in most jurisdictions to such statutes.¹ Thus, if the city is given power to modify its requirements concerning the construction of sewers, a sewer begun under a defective ordinance but constructed under a subsequent valid ordinance may be paid for by assessment.² If the ordinance provides that the improvement shall be paid for by assessments, and such ordinance is valid as to the improvement therein provided for, but invalid as to the particular form of assessment to be levied, it is possible for the city to levy an assessment by a subsequent assessment ordinance.³ So a drainage commissioner may levy a subsequent assessment to pay the cost of a prior improvement.⁴ If the public corporation has made a public improvement and at the time of making such improvement has made an invalid and ineffectual attempt to levy an assessment therefor, a statute curing such defect and providing for a re-assessment for such improvement is valid, if the defect concerned a matter with which the legislature could have dispensed at the outset.⁵ Such

¹ See Chapter XVIII.

² *City to use of Fox v. Schoenemann*, 52 Mo. 348 [1873].

³ *Cummings v. West Chicago Park Commissioners*, 181 Ill. 136, 54 N. E. 941 [1899]; (affirmed in *Lombard v. West Chicago Park Commissioners*, 181 U. S. 33, 45 L. 731, 21 S. 507 [1901]); *Helm v. Witz*, 35 Ind. App. 131, 73 N. E. 846 [1904].

⁴ *Dean v. Treasurer of Clinton County*, 146 Mich. 645, 109 N. W. 1131 [1901]. In this case, however, the subsequent assessment was levied on a larger area than the original assessment, and accordingly it was held that the surplus left after paying for widening cleaning and extending the drain could not be used for paying debts due for the original construction.

⁵ *City of Seattle v. Kelleher*, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904]; *Lombard v. West Chicago Park Commissioners*, 181 U. S. 33, 45 L. 731, 21 S. 507 [1901]; (affirming *Cummings v. West Chicago Park*

Commissioners, 181 Ill. 136, 54 N. E. 941 [1899]); *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]); *Ross v. Board of Supervisors of Wright County, Iowa*, 128 Ia. 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506 [1905]; *Kansas City v. Silver*, 74 Kan. 851, 85 Pac. 805 [1906]; *Newman v. City of Emporia*, 41 Kan. 583, 21 Pac. 593 [1889]; *Mason v. Spencer*, 35 Kan. 512, 11 Pac. 402 [1886]; *City of Emporia v. Bates*, 16 Kan. 495 [1876]; *City of Emporia v. Norton*, 13 Kan. 569 [1874]; *Gilmore v. Norton*, 10 Kan. 491 [1872]; *Mayor and City Council of Baltimore v. Ulman*, 79 Md. 469, 30 Atl. 43 [1894]; *Mayor and City Council of Baltimore v. Horn*, 26 Md. 194 [1866]; *Warren v. Street Commissioners of the City of Boston*, 187 Mass. 290, 72 N. E. 1022 [1905]; *Hall v. Street Commissioners of Boston*, 177 Mass. 434, 59 N. E. [1901]; *State v. District Court of Ramsey*

statutes are not looked upon with favor and are construed even more strictly than original assessment statutes.⁶ After judgment has been rendered declaring a specific assessment invalid the legislature cannot annul such judgment and ratify such assessment.⁷

County, 98 Minn. 63, 107 N. W. 726 [1906]; *McMillan v. Board of County Commissioners of Freeborn County*, 93 Minn. 16, 100 N. W. 384, 1125 [1904]; *State ex rel. Gotzian v. District Court of Ramsey County*, 77 Minn. 248, 79 N. W. 971 [1899]; *S. D. Mercer Co. v. City of Omaha*, — Neb. —, 107 N. W. 565 [1906]; *City of East Orange v. Hussey*, 72 N. J. L. (43 Vr.) 71, 59 Atl. 1060 [1905]; *DeWitt v. City of Elizabeth*, 56 N. J. L. (27 Vroom) 119, 27 Atl. 801 [1893]; *In re Report of Commissioners, etc., of Elizabeth*, 49 N. J. L. (20 Vr.) 488, 10 Atl. 363 [1887]; *State, Bergen County Savings Bank, Pros. v. Inhabitants of the Township of Union in the County of Bergen*, 44 N. J. L. (15 Vroom) 599 [1882]; *State, Peckham, Pros. v. Mayor and Common Council of the City of Newark*, 43 N. J. L. (14 Vroom) 576 [1881]; *State, Walter, Pros. v. Town of Union in the County of Hudson*, 33 N. J. L. (4 Vr.) 350 [1869]; *In the Matter of the Application of the Trustees of Union College for an Order directing the Treasurer of Long Island City to cancel certain water rates and rents*, 129 N. Y. 308, 29 N. E. 460 [1891]; *People ex rel. Kilmer v. McDonald*, 69 N. Y. 362 [1877]; *In the Matter of the Application of Van Antwerp to vacate an assessment*, 56 N. Y. 261 [1874]; *Brewster v. City of Syracuse*, 19 N. Y. 116 [1859]; *Hatzung v. City of Syracuse*, 92 Hun. 203, 36 N. Y. S. 521 [1895]; *Moran v. City of Troy*, 9 Hun. 540 [1877]; *Hopkins v. Mason* 42 Howard (N. Y.) 115 [1871]; *In the Matter of Regulating and Grading Eightieth Street between Fifth Avenue and the East River*, 31 Howard, 99 [1865]; *Astor*

v. Mayor, Aldermen and Commonalty of the City of New York, 37 N. Y. Sup. Ct. Rep. 539 [1874]; *Miller v. Graham*, 17 O. S. 1 [1866]; *Butler v. City of Toledo*, 5 O. S. 225 [1855]; *Duniway v. Portland*, 47 Or. 103, 81 Pac. 945 [1905]; *Thomas v. Portland* 40 Or. 50, 66 Pac. 439 [1901]; *Whitney v. City of Pittsburg* 147 Pa. St. 351, 30 Am. St. Rep. 740, 23 Atl. 395 [1892]; *Donley v. Pittsburg*, 147 Pa. St. 348, 30 Am. St. Rep. 738, 23 Atl. 394 [1892]; *City of Chester v. Black*, 132 Pa. St. 568, 6 L. R. A. 802, 19 Atl. 276 [1890]; *Erie City v. Reed*, 113 Pa. St. 468, 6 Atl. 679; *Hewitt's Appeal*, 88 Pa. St. 55; *Kelley v. City of Pittsburg*, 85 Pa. St. 170, 27 Am. Rep. 633 [1877]; *Commonwealth to use of Allegheny City v. Marshall*, 69 Pa. St. (19 P. F. Smith) 328 [1871]; *Magee v. Commonwealth for the use of the City of Pittsburg*, 46 Pa. St. 358 (10 Wright) 358 [1863]; *Schenley v. Commonwealth for the use of the City of Allegheny*, 36 Pa. St. (12 Casey) 64 [1859]; *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902]; *McNamee v. City of Tacoma*, 24 Wash. 591, 64 Pac. 791 [1901]; *Abernethy v. Town of Medical Lake*, 9 Wash. 112; 37 Pac. 306 [1894]; *Haubner v. City of Milwaukee*, 124 Wis. 153, 101 N. W. 930 (re-hearing denied, 102 N. W. 578 [1905]); *Schintgen v. City of LaCrosse*, 117 Wis. 158, 94 N. W. 84 [1903]; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578 (1872); *Dean v. Charlton*, 27 Wis. 522 [1871]; see Chapter XVII.

⁶ *Dean v. Charlton*, 27 Wis. 522 [1871].

⁷ *Searcy v. Patriot and Barkworks Turnpike Company*, 79 Ind. 274 [1881]; *Thomas v. Portland*, 40 Or.

"It would not be competent for the legislature to validate such an assessment notwithstanding an adjudication of a court declaring it a nullity and thus permit it to be enforced in the manner pointed out by the charter, through the issuance of a warrant and levy and sale of the property thereunder. A statute which operates to annul or set aside the final judgment of a court of competent jurisdiction and to disturb or defeat rights thus vested is inoperative and void. By reason of the distribution of powers under the constitution assigning each its separate and distinct functions, one department is not permitted to trench upon the functions and powers of the other."⁸ In some jurisdictions it has been held that "the legislature cannot legalize a void assessment."⁹ So a statute attempting to cure assessment proceedings under an unconstitutional statute has been held invalid.¹⁰ However, a statute authorizing another assessment for the same improvement is not objectionable as setting aside a pre-existing judgment declaring a former assessment invalid.¹¹ Such re-assessment statute recognizes and is based upon the theory that the original assessment is invalid.

§ 415. Contract may precede assessment.

If the statute permits the assessment to be levied after the contract is made, full effect is given to such statute. No constitutional restrictions seem to compel the legislature to require that the assessment shall be levied before the contract is made.¹ In such

50, 66 Pac. 439 [1901]; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578 [1872].

⁸ *Thomas v. Portland*, 40 Or. 50, 52, 66 Pac. 439 [1901].

⁹ *Schumacker v. Toberman*, 56 Cal. 508, 511 [1880]; (citing *People of the State of California v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677 [1875]); *Taylor v. Palmer*, 31 Cal. 240 [1866]. To the same effect see *Brady v. King*, 53 Cal. 44 [1878].

¹⁰ *State, Peckham, Pros. v. Mayor and Common Council of the City of Newark*, 43 N. J. L. (14 Vr.) 576 [1881].

¹¹ *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578 [1872].

¹ *Pennsylvania Co. v. Cole*, 132 Fed. 668 [1904]; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1885];

State of Kansas on the relation of Young v. City of Neodesha, 3 Kan. App. 319, 45 Pac. 122 [1896]; *Prince v. City of Boston*, 111 Mass. 226 [1872]; *Whiting v. Mayor and Aldermen of the City of Boston*, 106 Mass. 89 [1870]; *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870]; *Butler v. Detroit*, 43 Mich. 552, 5 N. W. 1078; *Lefevre v. Mayor, etc., of Detroit*, 2 Mich. 586 [1853]; *Keigher v. City of St. Paul*, 69 Minn. 78, 72 N. W. 54 [1897]; *Elwood v. City of Rochester*, 43 Hun. (N. Y.) 102 [1887]; *Webber v. Common Council of the City of Lockport*, 43 How. (N. Y.) 368 [1872]; *Addyston Pipe and Steel Company v. City of Corry*, 197 Pa. St. 41, 80 Am. St. Rep. 812, 46 Atl. 1035 [1900].

cases the work is begun under circumstances which, if not modified by the subsequent action of the public corporation would make the cost of the improvement a charge upon the public corporation, to be paid for out of the revenues accruing from general taxation,² but the validity of such statutes is not affected thereby. Property owners are bound to know, when the improvement is begun, that the public corporation has not made a final election to pay for such improvement by general taxation, but that it may still assess therefor.

§ 416. Payment by city does not invalidate assessment.

If authorized by statute the city or other public corporation may pay for the cost of a public improvement out of its treasury, from funds raised by general taxation and then proceed to reimburse itself in whole or in part by levying an assessment for the cost of such improvement.¹ This rule applies even if by statute the public corporation should have paid the cost of such improvement only out of the fund created by the assessment.² So the fact that the improvement is paid out of a fund raised by several local assessments does not prevent the levy of local assessments.³ The fact that the public corporation has borrowed money⁴ as by issu-

² *Smith v. Duck Pond Ditching Association*, 54 Ind. 235 [1876]; *In the Matter of the Petition of Roberts to Vacate an Assessment*, 81 N. Y. 62 [1880]; *Doughty v. Hope*, 3 Denio (N. Y.) 249 [1846]; *Wetmore v. Campbell*, 4 N. Y. Sup. Ct. Rep. 341 [1849]; *Strowbridge v. City of Portland*, 8 Or. 67 [1879].

¹ *Sweet v. West Chicago Park Commissioners*, 177 Ill. 492, 53 N. E. 74 [1899]; *City of Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342 [1889]; *City of Lafayette v. Fowler*, 34 Ind. 140 [1870]; *City of Burlington v. Quick*, 47 Ia. 222 [1877]; *Patterson v. Baumer*, 43 Ia. 477 [1876]; *Burns v. City of Duluth*, 96 Minn. 104, 104 N. W. 714 [1905]; *Bradley v. Village of West Duluth*, 45 Minn. 4, 47 N. W. 166 [1890]; *State, Jelliff, Pros. v. Mayor and Common Council of the City of Newark*, 48 N. J. L.

(19 Vr.) 101, 2 Atl. 627 [1886]; *Elwood v. City of Rochester*, 43 Hun. (N. Y.) 102 [1887]; *Heath v. McCrear*, 20 Wash. 342, 55 Pac. 432 [1898]; *Town of Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 323 [1897].

² *Petterson v. Baumer*, 43 Ia. 477 [1876].

³ *Burns v. City of Duluth*, 96 Minn. 104, 104 N. W. 714 [1905]. The money raised by the various local assessments was deposited in a "revolving fund" out of which new improvements were paid for in advance: and then assessments were levied for such improvements to replenish such fund.

⁴ *Davis v. City of Newark*, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891]; *In re Beechwood Avenue, Appeal of O'Mara*, 194 Pa. St. 86, 45 Atl. [1899].

ing bonds,⁵ and has thus paid for the cost of such improvement does not prevent the subsequent levy of an assessment against the property benefited by such improvement to reimburse the city. So if the public corporation has paid for the improvement by issuing warrants to the contractor⁶ or to one who loans money to pay for such improvement⁷ it may reimburse itself by levying an assessment.

§ 417. Benefit dependent on future action.

The property owner must have a fixed right to the improvement and the benefits which accrue therefrom to render him liable to assessment therefor. If he is not vested with such rights, and he may or may not continue to enjoy such benefits, dependent upon the future action of a natural person or of a private or public corporation, such benefit is too precarious to be the basis of an assessment for benefits.¹ Thus if owners of water seek damages for diverting water, the city cannot set off the value of the use of the returned sewage if the city is under no legal obligation to return such sewage.² An assessment for improving a navigable stream was held invalid among other reasons, because such improvement was dependent upon the approval of the Secretary of War, which approval had not yet been secured and might never be secured.³ However, if a bridge has actually been constructed across a navigable stream to connect the parts of a street upon either bank, the legality of such bridge will be presumed and the assent of the

⁵ *People ex rel. Wood v. Jones*, 137 Ill. 35, 27 N. E. 294 [1892]; *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890]; *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605 [1891]; *State of Minnesota v. Norton*, 63 Minn. 497, 65 N. W. 935 [1896]; *State, Hand. Pros. v. City Council of the City of Elizabeth*, 31 N. J. L. (2 Vr.) 547 [1864].

⁶ *City of Atchison v. Leu*, 48 Kan. 138, 29 Pac. 467 [1892]; *City of Port Angeles v. Lauridsen*, 26 Wash. 153, 66 Pac. 403 [1901].

⁷ *Corliss v. Village of Highland Park*, 132 Mich. 152, 93 N. W. 610, 95 N. W. 254; affirmed on rehearing 95 N. W. 416 [1903].

¹ *City of Waukegan v. Burnett*,

234 Ill. 460, 84 N. E. 1061 [1908]; *Gage v. City of Chicago*, 191 Ill. 210, 60 N. E. 896 [1901]; *Title Guarantee and Trust Co. v. City of Chicago*, 162 Ill. 505, 44 N. E. 832 [1896]; *Edwards v. City of Chicago*, 140 Ill. 440, 30 N. E. 350 [1893]; *Hutt v. City of Chicago*, 132 Ill. 352, 23 N. E. 1010 [1891]; *Swenson v. Board of Supervisors of Town of Hallock*, 95 Minn. 161, 103 N. W. 895 [1905]; *Langmead v. City of Cincinnati*, 29 Ohio C. C. 64 [1906]; *In re Barre Water Co.*, 72 Vt. 413, 48 Atl. 653.

² *In re Barre Water Co.*, 72 Vt. 413, 48 Atl. 653.

³ *City of Chicago v. Law*, 144 Ill. 569, 33 N. E. 855 [1893].

Secretary of War need not be shown.⁴ Relief will be given against an assessment of which confirmation is obtained by means of a promise to condemn the land on which the improvement is located, where the city abandons the condemnation proceedings after obtaining such confirmation.⁵ The most common form of attempted assessment in such cases is found where a public corporation seeks to levy assessments for improvements to be made in the future.

§ 418. Assessments for future improvements.

Cases are occasionally presented in which an improvement has been constructed which does not of itself confer any benefit, or which does not confer a benefit upon land which it is sought to assess but which will prove beneficial in the future if the municipal corporation or other public corporation proceed to construct a further and additional improvement. If the public corporation has resolved to construct such improvement, it is generally held that a statute authorizing the levy of an assessment for the benefits which will be conferred by such improvement, already resolved upon but to be constructed in the future, is constitutional.¹ A public corporation is regarded as under a legal obligation to construct such improvement, an obligation which may be enforced by the owners of the property assessed in case such public corporation does not voluntarily construct such improvement. In the cases thus far considered, a public corporation was under some legal obligation to construct the future improvement which would cause a benefit to inure to the property assessed, in return for which benefit the assessment is levied. Different considerations apply where the public corporation is not under any legal obligation to construct such improvement, but is free to construct it, or not to construct it, as in its discretion it may deem best. In cases of this sort the property owner has no means of compelling a public corporation to construct the improvement so as to benefit him in any way. Accordingly, it is generally held that in such cases the local assessment cannot be levied, since the property owner has no assurance that the improvement will ever be so constructed as to confer a benefit upon his property which it is sought to assess

⁴ *Pearson v. City of Chicago*, 162 Ill. 383, 44 N. E. 739 [1896].

⁵ *Dempster v. City of Chicago*, 175 Ill. 278, 51 N. E. 710 [1898].

¹ *Lingle v. West Chicago Park Com-*

missioners, 222 Ill. 384, 78 N. E. 794 [1906]; *Reed v. City of Cedar Rapids*, — Ia. —, 111 N. W. 1013 [1907].

for such improvement.² Thus a street was laid out across a river, but no provision for a bridge was made. It was held that the benefits which would accrue in the future if the bridge was constructed could not be estimated in determining the amount of the assessment.³ Thus no assessment can be levied against land which will be benefited by a sewer only if the sewer is extended.⁴ Thus it has been held that no assessment can be levied for the construction of a sewer on land a third of a mile away which could be drained by such sewer if a lateral sewer were constructed, where the public corporation is not bound to construct such lateral sewer.⁵ So no assessment can be levied or charge made for drainage for a benefit which will probably result in the future, in accordance with past custom, as a result of the construction of a highway, the town not being bound to construct such highway so as to cause drainage.⁶ There is, however, some authority for allowing such assessments. Thus a street would prove beneficial to its full extent only if a bridge were built to connect the two sections of the street on opposite sides of a river. It was held proper to levy the assessment on the assumption that such bridge would be built.⁷

² *City of Waukegan v. Burnett*, 234 Ill. 460, 84 N. E. 1061 [1908]; *Clark v. City of Chicago*, 214 Ill. 318, 73 N. E. 358 [1905]; *Gage v. City of Chicago*, 191 Ill. 210, 60 N. E. 896 [1901]; *Holdom v. City of Chicago*, 169 Ill. 109, 48 N. E. 164 [1897]; *Title Guarantee and Trust Co. v. City of Chicago*, 162 Ill. 505, 44 N. E. 832 [1896]; *Edwards v. City of Chicago*, 140 Ill. 440, 30 N. E. 350 [1893]; *Hutt v. City of Chicago*, 132 Ill. 352, 23 N. E. 1010 [1891]; *Swenson v. Board of Supervisors of Town of Hallock*, 95 Minn. 161, 103 N. W. 895 [1905]; *Hanscom v. City of Omaha*, 11 Neb. 37, 7 N. W. 739 [1881]; *People ex rel. Marvin v. City of Brooklyn*, 23 Barb. (N. Y.) 166 [1856].

³ *Hutt v. City of Chicago*, 132 Ill. 352, 23 N. E. 1010 [1891]; *contra*: *Dickson v. City of Racine*, 65 Wis. 306, 27 N. W. 58 [1886].

⁴ *Edwards v. City of Chicago*, 140 Ill. 440, 30 N. E. 350 [1893]. To the same effect, see *Clark v. City of Chicago*, 214 Ill. 318, 73 N. E. 358 [1905]; *Gage v. City of Chicago*, 191 Ill. 210, 60 N. E. 896 [1901]; *Title Guarantee and Trust Co. v. City of Chicago*, 162 Ill. 505, 44 N. E. 832 [1896].

⁵ *State, New Jersey Railroad and Transportation Company, Pros. v. City of Elizabeth*, 37 N. J. L. (8 Vr.) 330 [1875]. To the same effect, see *Hanscom v. City of Omaha*, 11 Neb. 37 [1881]; *People ex rel. Marvin v. City of Brooklyn*, 23 Barb. (N. Y.) 166 [1856].

⁶ *Swenson v. Board of Supervisors of Town of Hallock*, 95 Minn. 161, 103 N. W. 895 [1905].

⁷ *Dickson v. City of Racine*, 65 Wis. 306, 27 N. W. 58 [1886].

H.—CLASSES OF IMPROVEMENTS WITH REFERENCE TO TYPES OF ASSESSMENT.

§ 419. Classes of improvements for which assessments for benefits may be levied.

In determining whether an improvement of a given type is one for which the public corporation making such improvement may levy an assessment for benefits, or whether it is an improvement for which an assessment for the performance of a legal duty owing by the owner of the real property may be levied, or whether it is one for which a so-called assessment in return for goods delivered or work and labor done may be levied, we find that the courts are not harmonious in determining how certain types of improvement are to be classed. Furthermore, some improvements are regarded as being for a public purpose, and conferring a special local benefit on the one hand, and on the other as being a performance of a duty which the law imposes upon the owner of the property assessed therefor. In the case of such improvements the legislature may provide for an assessment either upon the theory of benefits or upon the theory of a charge for the performance of a legal duty.¹ Thus while the legislature may require the property owner to construct a sidewalk in front of his property on the theory of performance of a legal duty² yet if the legislature requires a sidewalk to be constructed on the theory of an assessment for benefits, the city cannot compel the property owner to construct the improvement in front of his property.³ According to the great weight of authority, public streets in a city, town, or village, constitute improvements for which assessments may be levied upon the theory of benefits, and on no other theory.⁴ This general principle includes laying out and opening of streets, and grading them and paving them.⁵ An assessment based on the theory of the performance of a legal duty cannot be levied for such improvements.⁶ It also includes such improvements as curbing and guttering, where such improvements are regarded as a part of the street.⁷ Assessments for thoroughfares

¹ See §§ 323, 324, *et seq.*, 334 *et seq.*

² See §§ 96, 323.

³ *Arndt v. City of Cullman*, 132 Ala. 540, 90 Am. St. Rep. 922, 31 So. 478.

⁴ *Shaler v. McAleese*, — N. J. Eq. —, 68 Atl. 416 [1907]; see § 95.

⁵ See §§ 95, 301 *et seq.*

⁶ *Motz v. City of Detroit*, 18 Mich. 494 [1869].

⁷ See §§ 95, 315.

and boulevards are generally upheld and placed within this class.⁸ Where assessments for public roads in the country are upheld, it is ordinarily upon the theory that such assessments are levied in return for the special benefits conferred upon the property assessed by such an improvement.⁹ Assessments for parks are upheld upon the theory of special benefits conferred by such improvement.¹⁰ The same principles apply to assessments for bridges, fences, and river and harbor improvements where they are regarded as valid.¹¹ A sidewalk seems to be regarded as an improvement which confers a special benefit and in some jurisdictions to be also regarded as an improvement which it is the legal duty of the adjoining land-owner to make. Accordingly, we find that in some jurisdictions an assessment for a sidewalk, made upon the theory of benefits, is regarded as valid.¹² In view of the nature of the improvement, this is probably not inconsistent with the view elsewhere expressed, that an assessment for a sidewalk based on the theory that it is the legal duty of the owner of the adjoining property to construct it at his own expense, is valid. Assessments for sidewalks have been held valid upon one of these theories without undertaking to decide which one.¹³ From this standpoint, sewers may be classed with sidewalks. They are generally regarded as conferring a special benefit upon the property drained thereby. In some jurisdictions at least it is held that the owner of property is legally bound to construct a sewer to drain the same, if required to do so by statute. Accordingly, we find that assessments for sewers on the theory of benefits are generally upheld as valid.¹⁴ This view is probably consistent with the theory adopted in some jurisdictions, that assessments for sewers based on the theory of legal duty, are valid.¹⁵ Similar considerations apply to drains and ditches. They confer a special benefit upon the property drained thereby, and further, in some jurisdictions at least it is held that the legal duty of constructing such drains may be imposed upon the owner of the property

⁸ See §§ 304, 305.

⁹ See § 322; *Bauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; (reversing *District of Columbia v. Armes*, 8 App. D. C. 393 [1896], *Bauman v. Ross*, 9 App. D. C. 260 [1896], *Abbott v. Ross*, 9 App. D. C. 289 [1896]).

¹⁰ See § 356.

¹¹ See §§ 359, 360, 363.

¹² §§ 96, 323.

¹³ *Lentz v. City of Dallas*, 96 Tex 258, 72 S. W. 59 [1903].

¹⁴ §§ 97, 324 *et seq.*; *Wolf v. City of Philadelphia*, 105 Pa. St. 25 [1884]; *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692 [1887].

¹⁵ § 97.

benefited.¹⁶ Accordingly, assessments for the construction of drains, based upon the theory of benefits, are generally held to be valid.¹⁷ In some jurisdictions it seems to be assumed that assessments for the construction of drains, based on the theory of the performance of a legal duty, are also valid.¹⁸ Where assessments for sprinkling, sweeping and cleaning the streets are upheld, it is generally upon the theory of assessments for benefits.¹⁹ This view, however, is due in part to the fact that such statutes are ordinarily based upon the theory of benefits, and if upheld at all must be upheld upon that theory.

§ 420. Classes of improvements for which assessments for legal duty may be levied.

In determining what improvements belong in the class for which assessments may be levied, based on the theory that it is the legal duty of the property owner to construct such improvement, at his own expense, and that if he omits or neglects to do so the public may construct such improvement and charge such owner with the cost thereof, we find a greater divergence of judicial opinion. There is some authority for intimating that the construction of streets¹ and public roads² may be placed in this class. This view, however, is contrary to that taken by the great weight of authority.³ In many jurisdictions it is held that the construction of sidewalks is a purpose for which assessments of this type may be levied.⁴ While this view has not been taken

¹⁶ §§ 97, 334.

¹⁷ §§ 97, 334.

¹⁸ §§ 97, 334 *et seq.*

¹⁹ See § 370.

¹ *Adams v. Fisher*, 63 Tex. 651 [1885].

² *Barrow v. Hepler*, 34 La. Ann. 362 [1882].

³ See § 95.

⁴ *Arndt v. City of Cullman*, 132 Ala. 540, 90 Am. St. Rep. 922, 31 So. 478; *Speer v. Mayor and Council of Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890]; *Winter v. City Council of Montgomery*, 83 Ala. 589, 3 So. 235 [1887]; *City of Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899 [1889]; *Palmer v. Way*, 6 Colo. 106 [1881]; *White v. People ex rel. City*

of Bloomington, 94 Ill. 604 [1880]; *Town of Greendale v. Suit*, 163 Ind. 282, 71 N. E. 658 [1904]; *Sloan v. Beebe*, 25 Kan. 343; *Langan v. Bitzer*, — Ky. —, 82 S. W. 280, 26 Ky. L. R. 579 [1904]; *Hydes v. Joyes*, 67 Ky. (4 Bush.) 464, 96 Am. Dec. 311 [1868] *O'Leary v. Sloo*, 7 La. Ann. 25 [1852]; *City of Lowell v. Hadley*, 49 Mass. (8 Met.) 180 [1844]; *Flint v. Webb*, 25 Minn. 93 [1878]; *Nugent v. City of Jackson*, 72 Miss. 1040, 18 So. 493 [1895]; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451 [1879]; *Kemper v. King*, 11 Mo. App. 116 [1881]; *City of Lincoln v. Janesch*, 63 Neb. 707, 93 Am. St. Rep. 478, 56 L. R. A. 762, 89 N. W. 280; *State, Kirk-*

by all the courts, on the other hand the contrary view is rare. In many states the legislature has not attempted to levy assessments of this sort for sidewalk improvements. The fact, therefore, that such assessments have not been upheld does not show that they might not be upheld if the question were presented for judicial determination. A curbstone and a gutter,⁵ or a railing on the side of the sidewalk,⁶ or grading and excavating that part of the street to be occupied by the sidewalk⁷ have been held not to be part of a sidewalk proper, and hence assessments for such improvements must be justified, if at all, on the theory of benefits. A gutter has, however, been held not to be an improvement within this class.⁸ In many jurisdictions the construction of sewers is a purpose for which assessments of this type may be levied.⁹ Under this theory the cost of a sewer connec-

patrick, Pros. v. Commissioners of Streets and Sewers in the City of New Brunswick, 42 N. J. L. (13 Vr.) 510 [1880]; State, Agens, Pros. v. Mayor and Common Council of Newark, 37 N. J. L. (8 Vr.) 415, 18 Am. Rep. 729 [1874]; State, Van Tassel, Pros. v. Mayor and Aldermen of Jersey City, 37 N. J. L. (8 Vr.) 128 [1874]; State, Sigler, Pros. v. Fuller, 34 N. J. L. (5 Vr.) 227 [1870]; Buffalo City Cemetery Co. v. City of Buffalo, 46 N. Y. 506 [1872]; Wilhelm v. City of Defiance 58 O. S. 56, 65 Am. St. Rep. 745, 40 L. R. A. 294, 50 N. E. 18 [1898]; Philadelphia v. Pennsylvania Hospital, 143 Pa. St. 367, 22 Atl. 744 [1891]; Smith v. Kingston Borough 120 Pa. St. 357, 14 Atl. 170 [1888]; Wilvert v. Sunbury Borough, 81½ Pa. St. (32 P. F. Smith) 57 [1871]; Deblois v. Barker. 4 R. I. 445; Tripp v. City of Yankton, 10 S. D. 516, 74 N. W. 447 [1898]; Whyte v. Mayor and Aldermen of Nashville, 32 Tenn. (2 Swan) 364 [1852] Washington v. Mayor and Aldermen of Nashville, 31 Tenn. (1 Swan) 177 [1851]; Mayor and Aldermen v. Maberry. 25 Tenn. (6 Humph.) 368, 44 Am. Dec. 315 [1845]; Taylor, McBean & Co. v. Chandler, 56 Tenn. (9 Heisk.) 346; *sub nomine* McBean v. Chandler, 24

Am. Rep. 308 [1872]; Nashville v. Berry, 2 Shannon's Cases (Tenn.) 561; Lentz v. City of Dallas, 96 Tex. 258, 72 S. W. 59 [1903]; Wilson v. Town of Philippi, 39 W. Va. 75, 19 S. E. 553 [1894]; Stowell v. City of Milwaukee, 31 Wis. 523 [1872].

⁵ Wilson v. Chilcott, 12 Colo. 600, 21 Pac. 901 [1889]; State, Robins, Pros. v. Commissioners of Streets and Sewers in the City of New Brunswick, 44 N. J. L. (15 Vr.) 116 [1882].

⁶ Williams v. Brace, 5 Conn. 190 [1824].

⁷ State, Kirkpatrick, Pros. v. Commissioners of Streets and Sewers of New Brunswick, 42 N. J. L. (13 Vr.) 510 [1880]; State, Cronin, Pros. v. Mayor and Aldermen of Jersey City 38 N. J. L. (9 Vr.) 410 [1876]; State, Van Tassel, Pros. v. Mayor and Aldermen of Jersey City, 37 N. J. L. (8 Vr.) 128 [1874].

⁸ State, Kirkpatrick, Pros. v. Commissioners of Streets and Sewers in the City of New Brunswick, 42 N. J. L. (13 Vr.) 510 [1880].

⁹ Gray v. Board of Aldermen of Boston, 139 Mass. 328, 31 N. E. 734; Van Wagoner v. Mayor and Aldermen of City of Paterson, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902].

tion from the property in question to the public sewer may be imposed upon such property.¹⁰ The construction of drains, also, if payable by assessment, is to be referred to this class in some jurisdictions.¹¹ At one time the Supreme Court of South Carolina was inclined to uphold assessments for sidewalks, drains and sewers, as being assessments of this type, while assessments of the first type were held to be invalid.¹² This distinction has since been repudiated and assessments of the second type as well as those of the first have been held to be invalid.¹³ Statutes imposing upon railroads the cost of constructing viaducts over railroad tracks are in effect assessments of this class.¹⁴ Under this theory a railroad may be compelled to build a viaduct at its own expense.¹⁵ While a railroad may be required to construct a suitable bridge for carrying its tracks above the street so as to avoid the grade crossing, the city cannot prescribe the kind of bridge which shall be built, nor can it build a bridge for the railroad at the expense of the latter. Since the railroad is primarily responsible for the safe construction of such bridge, it must be given the discretion as to the kind of bridge which it will construct.¹⁶ Assessments for abatement of nuisances,¹⁷ such as filling up land upon which filth or stagnant water collects,¹⁸ and for the maintenance of lights at railroad crossings,¹⁹ are to be referred to this class. Where a property owner may

¹⁰ *State. Van Wagoner. Pros. v. Mayor and Aldermen of the City of Paterson*, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902].

¹¹ See § 97; *State. Brittin. Pros. v. Blake*, 36 N. J. L. (7 Vr.) 442 [1872]; *Town of Muskego v. Drainage Commissioners*, 78 Wis. 40, 47 N. W. 11 [1890]; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947 [1889]; *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545 [1887].

¹² *Mauldin v. City Council of Greenville*, 42 S. C. 293, 46 Am. St. Rep. 723, 27 L. R. A. 284, 20 S. E. 842 [1893].

¹³ See § 302.

¹⁴ See § 359.

¹⁵ *Northern Pacific Ry. v. Duluth*, 208 U. S. 583 [1908]; (affirming

State ex rel. City of Duluth v. Northern Pacific Ry. Co., 98 Minn. 429, 108 N. W. 269); see § 359.

¹⁶ *City of Bloomington v. Chicago and Alton R. R. Co.*, 134 Ill. 451, 26 N. E. 366 [1890].

¹⁷ *Kennedy v. Board of Health*, 2 Pa. St. 366 [1845]; *Rude v. Town of St. Marie*, 121 Wis. 634, 99 N. W. 460 [1904]; *Smith v. City of Milwaukee*, 18 Wis. 63 [1864].

¹⁸ *Watkins v. City of Milwaukee*, 55 Wis. 335, 13 N. W. 222; see § 342.

¹⁹ *Chicago, Indianapolis and Louisville Ry. Co. v. City of Crawfordsville*, 164 Ind. 70, 72 N. E. 1025 [1904]; *Cincinnati, Hamilton and Dayton R. Co. v. Village of Bowling Green*, 57 O. S. 336, 41 L. R. A. 422, 49 N. E. 121 [1897]; see § 369.

be required to remove ice and snow from a sidewalk at his own expense, it is in effect an assessment of this type.²⁰ Statutes or ordinances requiring the property owner to remove ice and snow from sidewalks are generally based upon the theory that a legal duty to remove such ice and snow rests upon the property owner, and not upon any theory of benefits. Accordingly, if upheld at all, they must be upheld upon the theory of an assessment for a legal duty. While it has been attempted to justify assessments for laying water pipes upon the theory of the performance of a legal duty, such attempt has failed, and it has been held that unless such assessment can, in the particular case, be justified on the theory of benefits, it cannot be upheld.²¹

§ 421. Classes of improvements for which assessments for goods sold may be levied.

In determining for what purposes so-called assessments may be levied for goods sold, or work and labor done, we find that the legislature has attempted to provide for few charges of this kind outside of charges for furnishing water. Charges of this sort are upheld as being assessments of this type.¹ Under a statute providing that water-ways should be excavated upon tide lands of the state, and that a lien for the cost of such excavation should attach to such land, and that the lands should be sold to private individuals subject to such lien, purchasers of such land were held bound to pay such lien, the theory of the court apparently being that such assessment was a charge voluntarily assumed by the purchaser of such land.² So statute providing that a land-owner must pay the cost of construction and maintenance of a sewer if he wishes to make use of it,³ or the cost of a service water-pipe from the main pipe to the lot, if he wishes to make use of it,⁴ are valid enactments, and may be upheld as assess-

²⁰ See §§ 58, 371.

²¹ *Doughten v. City of Camden*, 72 N. J. L. 451, 3 L. R. A. (N. S.) 817, 63 Atl. 170 [1906].

¹ See §§ 298, 353.

² *Seattle Dock Co. v. Seattle and Lake Washington Waterway Co.*, 195 U. S. 624, 25 S. 789 [1904]; (affirming in a *per curiam* without report, *Seattle and Lake Washington Waterway Co. v. Seattle*

Dock Co., 35 Wash. 503, 77 Pac. 845 [1904]).

³ *Carson v. Brockton Sewerage Commissioners*, 182 U. S. 398, 45 L. 1151, 21 S. 860 [1901]; (affirming *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]).

⁴ *Prindiville v. Jackson*, 79 Ill. 337 [1875].

ments of this type. It may be noted, however, that assessments of the latter class might be upheld on the theory of benefits, without reference to the assent of the property owner,⁵ and in exacting the cost from the property owner only if he chooses to make use of the improvement, the legislature is exacting less than it might. Where an assessment based on the theory of benefits and levied to pay for the construction of a sewer has been resisted successfully by some of the property owners, a rule requiring such owners to pay an amount equal to such assessment in case they wish to make use of such sewer is valid.⁶

⁵ *Prindiville v. Jackson*, 79 Ill. 337 [1875].

⁶ *Hermann v. State ex rel.*, 54 O. S. 506, 32 L. R. A. 734, 43 N. E. 990 [1896].

CHAPTER IX.

STATUTORY PROVISIONS CONCERNING PUBLIC IMPROVEMENTS.

§ 422. Construction of legislative provisions with reference to public improvements.

Since the legislature has a wide discretion in determining what improvements confer a general benefit to the public at large so that they may be constructed by the public under the taxing power and also confer especial benefit upon the property affected thereby so that local assessments may be levied therefor,¹ it follows that if the improvement is one for which it is possible that a local assessment may be levied,² the determination of the legislature is final as to whether such improvement shall be constructed or not, and if so, whether it shall be paid for by general taxation or by special assessment, or in part by each.³ After it is once determined that the improvement falls within one of the classes of those for which the legislature may levy local assessments, further questions as to the power of the city or other public corporation or officer to levy local assessments for given kinds of improvements turn on the statutory grant of authority by the legislature and involve the construction of the statutes granting such authority. As has been said before,⁴ power to pay for an improvement by general taxation is not of itself power to levy local assessments for such improvement.⁵ Under the distinction made in Illinois between special taxation and special assessment, power to levy a special tax for a given kind of improvement is not power to levy a special assessment therefor.⁶ Thus a statute providing for the construction of sidewalks to be paid for by special taxation does not extend the power of special

¹ See § 290.

² See § 292.

³ See § 292.

⁴ See § 231.

⁵ *Krumberg v. City of Cincinnati*, 29 O. S. 69 [1875].

⁶ *People ex rel. Raymond v. Field*, 197 Ill. 568, 64 N. E. 544 [1902].

taxation to improvements of other types and does not authorize special assessments for the construction of sidewalks.⁷

§ 423. Cost of pre-existing improvements.

Whether an assessment can be levied for improvements already constructed and not undertaken originally upon the assessment plan is a question the constitutional aspect of which has been discussed elsewhere.¹ Even where such assessments may be levied they cannot be levied except by specific statutory authority. Under most assessment statutes the proceeding, if to be on the assessment plan, must be commenced and carried on in the manner designated. Such statutes do not give any authority for levying assessments for improvements already undertaken if not commenced on the assessment plan.² If an improvement has been begun by general taxation an assessment therefor cannot be levied after such improvement is completed.³ After an improvement has been begun an assessment cannot be levied changing the method of collection from that which was prescribed when the improvement was begun.⁴ If a public improvement has been commenced upon the assessment plan the fact that such improvement is commenced and completed before the assessment is levied does not invalidate an assessment therefor.⁵ Unless the statute

⁷ *People ex rel. Raymond v. Field*, 197 Ill. 568, 64 N. E. 544 [1902].

¹ See § 406 *et seq.*

² *Kelly v. Luning*, 76 Cal. 309, 18 Pac. 335 [1888]; *District No. 110 v. Feck*, 60 Cal. 403 [1882]; *In the Matter of opening and grading Market Street*, 49 Cal. 546 [1875].

³ *Spaulding v. Baxter*, 25 Ind. App. 485, 58 N. E. 551 [1900].

⁴ *Fowler v. City of St. Joseph*, 37 Mo. 228 [1866].

⁵ *Pennsylvania Co. v. Cole*, 132 Fed. 668 [1904]; *City of Meriden v. Camp*, 46 Conn. 284 [1878]; *Sweet v. West Chicago Park Commissioners*, 177 Ill. 492, 53 N. E. 74 [1899]; *The People ex rel. Wood v. Jones*, 137 Ill. 35, 27 N. E. 294 [1892]; *City of Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342 [1889]; *Geiger v. Bradley*, 117 Ind. 120, 19 N. E. 760 [1880]; *Burlington v. Quick*, 47 Ia

222 [1877]; *Patterson v. Baumer*, 43 Ia. 477 [1876]; *City of Atchison v. Leu*, 48 Kan. 138, 29 Pac. 467 [1892]; *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605 [1891]; *Gedge v. City of Covington*, — Ky. —, 80 S. W. 1160, 26 Ky. Law. Rep. 273 [1904]; *Corliss v. Village of Highland Park*, 132 Mich. 152, 93 N. W. 254, 93 N. W. 610; (affirmed on rehearing 95 N. W. 416 [1903]); *Burns v. City of Duluth*, 96 Minn. 104, 104 N. W. 714 [1905]; *State, Jelliff. Pros. v. Mayor and Common Council of the City of Newark*, 48 N. J. L. (19 Vr.) 101, 2 Atl. 627 [1886]; *State, Hand, Pros. v. City Council of the City of Elizabeth*, 31 N. J. L. (2 Vr.) 547 [1864]; *In the Matter of Roberts*, 81 N. Y. 62 [1880]; *Heath v. McCrear*, 20 Wash. 342, 55 Pac. 432 [1898].

specifically requires the assessment to be levied before the improvement is constructed the city has power to defer such levying until after the improvement is constructed. Thus under a statute authorizing the city to assess "the probable amount of expense" of a public improvement, it was held that an assessment might be levied after performance.⁶ Accordingly the city may pay the cost of a public improvement,⁷ as by constructing such improvement at its own expense,⁸ or by paying for the same by issuing bonds,⁹ and subsequently levy an assessment to reimburse itself for the expense thus incurred. If a city is authorized to issue bonds payable out of assessments without any special election; but it is required to hold a special election if the credit of the city is to be pledged in excess of current revenue, bonds which are issued without a special election and to secure which there is pledged both the amount to be raised by special assessment and also the faith and credit of the city, are valid as to the amount to be raised by special assessment, though invalid as affecting the personal liability of the city.¹⁰ Holders of bonds are not responsible for the proper application of the funds raised by the sale of such bonds.¹¹ Accordingly, the fact that such funds have been wasted in litigation does not prevent the levy of the assessment to pay such bonds.¹² Furthermore, the city may pay the contract price of the public improvement to the contractor,¹³ as by making such payment out of funds raised by general taxation,¹⁴ and then reimburse itself by special assess-

⁶ *City of Meriden v. Camp*, 46 Conn. 284 [1878].

⁷ *Sweet v. West Chicago Park Commissioners*, 177 Ill. 492, 53 N. E. 74 [1899]; *Patterson v. Baumer*, 43 Ia. 477 [1876]; *In the Matter of Roberts*, 81 N. Y. 62 [1880]; *Adkins v. Toledo*, 27 Ohio Cir. Ct. R. 417 [1905].

⁸ *City of Burlington v. Quick*, 47 Ia. 222 [1877].

⁹ *People ex rel. Wood v. Jones*, 137 Ill. 35, 27 N. E. 294 [1892]; *Loesnitz v. Selinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890]; *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605 [1891]; *Gedge v. City of Covington*, — Ky. —, 80 S. W. 1160, 26 Ky. Law Rep. 273 [1904];

State, Hand, Pros. v. City Council of the City of Elizabeth, 31 N. J. L. (2 Vr.) 547 [1864].

¹⁰ *Gedge v. City of Covington*, — Ky. —, 80 S. W. 1160, 26 Ky. Law Rep. 273 [1904].

¹¹ *Loesnitz v. Selinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 867 [1880].

¹² *Loesnitz v. Selinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890].

¹³ *City of Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342 [1889]; *City of Atchison v. Len*, 48 Kan. 138, 29 Pac. 467 [1892]; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898].

¹⁴ *Patterson v. Baumer*, 43 Ia. 477 [1876]; *Burns v. City of Duluth*, 96

ment. The city may pay for such improvement by borrowing money and then levy a special assessment to reimburse itself.¹⁵ Where a sewer was constructed upon land belonging to a private owner and at the time such improvement was constructed no assessment therefor could have been levied a statute passed subsequently authorizing an assessment for such improvement has been held to be retro-active and unconstitutional.¹⁶

§ 424. Improvement constructed without proper ordinance.

If an improvement is constructed before the passage of a valid ordinance for constructing such improvement at the cost of the abutting property owners, the city cannot in the absence of some specific statutory authority therefor, levy an assessment by subsequent ordinance for the cost of such improvement.¹ This is especially true where the work has been done by private property owners and has subsequently been adopted by the city and the city has then attempted to levy an assessment for the cost of such work.² However, under a statute specifically giving authority therefor, it has been held that a city may purchase a private sewer already constructed by individual land-owners and then

Minn. 104, 104 N. W. 714 [1905]; State, Jelliff, Pros. v. Mayor and City Council of the City of Newark, 48 N. J. L. (19 Vr.) 101, 2 Atl. 627 [1886].

¹⁵ Corliss v. Village of Highland Park, 132 Mich. 152, 93 N. W. 254, 93 N. W. 610; affirmed on rehearing, 95 N. W. 416 [1903].

¹⁶ Holliday v. City of Atlanta, 96 Ga. 377, 23 S. E. 406 [1895].

¹ City of Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853 [1903]; Connecticut Mutual Life Insurance Company v. City of Chicago, 185 Ill. 148, 56 N. E. 1071 [1900]; Pells v. City of Paxton, 176 Ill. 318, 52 N. E. 64 [1898]; Thaler v. West Chicago Park Commissioners, 174 Ill. 211, 52 N. E. 116 [1898]; Winkelman v. Moredock and Ivy Landing Drainage District, 170 Ill. 37, 48 N. E. 715 [1897]; Davis v. City of Litchfield, 155 Ill. 384, 40 N. E. 354 [1895]; City of East St. Louis v. Albrecht,

150 Ill. 506, 37 N. E. 934 [1894]; Weld v. People ex rel. Kern, 149 Ill. 257, 36 N. E. 1006 [1894]; City of Carlyle v. The County of Clinton, 140 Ill. 512, 30 N. E. 782 [1893]; Dolese v. McDougall, 78 Ill. App. 629 [1897]; City of Alton v. Foster, 74 Ill. App. 511 [1897]; Badger v. Inlet Swamp Drainage District, 42 Ill. App. 79 [1890]; Newman v. City of Emporia, 32 Kan. 456, 4 Pac. 815 [1884]; Second Municipality of New Orleans v. Botts, 8 Robinson (La.) 198 [1844]; Keane v. Klausman, 21 Mo. App. 485 [1886]; Folz v. City of Cincinnati, 2 Handy (Ohio), 261 [1855]; Donohue v. Brotherton, 7 Ohio N. P. 367 [1900]; Appeal of Harper, 109 Pa. St. 9, 1 Atl. 791 [1885]; Buckley v. City of Tacoma, 9 Wash. 253, 37 Pac. 441 [1894].

² Create v. City of Chicago, 56 Ill. 422 [1870]; Dorathiv v. City of Chicago, 53 Ill. 79 [1869].

levy an assessment for such purchase price.³ So it has been held in some jurisdictions that a city may purchase a toll road or turnpike and levy an assessment for the cost of such purchase.⁴ Statutes are found in many states which authorize a city to levy an assessment for work done before the passage of a valid ordinance providing for constructing such improvements at the cost of the property owners. Such statutes are regarded as valid,⁵ are given full force and effect, and assessments levied for such improvements under such statutes are valid.⁶ So it has been held that the legislature may authorize the city to levy an assessment to pay an additional amount to the contractor over and above the contract price, which under the charter of the city it was forbidden to pay.⁷ The power to levy assessments for pre-existing improvements is, however, limited by the terms of the statute authorizing such assessments.⁸ Thus, under a statute authorizing the acceptance of grading previously done and crediting the owner who has done such grading for the cost thereof upon his assessment, no such allowance can be made for macadamizing and curbing already done.⁹ If work has been begun under a defective ordinance and before the performance of the contract an ordinance has been passed curing the defect, an assessment for such improvement has been held to be valid.¹⁰

§ 425. Expense of appropriation of property for public use.

It is very frequently provided by statute that the expense of appropriating property by eminent domain for the purpose of constructing a public improvement is one of the items which may be included in special assessments for such improvements, if the improvement is one of the types for which a special assessment

³ *Slocum v. Selectmen of Brookline*, 163 Mass. 23, 39 N. E. 351 [1895].

⁴ See § 412.

⁵ See § 413.

⁶ *Seattle v. Kelleher*, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904]; *New England Hospital for Women and Children v. Street Commissioners of the City of Boston*, 188 Mass. 88, 74 N. E. 294 [1905]; *In the Matter of Sackett, Douglass and De Graw Streets in the City of Brooklyn*, 74 N. Y. 95 [1878]; *Brewster v. City of*

Syracuse, 19 N. Y. 116 [1859]; *Duniway v. Portland*, 47 Or. 103, 81 Pac. 945 [1905]; *Cleveland v. Tripp*, 13 R. I. 50 [1880].

⁷ *Brewster v. City of Syracuse*, 19 N. Y. 116 [1859].

⁸ *De Haven v. Berendes*, 135 Cal. 178, 67 Pac. 786 [1901].

⁹ *De Haven v. Berendes*, 135 Cal. 178, 67 Pac. 786 [1901].

¹⁰ *Kiley v. Craner*, 51 Mo. 541 [1873].

may be levied.¹ There must be a valid statute for appropriating land in order to justify a special assessment for the cost of such proceedings.² Such assessment cannot be levied if the appropriation proceedings are entirely void.³ The cost of appropriating land cannot be made the subject of assessment unless the statute provides therefor.⁴ If the statute provides that the cost of appropriation must be paid for by general taxation, a local assessment cannot be levied therefor.⁵

§ 426. Value of land appropriated.

The value of the land which has been taken by proceedings in eminent domain is one of the most important items of cost in appropriation proceedings and under most statutes may be levied upon the land which is benefited by the improvement.¹ Under

¹ *Bauman v. Ross*, 167 U. S. 548, 42 L. 1270, 17 S. 966 [1897]; (reversing *District of Columbia v. Armes*, 8 App. D. C. 393 [1896]; *Bauman v. Ross*, 9 App. D. C. 260 [1896]; *Abbott v. Ross*, 9 App. D. C. 289 [1896]); In the Matter of the proceedings to change the grade of Beale Street in the City and County of San Francisco, 39 Cal. 495 [1870]; *Judson v. Bridgeport*, 25 Conn. 426 [1857]; *Edgerton v. Mayor and Aldermen of the Town of Green Cove Springs*, 19 Fla. 140 [1882]; *Waggenman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895]; (distinguishing *City of Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1893]); *People ex rel. Thatcher v. Village of Hyde Park*, 117 Ill. 462; 6 N. E. 33 [1887]; *Page v. Mayor and City Council of Baltimore*, 34 Md. 558 [1871]; *Gardiner v. Street Commissioners of the City of Boston*, 188 Mass. 223, 74 N. E. 341 [1905]; *State ex rel. Chicago, Burlington and Quincy Railroad Company v. City of Kansas*, 89 Mo. 34, 14 S. W. 515 [1886]; *Clark v. City of Elizabeth*, 61 N. J. L. (32 Vr.) 565, 40 Atl. 616, 40 Atl. 737 [1898]; *Davis v. Mayor and Common Council of the City of Newark*, 54 N. J. L. (25 Vr.) 595, 25 Atl. 336

[1892]; *State, Aldridge, Pros. v. Essex Public Board*, 46 N. J. L. (17 Vr.) 126 [1884]; *Pratt v. City of Milwaukee*, 93 Wis. 658, 68 N. W. 392 [1896].

² *State, Kerrigan, Pros. v. Township of West Hokoken*, 37 N. J. L. (8 Vr.) 77 [1874]; *Carron v. Martin*, 26 N. J. L. (2 Dutcher) 594, 69 Am. Dec. 584 [1857].

³ *State, Kerrigan, Pros. v. Township of West Hoboken*, 37 N. J. L. (8 Vr.) 77 [1874]; *Carron v. Martin*, 26 N. J. L. (2 Dutcher) 594, 69 Am. Dec. 584 [1857].

⁴ In the Matter of the Assessments of lands in the Town of Flatbush for the Extension of Prospect Park in the City of Brooklyn, 60 N. Y. 398 [1875].

⁵ *Krumberg v. City of Cincinnati*, 29 O. S. 69 [1875].

¹ *South Chicago City Railway Company v. City of Chicago*, 196 Ill. 490, 63 N. E. 1046 [1902]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]; *Andrews v. People ex rel. Rumsey*, 84 Ill. 28 [1876]; *Municipality Number Two for the opening of Roffignac Street*, 7 La. Ann. 76 [1852]; *Mayor and City Council of Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 696 [1861]; *Gardiner v. Street Commissioners of*

a statute authorizing assessments for the value of lands appropriated, the value of land owned by a city and formerly used for public park, but since taken for the purpose of widening streets,² or acquired by the city for a pipe-line and afterwards taken for a street,³ or property held by the city in trust for school purposes,⁴ may be included in the assessment. The value of property which has been used as a right of way appurtenant to certain land and which has been taken for a public street may be included, since no public easement exists therein.⁵ The value of property between a levee and a stream where such property is subject to a public use cannot be included,⁶ but if the levee has been advanced by public authorities so as to include such property and the public use has thereby been extinguished, an assessment may be levied therefor.⁷ If the appropriation proceedings are distinct from the assessment proceedings, a judgment appropriating the property is final both as to the necessity and as to the right of appropriation and cannot be attacked collaterally.⁸ Hence, in an assessment proceeding the defense cannot be interposed that the land appropriated for a street had already been dedicated to the public.⁹ In some jurisdictions the power of levying local assessments for the cost of land appropriated has been limited or entirely denied.¹⁰ If there is no authority for assessing such items of expense against the property owners, they will be presumed to be included in the part of the assessment apportioned to the city.¹¹ In Illinois it is held that the cost of land appro-

the City of Boston, 188 Mass. 223, 74 N. E. 341 [1905]; *Leslie v. City of St. Louis*, 47 Mo. 474 [1871]; *State v. Several Parcels of Land*, — Neb. —, 110 N. W. 753 [1907]; *State, White, Pros. v. Mayor and Council of the City of Bayonne*, 49 N. J. L. (20 Vr.) 311, 8 Atl. 295 [1887]; *State, Aldridge, Pros. v. Essex Public Road Board*, 46 N. J. L. (17 Vr.) 126 [1884]; *In re Opening of 178th Street, City of New York*, 94 N. Y. S. 838, 107 App. Div. 22 [1905]; *In re Mill Creek Sewer*, 196 Pa. St. 183, 46 Atl. 312 [1900].

² *In the Matter of Widening and Improving Ninth Avenue and Fifteenth Street in the City of Brooklyn*, 45 N. Y. 729 [1871].

³ *Matter of the Mayor, Aldermen*

and Commonalty of New York, 186 N. Y. 237, 78 N. E. 952 [1906].

⁴ *Fagan v. City of Chicago*, 84 Ill. 227 [1876].

⁵ *Hemingway v. City of Chicago*, 60 Ill. 324 [1871].

⁶ *Municipality Number Two for the Opening of Roffignac Street*, 7 La. Ann. 76 [1852].

⁷ *Municipality Number Two for the Opening of Roffignac Street*, 7 La. Ann. 76 [1852].

⁸ *Gage v. City of Chicago*, 146 Ill. 499, 34 N. E. 1034 [1893].

⁹ *Gage v. City of Chicago*, 146 Ill. 499, 34 N. E. 1034 [1893].

¹⁰ *City of St. Joseph v. Crowther*, 142 Mo. 155, 43 S. W. 786 [1897].

¹¹ *In re Reynolds Street Sewer*, 34 Super. Ct. 209 [1907].

propriated may be paid for by special assessment where the actual benefits are inquired into,¹² but not by special taxation where the question of benefits is not inquired into.¹³ In Ohio it was held originally that while the cost of appropriating land could not be included in a special assessment in the absence of specific statutory authority,¹⁴ it might be so included if authorized by statute.¹⁵ Subsequently, in passing upon the Ohio statute, the Supreme Court of the United States held that a statute providing for assessing the entire cost of appropriating property upon the adjoining property, a part of which had been appropriated, and apportioning this entire cost according to frontage was unconstitutional as amounting to a taking of property without due process of law.¹⁶ Subsequently this decision was followed in Ohio.¹⁷ It will be observed that this decision does not necessarily hold that an assessment cannot be levied for such items, but merely that the method of apportioning such assessment is invalid under the circumstances of the particular case.¹⁸ The later decisions in Ohio have, however, gone farther than the decision of the Supreme Court of the United States and have held that an assessment cannot constitutionally be levied even under express statutory authority, either upon property a part of which has thus been appropriated,¹⁹ or upon other property.²⁰ It is ordinarily assumed that a grant of power to appropriate property includes power to acquire such property by contract.²¹ Where

¹² *Waggeman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895]; (distinguishing *City of Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1893]).

¹³ *City of Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1893].

¹⁴ *Krumberg v. Cincinnati*, 29 O. S. 69 [1875].

¹⁵ *City of Cleveland v. Wick*, 18 O. S. 303 [1868]; *Village of Norwood v. Ogden*, 15 Ohio C. C. 539, 18 Ohio C. C. 869, 8 Ohio C. D. 383 [1898].

¹⁶ *Village of Norwood v. Baker*, 172 U. S. 269, 43 L. 443, 19 S. 187 [1898]; (affirming *Baker v. Village of Norwood*, 74 Fed. 997 [1896]).

See, also, *Scott v. City of Toledo*, 30 Fed. 385, 1 L. R. A. 688 [1888].

¹⁷ *Dodsworth v. City of Cincinnati*, 18 Ohio C. C. 288, 10 Ohio C. D. 177 [1899].

¹⁸ See, also, *Rhoades v. City of Toledo*, 6 Ohio C. C. 9 [1890].

¹⁹ *Cincinnati, Lebanon and Northern Railway Company v. City of Cincinnati*, 62 O. S. 465, 49 L. R. A. 566, 57 N. E. 229 [1900].

²⁰ *City of Dayton v. Bauman*, 66 O. S. 379, 64 N. E. 433 [1902].

²¹ *Kramer v. City of Los Angeles*, 147 Cal. 668, 82 Pac. 334 [1905]; *Lower Kings River Reclamation District No. 531 v. McCullah*, 124 Cal. 175, 56 Pac. 887 [1899]; *State v. Several Parcels of Land. — Neb.* —, 110 N. W. 753 [1907].

this theory is entertained the contract price may form one of the items for which the assessment is to be levied.²² The existence of this power has, however, been doubted.²³

§ 427. Value of building taken by appropriation.

The value of buildings upon land appropriated for a public improvement, which must be removed or destroyed in the construction of such improvement, forms a proper item of assessment.¹ By statute it may be provided that if no buildings are taken, the assessment district shall not extend beyond the center line of the blocks adjacent to the streets improved, while a wider area may be assessed if buildings are taken.² Under such statutes it is equally improper to assess the entire cost of buildings upon the adjacent blocks,³ and to assess non-adjacent blocks for more than a proportionate part of the cost of buildings.⁴ By statute in New York it has been provided that a map or plan of the proposed streets may be filed and that no damages can be recovered for the value of buildings erected upon ground to be occupied by such proposed streets after the filing of such plan.⁵ Such provision has been held not to amount to a taking of property without just compensation.⁶ A similar statute has been held to be valid in Pennsylvania.⁷

§ 428. Damage caused by appropriation.

The damage caused by a public improvement to land which is not appropriated for such improvement is another item for which it is often provided by statute that assessments may be levied

²² Lower Kings River Reclamation District No. 531 v. McQuillan, 124 Cal. 175, 56 Pac. 887 [1899].

²³ Lake Shore and Michigan Southern Railway Company v. City of Chicago, 148 Ill. 509, 37 N. E. 88 [1894].

¹ *In re Avenue L in City of New York*, 95 N. Y. S. 245, 107 App. Div. 581 [1905]; *In the Matter of the Board of Street Opening*, 74 Hun. 561, 26 N. Y. Supp. 855 [1893]; *In the Matter of the Board of Street Opening*, 64 Hun. 59, 18 N. Y. Supp. 727 [1892].

² *In the Matter of the Board of Street Opening*, 74 Hun. 561, 26 N. Y. Supp. 855 [1893].

³ *In the Matter of the Board of Street Opening*, 74 Hun. 561, 26 N. Y. Supp. 855 [1893].

⁴ *In the Matter of the Board of Street Opening*, 64 Hun. 59, 18 N. Y. Supp. 727 [1892].

⁵ *In the Matter of One Hundred and Twenty-Seventh Street*, 56 Howard, 60 [1878].

⁶ *In the Matter of One Hundred and Twenty-seventh Street*, 56 Howard, 60 [1878].

⁷ *Forbes Street*, 70 Pa. St. (20 P. F. Smith) 125 [1871]; *Pittsburg City District*, 2 Watts & C. 320 [1841].

upon property benefited by the improvement.¹ One of the most common forms of damage in such cases is that caused by change of the grade of a street.² Unless the statute specifically authorizes an assessment for damages, no assessment can be levied.³ If the city is authorized to change the grade of a street but there is no specific provision for assessing the cost of such change upon property benefited, such expense must be paid for by general taxation.⁴ It has been said that a construction of the statute which would require payment of damages to an abutting owner followed by an assessment upon him to reimburse the city for such payment would be absurd.⁵ However, it has been held proper to assess the cost of grading upon a lot and then in case the grade had previously been established to allow the lot owner to recover as one of his items of damages the amount of such assessment.⁶ In Ohio, in analogy to the rule now adopted which holds assessments to pay for the cost of land appropriated to be invalid,⁷ an assessment cannot be levied on abutting property owners to reimburse the city for the damages which it has been obliged to pay to such owners for such change of grade.⁸ The taking of an alley to open a street in its place is said not to cause damage to abutting property, since the alley furnished the same access as the street.⁹

§ 429. Irregularities in appropriation proceedings.

Under some statutes a provision is made for assessing damages and benefits in one proceeding. Under such statutes the ques-

¹ State of Minnesota ex rel. Chapin v. District Court of Ramsey County, 40 Minn. 5, 41 N. W. 235 [1889]; State, Ropes, Pros. v. Essex Public Road Board, 37 N. J. L. (8 Vr.) 335 [1875]; People ex rel. Doyle v. Green, 3 Hun. 755 [1875]; Dixon v. City of Cincinnati, 11 Ohio C. C. 629, 5 Ohio C. D. 301 [1894]; Saunderson v. Herman, 95 Wis. 48, 69 N. W. 977 [1897]; (following Liebermann v. City of Milwaukee, 89 Wis. 336, 61 N. W. 1112 [1895]); Stowell v. Milwaukee, 31 Wis. 523 [1872].

² State, Ropes, Pros. v. Essex Public Road Board, 37 N. J. L. (8 Vr.) 335 [1875]; People ex rel. Doyle v. Green, 3 Hun. 755 [1875]; Dixon v.

City of Cincinnati, 11 Ohio C. C. 629, 5 Ohio C. D. 301 [1894].

³ Goodrich v. City of Omaha, 10 Neb. 98, 4 N. W. 242 [1880]; Barnett's Case, 28 Pa. Super. Ct. 361 [1905].

⁴ Goodrich v. City of Omaha, 10 Neb. 98, 4 N. W. 242 [1880].

⁵ Goodrich v. City of Omaha, 10 Neb. 98, 4 N. W. 242 [1880].

⁶ Stowell v. Milwaukee, 31 Wis. 523 [1872].

⁷ See § 308, § 426.

⁸ McGlynn v. City of Toledo, 22 Ohio C. C. 34 [1901].

⁹ Fagan v. City of Chicago, 84 Ill. 227 [1876].

tion of the value of the property taken is to be determined in the same proceeding as that in which the amount of benefits is determined.¹ Under other statutes the value of the property taken is determined in a proceeding different from that in which the assessment is apportioned. In proceedings of the latter type the determination of the value of the property taken, made in the appropriation proceedings, is final and the question of value cannot be inquired into in the assessment proceedings.² If authority to appropriate land by eminent domain exists, a mere irregularity in the appropriation proceedings does not invalidate an assessment therefor if the court had jurisdiction of the case.³ However, the fact that the certificate of appointment of three disinterested freeholders of the city to assess damages caused by laying out a street does not show that they were disinterested freeholders, has been held to invalidate the assessment of damages and the assessment of benefits to pay for such damages.⁴ A judgment in a proceeding in which both benefits and damages are to be assessed and the one set off against the other, is conclusive, both as to the city and the property owner.⁵ It therefore prevents a subsequent assessment of such property for benefits arising from such improvement.⁶

§ 430. Interest and costs in appropriation proceedings.

Where by statute the title of property appropriated passes before the levy of the assessment it has been held proper to include interest on the value of the property from the time of the passing of title as an item of assessment.¹ Whether the costs in con-

¹ *Andrews v. People ex rel. Rumsey*, 83 Ill. 529 [1876].

² *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]; *Andrews v. People ex rel. Rumsey*, 84 Ill. 28 [1876]; *In re Opening of 178th Street, City of New York*, 94 N. Y. S. 838, 107 App. Div. 22 [1905]. See § 997.

³ *South Chicago City Railway Company v. City of Chicago*, 196 Ill. 490, 63 N. E. 1046 [1902]; *Pratt v. City of Milwaukee*, 93 Wis. 658, 68 N. W. 392 [1896].

⁴ *Judson v. City of Bridgeport*, 25 Conn. 426 [1857]; (a suit by one

whose property has been sold for such assessment to recover from the city the money received by it on such sale).

⁵ *Davis v. Mayor and Common Council of the City of Newark*, 54 N. J. L. (25 Vr.) 595, 25 Atl. 336 [1892].

⁶ *Davis v. Mayor and Common Council of the City of Newark*, 54 N. J. L. (25 Vr.) 595, 25 Atl. 336 [1892].

¹ *In re Mayor, etc., of New York*, 89 N. Y. S. 6, 95 App. Div. 552 [1904].

demnation proceedings can be made the item of assessment is a question upon which there is some diversity of opinion arising chiefly from differences in wording of the respective statutes which apply. In Illinois it has been said to be error to add the costs of a proceeding to appropriate land for widening a street to the amount for which the assessment is to be levied.² Thus, where the damages amounted to over eight thousand dollars it was held to be error to add an item of ninety-six dollars for compensation for the city attorney, the printer, the surveyor, the clerk of the court and the commissioners.³ In Louisiana it has been held that the fees of commissioners cannot be included in an assessment for opening a street.⁴ A different result has been reached under other statutes. Thus it has been held proper to include the compensation of appraisers who are to assess damages for opening a street in an assessment for such improvement.⁵ In Ohio the costs and expenses of proceedings in appropriation have been placed upon the same basis as the damages for the value of the land taken, being regarded as proper items of assessment where the value of the land taken is regarded as proper,⁶ and improper when it has been held that the value of the land taken cannot be included in the assessment.⁷ Whether the expense of searching title to land which it is proposed to appropriate for opening a street can be included in an assessment has been discussed but not decided.⁸

² Trustees of the Illinois and Michigan Canal v. City of Chicago, 12 Ill. 403 [1851]; Morris v. City of Chicago, 11 Ill. 650 [1850]; City of Chicago v. Cook, 105 Ill. App. 353 [1903]; judgment affirmed 68 N. E. 538.

³ Morris v. City of Chicago, 11 Ill. 650 [1850].

⁴ City of New Orleans praying for the opening of Phillip and other streets, 10 La. Ann. 313 [1855].

⁵ Kuhns v. City of Omaha, 55 Neb. 183, 75 N. W. 562 [1898].

⁶ City of Cleveland v. Wick, 18 O. S. 303 [1868]; Village of Norwood v. Ogden, 15 Ohio C. C. 539, 18 Ohio C. C. 869, 8 Ohio C. D. 383 [1898].

⁷ Village of Norwood v. Baker, 172 U. S. 269, 43 L. 443, 19 S. 187 [1898]; (affirming Baker v. Village of Norwood, 74 Fed. 997 [1896]); Scott v. City of Toledo, 36 Fed. 385, 1 L. R. A. 688 [1888]; City of Dayton v. Bauman, 66 O. S. 379, 64 N. E. 433 [1902]; Cincinnati, Lebanon and Northern Railway Company v. City of Cincinnati, 62 O. S. 465, 49 L. R. A. 566, 57 N. E. 229 [1900]; Rhoades v. City of Toledo, 6 Ohio C. C. 9 [1890].

⁸ State, Raymond, Pros. v. Mayor and Council of the Borough of Rutherford, 55 N. J. L. (26 Vr.) 441, 27 Atl. 172 [1893].

§ 431. Highways included in term "street."

Since a street is a public improvement for which local assessments may be levied,¹ the power of a city or other public corporation or public officer to levy local assessments therefor turns on questions of statutory construction. Power may be given to construct a street by general taxation,² or to construct it by local assessment to the exclusion of general taxation,³ or to construct it by either method in the discretion of the city.⁴ Power to improve streets by local assessment is very generally given by statute.⁵ The term "street" in this connection is a generic one and is broad enough to include boulevards.⁶ It is also broad enough to authorize the city to construct a parkway separating the driveways of a street,⁷ and to provide for sodding such parkway and planting trees.⁸ However, under a statute authorizing the grading and paving of a street, it was held that the city had no power to require the space between the sidewalk and the curb to be filled with rich earth and sodded at the expense of the abutting property owners.⁹ The term "street" is regarded as broad enough to include a public road or a turnpike which has been taken into the city limits.¹⁰ The existence of this power has,

¹ See § 301 *et seq.*

² State ex rel. The City of Columbus v. Strader, 25 O. S. 527 [1874].

³ Rhinelander v. Mayor, etc., of New York, 24 Howard (N. Y.) 304 [1862].

⁴ Oakland Paving Company v. Rier, 52 Cal. 270 [1877].

⁵ Perine v. Forbush, 97 Cal. 305, 32 Pac. 226 [1893]; Seoville v. City of Cleveland, 1 O. S. 126; Clark v. City of Cleveland, 1 O. S. 139 [1853]; Jessing v. City of Columbus, 1 Ohio C. C. 90 [1885]; (affirmed 22 W. L. B. 453); Philadelphia to use v. Pemberton, 208 Pa. St. 214, 57 Atl. 516 [1904].

⁶ West Chicago Park Commissioners v. Farber, 171 Ill. 146, 49 N. E. 427 [1898]; Thompson v. City of Highland Park, 187 Ill. 265, 58 N. E. 328 [1900]; Cummings v. West Chicago Park Commissioners, 181 Ill. 136, 54 N. E. 941 [1899].

⁷ Thompson v. City of Highland

Park, 187 Ill. 265, 58 N. E. 328 [1900]; Cummings v. West Chicago Park Commissioners, 181 Ill. 136, 54 N. E. 941 [1899].

⁸ Thompson v. City of Highland Park, 187 Ill. 265, 58 N. E. 328 [1900]; Murphy v. City of Peoria, 119 Ill. 509, 9 N. E. 895 [1888].

⁹ Adams v. City of Shelbyville, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899].

¹⁰ Huefeld v. City of Covington. — Ky. —, 60 S. W. 296, 22 Ky. L. Rep. 1188 [1901]; Lewis v. Schmidt. — Ky. —, 43 S. W. 433, 19 Ky. L. Rep. 1315; State, Townsend, Pros. v. Mayor and Common Council of Jersey City, 26 N. J. L. (2 Dutch.) 444 [1857]; People of the State of New York ex rel. Caya-dutta Plank Road Company v. Cummings, 166 N. Y. 110, 59 N. E. 703 [1901]; Philadelphia to use v. Gowen, 202 Pa. St. 453, 52 Atl. 3 [1902].

however, been doubted.¹¹ While a turnpike company may have a right to object to an improvement of its road within city limits by the city, property owners cannot object thereto if the turnpike company does not see fit to do so.¹² Under an ordinance providing that no street shall be accepted for public use of a less width than thirty feet and that streets must be first dedicated or properly opened, an assessment cannot be levied for paving a street the width of which on the city plan is thirty feet, but which has been opened for a less width.¹³ The fact that a railroad track is located in a street does not prevent it from being a street within the meaning of these statutes.¹⁴ Even if the surface of the street is covered with railroad tracks, it has still been held to be a street so that the city may improve it at the expense of the abutting property owners under a statute authorizing such improvement of the street.¹⁵ The fact that a railroad company whose tracks occupy a street has agreed to grade and pave such street and to keep it in good repair does not prevent the city from repairing such street itself at the expense of the abutting property owners.¹⁶ A street crossing a railroad at a grade which carries the street below the railroad and below the natural surface of the ground is said to be "a subway but still a street" within the meaning of a statute authorizing the paving of streets.¹⁷ The term "street" has been held not to include a cause-way running out into the lake between water lots and connecting the shore with a pier.¹⁸ Such improvement is intended primarily for the public benefit, is chiefly intended for through traffic, and does not benefit the adjoining water lots in the way that an ordinary street benefits lots abutting thereon. Under

¹¹ *State, Parker, Pros. v. City of New Brunswick*, 32 N. J. L. (3 Vr.) 548 [1867].

¹² *Bagg v. City of Detroit*, 5 Mich. 336 [1858]; *State, Parker, Pros. v. Mayor, etc., of City of New Brunswick*, 30 N. J. L. (1 Vr.) 395 [1863].

¹³ *City of Philadelphia to use v. Ball*, 147 Pa. St. 243, 23 Atl. 564 [1892].

¹⁴ *Chicago, Burlington and Quincy Railroad Company v. City of Chicago*, 139 Ill. 355, 28 N. E. 1069 [1893]; *Chicago, Burlington and*

Quincy Railroad Company v. City of Quincy, 136 Ill. 563, 29 Am. St. Rep. 334, 27 N. E. 192 [1892].

¹⁵ *Richards v. City of Cincinnati*, 31 O. S. 506 [1877]; *contra*, *Saxton National Bank v. Haywood*, 62 Mo. App. 550 [1895].

¹⁶ *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768 [1899].

¹⁷ *Louisville Steam Forge Co. v. Mehler*, 112 Ky. 438, 64 S. W. 396, 64 S. W. 652, 23 Ky. Law Rep. 1335 [1901].

¹⁸ *Reed v. Erie*, 79 Pa. St. (9 P. F. Smith) 346 [1875].

statute authorizing the improvement of a street or a portion thereof, it has been held that a private alley appurtenant to the abutting lots is not a street.¹⁹ On the other hand a strip of land used in fact as a street with reference to which abutting lots had been sold fronting thereon is held to be a public street within the meaning of the statutes.²⁰ A way running down a river bank, between high-water mark and low-water mark is not a "street" within the meaning of the statute authorizing the improvement of a street at the expense of the property owners.²¹ The term "another road" with reference to an improvement within two miles of which land is to be assessed, may be used to denote another section of the same road.²²

§ 432. Other improvements included in "street."

The term "street" in its broadest sense includes sidewalks.¹ Authority to improve a street, therefore, includes authority to improve sidewalks.² Authority to pave a street includes authority to pave the space reserved for sidewalks.³ A statutory grant of authority "to pave, gravel or macadamize any street, avenue, square, public place or alley" was held to be sufficiently comprehensive to include the paving of a sidewalk.⁴ So authority to pave a "street or public place" includes authority to pave a sidewalk.⁵ So in a provision for grading a street, grading a

¹⁹ *De Grilleau v. Frawley*, 48 La. Ann. 184, 19 So. 151 [1896].

²⁰ *Steinacker v. Gest*, — Ky. —, 89 S. W. 481, 28 Ky. Law Rep. 573 [1905].

²¹ *Terrell v. City of Paducah*, — Ky. —, 5 L. R. A. (N. S.) 289, 92 S. W. 310 [1906].

²² *St. Benedict's Abbey v. Marion County*, — Or. —, 93 Pac. 231 [1908].

¹ *City Council of Montgomery v. Foster*, 133 Ala. 587, 32 So. 610 [1901]; *Bonnet v. City and County of San Francisco*, 65 Cal. 230, 3 Pac. 81 [1884]; *Taber v. Grafmiller*, 109 Ind. 206, 9 N. E. 721 [1886]; *Gallaher v. City of Jefferson*, 125 Ia. 324, 101 N. W. 124 [1904]; *Williams v. Mayor*, 2 Mich. 560 [1853]; *City of Independence to the use of Smith v. Briggs*, 58 Mo. App. 241 [1894];

In the Matter of *Burmeister*, 76 N. Y. 174 [1879]; reversing In the Matter of *Burmeister*, 9 Hun. 613 [1877].

² *Taber v. Grafmiller*, 109 Ind. 206, 9 N. E. 721 [1886].

³ In the Matter of *Burmeister*, 76 N. Y. 174 [1879]; reversing In the Matter of *Burmeister*, 9 Hun. 613 [1877].

⁴ *City Council of Montgomery v. Foster*, 133 Ala. 587, 32 So. 610 [1901].

⁵ In the Matter of *Burmeister*, 76 N. Y. 174 [1879]; reversing In the Matter of *Burmeister*, 9 Hun. 613 [1877]; In the Matter of *Burke*, 62 N. Y. 224 [1875]; In the matter of *Phillips*, 60 N. Y. 16 [1875]; In the matter of *Belmont*, 12 Hun. (N. Y.) 558 [1878].

sidewalk is included.⁶ A petition and notice for grading and paving a street has been held sufficient to support an ordinance which provides, in addition to filling and paving, for curbing, guttering, laying cross-walks and intersections and paving sidewalks.⁷ A statute may, however, show by its context that a narrower sense is to be given to the term street.⁸ Thus, if by statute specific provisions are made for improving streets and other specific provisions are made for improving sidewalks, the statutes applicable to street improvements cannot be extended to sidewalks. A resolution of intention to curb and macadamize a street does not include the construction of the sidewalk.⁹ An ordinance for paving a street does not require the paving of an existing sidewalk.¹⁰ A sidewalk has been held not to be a "public way."¹¹ Power to levy an assessment for sidewalks and gutters does not include power to levy a special assessment for paving a street.¹² Whether a sewer situated in a street is to be regarded as a part of a street within the meaning of statutes concerning the improvement of a street is a question which turns chiefly upon the character of the sewer. If built primarily for the purpose of draining off surface water, it is regarded as a part of the street.¹³ Accordingly, under authority to assess for grading and graveling a street the council may by resolution include the construction of a storm water sewer and may levy an assessment therefor.¹⁴ If built primarily for affording drainage to houses on abutting land, it is not regarded as a part of the street.¹⁵ Under a resolution of council for the construction

⁶ *City of Independence to the use of Smith v. Briggs*, 58 Mo. App. 241 [1894]. See also *Gallaher v. City of Jefferson*, 125 Ia. 324, 101 N. W. 124 [1904].

⁷ *State, Malone, Pros. v. Mayor and Common Council of Jersey City*, 28 N. J. L. (4 Dutcher) 500 [1860].

⁸ *Himmelman v. Satterlee*, 50 Cal. 68 [1875].

⁹ *Dyer v. Chase*, 52 Cal. 440 [1877]; *Himmelman v. Satterlee*, 50 Cal. 68 [1875].

¹⁰ *County of Adams v. County of Quincy*, 130 Ill. 566, 22 N. E. 624 [1889].

¹¹ *Mudge v. Walker* (Ky.), 90 S.

W. 1046, 28 Ky. Law Rep. 996 [1906].

¹² *McCrowell v. City of Bristol*, 89 Va. 652, 20 L. R. A. 653, 16 S. E. 867 [1892].

¹³ *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895 [1888]; *Kirkland v. Board of Public Works of the City of Indianapolis*, 142 Ind. 123, 41 N. E. 374 [1895]; *Parsons v. City of Grand Rapids*, 141 Mich. 467, 104 N. W. 730 [1905]; *Taylor v. Wapakoneta*, 26 Ohio Cir. Ct. R. 285 [1904].

¹⁴ *Gates v. City of Grand Rapids*, 134 Mich. 96, 95 N. W. 998 [1903].

¹⁵ *Peck v. City of Grand Rapids*, 125 Mich. 416, 84 N. W. 614 [1900];

of a street the city cannot levy an assessment for the construction of a sewer to provide for the disposal of sewage from the adjoining property.¹⁶ However, a grant of power to cities to repair their streets and to keep them in order has been held to authorize the construction of sewers, without, apparently, any distinction as to the purpose of the sewer.¹⁷ Power to do the work of "regulating, grading or otherwise improving" a certain street is held to confer power to construct a sewer therein.¹⁸ Property was detached from a municipality under a statute providing that proceedings for "improving any street" within the area detached could be finished. It was held that under this provision the laying of water-pipes could be continued and completed.¹⁹ The term "street" does not include retaining walls,²⁰ railings and barriers,²¹ or a bridge over a railroad.²² Hence, on the one hand the cost of retaining walls cannot be included in the assessment.²³ On the other hand failure to erect railings and barriers does not prevent the improvement from being completed.²⁴ One reason for not including the cost of retaining walls in an assessment for street improvement is that the retaining wall in the particular case was necessary to furnish to the abutting lot the lateral support to which it was entitled by law and of which it had been deprived by the city's act in removing the natural soil from the street.²⁵ A retaining wall in the street dividing the street lengthwise into two parts of different grades for the purpose of giving access to property not on the line of the street was regarded as conferring no benefit upon the owners of abutting property and hence was not included in the street improvement.²⁶ On

McMakin v. City of Cincinnati, 7 Ohio N. P. 203 [1900]; *City of Cincinnati for the use of Wilson v. Fugman*, 5 Ohio N. P. 14 [1897].

¹⁶ *Peek v. City of Grand Rapids*, 125 Mich. 416, 84 N. W. 614 [1900].

¹⁷ *Johnson v. City of Milwaukee*, 88 Wis. 383, 60 N. W. 270 [1894].

¹⁸ In the matter of the Trustees of the Leake and Watts Orphan Home, 92 N. Y. 116 [1883].

¹⁹ *Town of Cicero v. Green*, 211 Ill. 241, 71 N. E. 884 [1904].

²⁰ *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890]; *Naltner v. Blake*, 56 Ind. 127 [1877].

²¹ *Chase v. Board of Aldermen of Springfield*, 119 Mass. 556 [1876].

²² *Friedenwald v. Shipley*, 74 Md. 220, 21 Atl. 790, 24 Atl. 156 [1891].

²³ *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890]; *Naltner v. Blake*, 56 Ind. 127 [1877].

²⁴ *Chase v. Board of Aldermen of Springfield*, 119 Mass. 556 [1876].

²⁵ *Armstrong v. City of St. Paul*, 30 Minn. 299, 15 N. W. 174 [1883].

²⁶ *In re Grading, Paving and Curbing Wick Street*, Appeal of the City of Pittsburg, 184 Pa. St. 93; 39 Atl. 3 [1898].

the other hand where it was necessary to construct a retaining wall to separate a street from a canal and the wall was necessary solely for the preservation of the street, it was held proper to include its cost in an assessment for street improvements.²⁷

§ 433. Location of street to be improved.

Ordinarily a city is authorized to improve only streets within such city.¹ The rules for determining whether the ordinance and the resolution show that the street is within the city are discussed elsewhere.² If there is no constitutional provision against special legislation, the city may be authorized to improve, in certain ways, streets in given portions of the city, without receiving authority to improve in like manner other streets in the same city.³ It will be presumed, however, that a city has general power over all its streets under statutes authorizing street improvements, unless the legislature clearly shows its intention to restrict its power to certain streets only.⁴ Under authority to lay out any street, the city may lay out more than one street.⁵ In describing the street to be improved the popular name of such street may be employed. By the use of such name will ordinarily be intended the whole street known by such name,⁶ even if a part of such street bears another official name.⁷ If the city is authorized to improve streets of a certain width as a minimum, it cannot levy an assessment for improving a street of less width.⁸ Park commissioners may be restricted to improving the streets which they have laid out and opened.⁹

§ 434. Opening and vacating street.

The cost of appropriating land to be used as a street is in most jurisdictions regarded as a proper item of expense if pro-

²⁷ Longworth v. City of Cincinnati, 34 O. S. 101 [1877].

¹ Moberry v. City of Jeffersonville, 38 Ind. 198 [1871]; Mayor and City Council of Baltimore v. Porter, 18 Md. 284, 79 Am. Dec. 686 [1861].

² See § 859.

³ Houston v. McKenna, 22 Cal. 550 [1863]; In the matter of the Emigrant Industrial Savings Bank, 75 N. Y. 388 [1878].

⁴ Houston v. McKenna, 22 Cal. 550 [1863].

⁵ Murphy v. City of Long Branch, — N. J. Sup. —, 61 Atl. 593 [1905].

⁶ Lynch v. City of Kansas City, 44 Kan. 452, 24 Pac. 973 [1890].

⁷ Lynch v. City of Kansas City, 44 Kan. 452, 24 Pac. 973 [1890].

⁸ City of Philadelphia to use v. Ball, 147 Pa. St. 243, 23 Atl. 564 [1892].

⁹ In the matter of the Petition of Deering, 85 N. Y. 1 [1881].

vision therefor is made by statute.¹ The statutes occasionally provide for assessments for opening streets. The term "opening" is said not to include improving as by grading and paving.² What the term "opening" does include has been said to be so uncertain that a statute authorizing an assessment for "opening" a street cannot be enforced.³ In other jurisdictions the term "opening" appears to include the cost of appropriating the property for a public use and removing such obstructions as existed upon the surface of the land when taken.⁴ Under a statute which provided for "laying out" a street, it was held that an order passed by the proper board reciting the necessity of widening a given street and providing for a notice to the abutters of the intention of the board to lay out the street by taking a portion of the land of such abutting owners; and another order repeating the finding as to necessity of widening the street, reciting the giving of notice aforesaid, and adjudging that the land should be taken as a part of the street and assessing the damages therefor, amounted together to an order "laying out" the street.⁵ When applied to sewers the term "laying out" is said to mean "the designation by the common council of the locality of the sewer or drain and its dimensions and mode of construction."⁶ The different meanings which may be attached to the term "laying out" have been noticed in other cases.⁷ Under a statute which

¹ See § 308.

² *Reed v. City of Toledo*, 18 Ohio 161 [1849]. It does not include grading and graveling. *Wilexon v. City of San Luis Obispo*, 101 Cal. 508, 33 Pac. 988 [1894].

³ *State, Gaines, Pros. v. Hudson County Avenue Commissioners*, 37 N. J. L. (8 Vr.) 12 [1874]. [By the terms of this statute, it was provided that the opening of an avenue should be paid for by assessments while the cost of constructing this avenue should be borne by the county at large.]

⁴ "By the term opening we do not understand the improvement of a street or highway by grading, culverting, etc. The term is generally (we think always) clearly distinguishable from such kind of improvement. The term opening refers to

the throwing open to the public what already was appropriated to individual use and the removing of such obstructions as exist on the surface of the earth rather than any artificial improvement of the surface, and we think in the charter this distinction is very clearly drawn." *Reed v. City of Toledo*, 18 Ohio, 161, 165 [1849].

⁵ *Masonic Building Association v. Brownell*, 164 Mass. 306, 41 N. E. 306 [1895].

⁶ *Cone v. City of Hartford* 28 Conn. 363 [1859]. [The court assumed in this case that "laying out" as applied to highways had a more technical meaning than the same term as applied to sewers.]

⁷ "The words 'laid out' used in reference to ways do not always have the same signification. They will be

provides for opening and improving streets and levying an assessment therefor an assessment cannot be levied for the improvement of a street already in existence.⁸ Under provisions of a statute for vacating a street, the damage caused by such vacation may be included in an assessment to be levied upon the owners of property benefited by such vacation.⁹

§ 435. Widening street.

Authority to levy assessments for widening a street is generally given by statute.¹ If the exercise of such power is held invalid, it is for special reasons peculiar to each case. Thus, under a statute providing that the cost of repaving shall be paid out of the repair fund, it was held that an assessment could not be levied for widening a street where the improvement was not for the benefit of the owners but of the public and resulted in the reconstruction of the street already paved.² An assessment for widening a street may be invalid if the assessment is grossly in excess of the benefits.³ This is true especially if the benefits have once been deducted in a condemnation proceeding and it is subsequently sought to assess for such benefits.⁴ An assessment for widening a street may be invalid because the improvement of widening is combined with another improvement, such as grading and graveling, which, by statute, is made a distinct proceeding.⁵

§ 436. Power to grade street.

Power conferred upon a city to grade a street implies power to fix the grade of such street.¹ If a city has power to grade

found to be used as descriptive of all conditions of a way, such as a way voted to be built, a way being built, or a way built. The context usually determines the meaning of the expression." *Mansur v. County Commissioners of Aroostook County*, 83 Me. 514, 523, 22 Atl. 358 [1891].

⁸ *Municipality Number Two v. McDonough*, 16 La. 533 [1840]; *Second Municipality of New Orleans v. McDonough*, 9 Robinson (La.) [1845].

⁹ In the matter of *Barelay*, 91 N. Y. 430 [1883]; *Vacation of Howard Street, Philadelphia*, 142 Pa. St. 601, 21 Atl. 974 [1891].

¹ *Whiting v. Mayor and Aldermen of the City of Boston*, 106 Mass. 89 [1870]; *City of Asheville v. Wachovia Loan & Trust Co.*, 143 N. C. 360, 55 S. E. 800 [1906].

² *Wreford v. City of Detroit*, 132 Mich. 348, 93 N. W. 876 [1903].

³ *City of Norfolk v. Chamberlain*, 89 Va. 196, 16 S. E. 730 [1892].

⁴ *City of Norfolk v. Chamberlain*, 89 Va. 196, 16 S. E. 730 [1892].

⁵ *Mendenhall v. Clugish*, 84 Ind. 94 [1882].

¹ *Himmelmann v. Hoadley*, 44 Cal. 213 [1872].

streets, it ordinarily has power to change a grade once established,² subject in some states to liability to damages for changing an established grade. A statute authorizing park commissioners to establish the grade of streets in a certain territory "where the same have not heretofore been fixed and established by law," does not give to such commissioners power to change established grades whether established by statute or by ordinance of the council.³ Power to grade does not of itself confer power to levy a local assessment for grading.⁴ In the absence of a statute specifically authorizing the levy of an assessment therefor the cost of grading must be paid for by general taxation.⁵ The power to assess for the cost of grading is frequently given by statute and if so given may be exercised.⁶ Under some statutes it is provided that the cost of grading can be paid for by local assessment only if the general funds or the revenues of the city are not sufficient to justify paying such expense out of the city treasury. Under such statutes the cost of grading cannot be assessed upon property owners unless the city council declares formally that the revenues of the city are not sufficient to justify paying the cost of grading out of the city treasury.⁷ Under authority to levy an assessment for grading, it has been held that an improvement consisting of "grading, grubbing, guttering and curbing" the streets may be paid for by assessment.⁸ Under authority to grade and gravel a street a sewer cannot be constructed.⁹ Whether an order to grade a street would justify macadamizing a street was

² *Mason v. City of Sioux Falls*, 2 S. Dak. 640, 39 Am. St. Rep. 802, 51 N. W. 770 [1892].

³ In the matter of the Mutual Life Insurance Company, 89 N. Y. 530 [1882].

⁴ *Field v. Barber Asphalt Paving Company*, 117 Fed. 925 [1902]; *Seo-field v. City of Council Bluffs*, 68 Ia. 695, 28 N. W. 20 [1886]; *Keys v. City of Neodesha*, 64 Kan. 681, 68 Pac. 625 [1902]; *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304 [1885].

⁵ *Keys v. City of Neodesha*, 64 Kan. 681, 68 Pac. 625 [1902]; *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304 [1885].

⁶ *City of Napa v. Easterby*, 61 Cal.

509 [1882]; *Emery v. San Francisco Gas Company*, 28 Cal. 346 [1865]; *Butler v. City of Toledo*, 5 O. S. 225 [1855]; *Ridenour v. Saffin*, 1 Handy (Ohio) 464 [1855]; *McNair v. Ostrander*, 1 Wash. 110, 23 Pac. 414 [1890].

⁷ *Wheeler v. City of Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088 [1898]; *City of Sedalia to the use of Taylor v. Abell*, 103 Mo. App. 431, 76 S. W. 97 [1903]; *City of Carthage ex rel. Carthage National Bank v. Badgley*, 73 Mo. App. 123 [1897].

⁸ *City of Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26 [1894].

⁹ *Peek v. City of Grand Rapids*, 125 Mich. 416, 84 N. W. 614 [1900].

held to depend on the plan of work to be done which was before the board when the order was made, which was to be regarded as part of such order; but which was not put in evidence in the case so as to enable the court to determine the question.¹⁰ Under authority to levy an assessment for grading an item of expense for removing gas pipes cannot be included, since it is the duty of the gas company to remove its own gas pipes when public necessities require it.¹¹ Under a statute providing for assessing upon abutting property the cost of altering the grade of a street, it has been held that the cost of altering such grade in order to carry the street under a railroad and thus avoid a grade crossing is "not within the purview of this statute."¹²

§ 437. Power to pave street.

Many statutes provide for levying assessments for paving a street; and assessments under such statutes are valid.¹ The question presented under such statutes is as to the meaning of "paving" and the forms of improvement which may be included thereunder. Paving consists in producing by any means a hard, firm, smooth surface for travel.² Paving consists in producing a compact, even, hard surface,³ or covering the street with stone or brick so as to make a convenient surface for travel.⁴ Many different forms of paving have been provided for by statute and considered by the courts. Among such forms of paving for which local assessments may be levied are macadamizing⁵ and special

¹⁰ State of Minnesota ex rel. Lewis v. District Court of Ramsey County, 33 Minn. 164, 22 N. W. 295 [1885].

¹¹ In the matter of Deering, 93 N. Y. 361 [1883].

¹² Louisville Steam Forge Co. v. Mehler, 112 Ky. 438, 64 S. W. 396, 64 S. W. 652, 23 Ky. Lew. Rep. 1335 [1901].

¹ Washington & Georgetown Railroad Company v. District of Columbia, 108 U. S. 522, 27 L. 807, 2 S. 865 [1883]; Emery v. San Francisco Gas Company, 28 Cal. 346 [1865]; Mayor and Aldermen of Savannah v. Weed, 96 Ga. 670, 23 S. E. 900 [1895]; Mayor and City Council of Baltimore v. Hughes' Adm'r, 1 Gill

& Johnson (Md.) 480, 19 Am. Dec. 243 [1829]; Mayor, etc., of Baltimore v. Moore, 6 Harris & Johnson (Md.) 375 [1825]; Breevort v. City of Detroit, 24 Mich. 322 [1872]; Franklin v. Hancock, 204 Pa. St. 110, 53 Atl. 644 [1902].

² Philadelphia to use of Mack v. Eddleman, 169 Pa. St. 452, 32 Atl. 639 [1895].

³ State of Florida ex rel. City of Jacksonville v. Jacksonville Street Railroad Company, 29 Fla. 590, 10 So. 590 [1892].

⁴ Warren v. Henly, 31 Ia. 31 [1870].

⁵ Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082 [1893]; Alameda Ma-

forms thereof,⁶ block pavements,⁷ including granite block⁸ and wooden block,⁹ such as the Nicholson block,¹⁰ planking¹¹ and asphalt pavements.¹² The only objection raised to the use of any of these materials for paving arises under statutes providing for competitive bidding, where the specifications call for such of these materials as are patented and cannot therefore be open to free competition.¹³ Under a statute providing for paving streets and filing liens therefor, "as is now practiced and allowed by law," the latter expression refers to the lien and not to the paving and does not restrict the city to methods of paving known and used when such statute was passed.¹⁴ Paving is a

macadamizing Company v. Williams, 70 Cal. 534, 12 Pac. 530 [1886]; Amery v. City of Keokuk, 72 Ia. 701, 30 N. W. 780 [1887]; Sanger v. Rice, 43 Kan. 580, 23 Pac. 633 [1890]; Hines v. City of Leavenworth, 3 Kan. 180 [1865]; Ross v. Gates, 183 Mo. 338, 81 S. W. 1107 [1904]; (macadam held to be "paving" within the meaning of an ordinance); Saxton v. City of St. Joseph, 60 Mo. 153 [1875]; Kiley v. Cranor, 51 Mo. 541 [1873]; Neenan v. Donoghue, 50 Mo. 493 [1872]; City of St. Louis to the use of Lohrum v. Coons, 37 Mo. 44 [1865]; City of St. Louis to use of Carrol v. Hardy, 35 Mo. 261 [1864]; Powell v. City of St. Joseph, 31 Mo. 347 [1861]; City of St. Joseph v. Anthony, 30 Mo. 537 [1860]; Oster v. City of Jefferson, 57 Mo. App. 485 [1894]; Gibson v. Zimmerman, 27 Mo. App. 90 [1887]; Union Cemetery Association v. McConnell, 124 N. Y. 88, 26 N. E. 330 [1891].

⁶In the matter of Belmont, 12 Hun. 558 [1878].

⁷Gleason v. Barnett, 106 Ky. 125, 50 S. W. 67 [1899]; Mayor and City Council of Baltimore v. Raymo, 68 Md. 569, 13 Atl. 383 [1888].

⁸Cole v. Skrainka, 105 Mo. 303, 16 S. W. 491 [1891]; Philadelphia to use v. Evans, 139 Pa. St. 483, 21 Atl. 200 [1891].

⁹Owens v. City of Milwaukee, 47 Wis. 461, 3 N. W. 3 [1879].

¹⁰Nicholson Pavement Co. v. Pain-

ter, 35 Cal. 699 [1868]; Martindale v. Palmer, 52 Ind. 411 [1875]; Howell v. Bristol, 71 Ky. (8 Bush.) 493 [1871]; Motz v. City of Detroit, 18 Mich. 494 [1869]; Hobart v. City of Detroit, 17 Mich. 246, 97 Am. Dec. 185; Rogers v. City of St. Paul, 22 Minn. 494 [1876]; Dean v. Borchsenius, 30 Wis. 236 [1872]; Mills v. Charleton, 29 Wis. 400, 9 Am. Rep. 578 [1872].

¹¹City of Seattle v. Kelleher, 195 U. S. 351, 25 S. C. 44, 49 L. 232 [1904]; Knowles v. Seale, 64 Cal. 377, 1 Pac. 159 [1883]; Deady v. Townsend, 57 Cal. 298 [1881]; Emery v. San Francisco Gas Co., 28 Cal. 346 [1865].

¹²N. P. Perine Contracting & Paving Company v. Quackenbush, 104 Cal. 684, 38 Pac. 533 [1894]; Barber Asphalt Paving Company v. Edgerton, 125 Ind. 455, 25 N. E. 436 [1890]; Barber Asphalt Paving Co. v. Gaar, 115 Ky. 334, 73 S. W. 1106, 24 Ky. L. Rep. 2227 [1903]; Barber Asphalt Paving Co. v. French, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]; Barber Asphalt Paving Co. v. Ullman, 137 Mo. 543, 38 S. W. 458 [1896]; City of Schenectady v. Trustees of Union College, 66 Hun. (N. Y.) 179, 21 N. Y. Supp. 147 [1892]; City of Erie use Erie Paving Co. v. Moody, 171 Pa. St. 610, 33 Atl. 378 [1895].

¹³See § 515.

¹⁴Philadelphia to use v. Evans, 139 Pa. St. 483, 21 Atl. 200 [1891].

term applicable as well to sidewalks as to streets,¹⁵ and includes flagging.¹⁶ Paving a street does not necessarily involve any change in grade.¹⁷ The city may, if it sees fit, pave only a part of the width of the street, in the absence of a statute specifically providing the width which must be paved.¹⁸ The city may omit to pave the part of a street between the tracks of a railroad located therein.¹⁹ It is not necessary that the paved part of a street be in the center thereof.²⁰ This is "a matter within the discretion of the city officers."²¹

§ 438. Distinction between grading and paving.

Grading and paving are ordinarily to be distinguished.¹ Authority to levy an assessment for paving is not authority to levy an assessment for grading.² The change of grade of a street is held not to be necessarily a proceeding relative to an assessment for paving.³ However, power to make assessments for "pitching, paving, regulating and repairing streets" was held to include power to assess for grading.⁴ In some jurisdictions the cost of grading cannot be paid for by assessments, while the cost of paving can.⁵ In such jurisdictions the actual preparation of the

¹⁵ In the matter of Burmeister, 76 N. Y. 174 [1879]; (reversing In the matter of Burmeister, 9 Hun. (N. Y.) 613 [1877]); In the Matter of the Petition of Burke to Vacate an Assessment, 62 N. Y. 224 [1875]; In the matter of Phillips to Vacate an Assessment, 60 N. Y. 16 [1875].

¹⁶ In the matter of Burmeister, 76 N. Y. 174 [1879]; (reversing in the matter of Burmeister, 9 Hun. (N. Y.) 613 [1877]).

¹⁷ State of Florida ex rel. City of Jacksonville v. Jacksonville Street Railway Company, 29 Fla. 590, 10 So. 590 [1892].

¹⁸ Bacon v. Mayor and Aldermen of Savannah, 86 Ga. 301, 12 S. E. 580 [1890]; Topliff v. City of Chicago, 196 Ill. 215, 63 N. E. 692 [1902]; County of Jefferson v. City of Mt. Vernon, 145 Ill. 80, 33 N. E. 1091 [1893]; Downing v. City of Des Moines, 124 Ia. 289, 99 N. W. 1066 [1904].

¹⁹ Matter of McCormack, 10 Abb. Pr. N. S. (N. Y.) 234 [1870].

²⁰ McGrew v. City of Kansas City, 64 Kan. 61, 67 Pac. 438 [1902].

²¹ McGrew v. City of Kansas City, 64 Kan. 61, 62, 67 Pac. 438 [1902].

¹ Fort Street & Elmwood R. R. Co. v. Schneider, 15 Mich. 74 [1866]; Green v. Ward, 82 Va. 324 [1886].

² Bueroff v. City of Council Bluffs, 63 Ia. 646, 19 N. W. 807.

³ In the matter of Buhler, 32 Barb. (N. Y.) 79 [1859]. See also, where an assessment could be levied for paving but not for a change of grade to carry a street under a railroad; Louisville Steam Forge Co. v. Mehler, 112 Ky. 438, 64 S. W. 396, 652, 23 Ky. Law Rep. 1335 [1901].

⁴ People ex rel. Doyle v. Green, 3 Hun. (N. Y.) 755 [1875].

⁵ Allen v. City of Davenport, 107 Ia. 90, 77 N. W. 532 [1898]; Scofield v. City of Council Bluffs, 68 Ia. 695, 28 N. W. 20 [1886]; City of Poplar Bluff to use of Wheeler v. Hoag, 62 Mo. App. 672 [1895]; Gibson v. Kayser's Executors, 16 Mo. App. 404 [1885]; Farrington v. City

surface of the ground so as to make it suitable for receiving the pavement is not regarded as grading within the meaning of these statutes, but is a part of paving.⁶ A contract by a street railway company to pave its track does not, however, make it liable for excavation incident thereto.⁷ On the other hand, macadamizing a street is not looked upon as grading, although it makes a slight change in the grade.⁸

§ 439. What is included in paving.

A provision for paving a street impliedly includes the necessary processes incident thereto,¹ such as leveling the surface,² and sand filling.³ Whether a provision for paving includes curbing, guttering, sewers and the like is a question upon which there is some conflict of authority. In some jurisdictions it seems to be held that improvements of these classes are not included under a general provision for paving.⁴ Thus a provision for assessing for paving has been held not to include curbing.⁵ A provision for macadamizing has been held not to include curb-

of Mt. Vernon, 166 N. Y. 233, 59 N. E. 826 [1901]; *Green v. Ward*, 82 Va. 324 [1886].

⁶ *Field v. Barber Asphalt Paving Company*, 117 Fed. 925 [1902]; *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898]; *Seofield v. City of Council Bluffs*, 68 Ia. 695, 28 N. W. 20 [1886]; *City of Poplar Bluff to use of Wheeler v. Hoag*, 62 Mo. App. 672 [1895]; *Gibson v. Kaycer's Executors*, 16 Mo. App. 404 [1885]; *State, Parker, Pros. v. City of New Brunswick*, 32 N. J. L. (3 Vr.) 548 [1867]; *Farrington v. City of Mt. Vernon*, 166 N. Y. 233, 59 N. E. 826 [1901]; *Blount v. City of Janesville*, 31 Wis. 648 [1872].

"Where an alley has been sufficiently graded, or where it does not need to be graded, the small cost of preparing it for pavement might be included in the cost of the pavement as a mere incident thereto." *Hentig v. Gilmore*, 33 Kan. 234, 243, 6 Pac. 304 [1885]. Such form of grading is said to be "that slight alteration of the surface of the ground usually

incident to the laying of pavements and the paving of gutters." *State. Parker, Pros. v. City of New Brunswick*, 32 N. J. L. (3 Vr.) 548 [1867]; See to the same effect *O'Reilley v. City of Kingston*, 114 N. Y. 439, 21 N. E. 1004 [1889].

⁷ *Fort Street & Elmwood R. R. Co. v. Schneider*, 15 Mich. 74 [1866].

⁸ *Warren v. Henly*, 31 Ia. 31 [1870].

¹ *People ex rel. Doyle v. Green*, 3 Hun. (N. Y.) 755 [1875]; *Dean v. Borchsenius*, 30 Wis. 236 [1872].

² *People ex rel. Doyle v. Green*, 3 Hun. (N. Y.) 755 [1875].

³ *Dean v. Borchsenius*, 30 Wis. 236 [1872].

⁴ *City Street Improvement Co. v. Taylor*, 138 Cal. 364, 71 Pac. 446 [1903]; *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082 [1893]; *Beaudry v. Valdez*, 32 Cal. 269 [1867].

⁵ *City Street Improvement Co. v. Taylor*, 138 Cal. 364, 71 Pac. 446 [1903].

ing,⁶ the construction of rock gutters,⁷ or the construction of sidewalks.⁸ A contract for paving and macadamizing a street may be performed fully, although no curbing or guttering has been done.⁹ In other jurisdictions it is held that a power to pave includes many other types of improvement as incidental thereto.¹⁰ Thus, authority to pave has been held to include removing earth for paving, and setting curbstones,¹¹ the construction of gutters,¹² curbing and guttering,¹³ and filling and adjusting sewers, catch-basins and manholes.¹⁴ Under a provision for additional macadamizing, rock on the roadway may be removed and such part of the roadway relaid with new rock.¹⁵

§ 440. Intersections.

Who shall pay for the cost of paving the intersection of two streets which cross each other, is a question which rests in the discretion of the legislature.¹ The legislature may provide that the street shall pay the cost of such intersections out of its funds raised by general taxation.² If the statute specifically provides that the city shall pay the cost of intersections out of its general funds,³ or if it provides for paying the cost of such intersections out of a ward fund,⁴ or if it provides for levying an assessment for a street improvement excluding intersections,⁵ the intention of the legislature to relieve abutting property owners from the cost of such improvements is clear. A street intersection is,

⁶ *Beaudry v. Valdez*, 32 Cal. 269 [1867].

⁷ *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082 [1893].

⁸ *Himmelman v. Satterlee*, 50 Cal. 68 [1875].

⁹ *Fox v. Middlesborough Town Company*, 96 Ky. 262, 28 S. W. 776 [1894].

¹⁰ *City of Springfield to use of Central National Bank v. Weaver*, 137 Mo. 650; 37 S. W. 509, 39 S. W. 276 [1896].

¹¹ *Steckert v. City of East Saginaw*, 22 Mich. 104 [1870].

¹² *Warren v. Henly*, 31 Ia. 31 [1870].

¹³ *Owens v. City of Marion*, 127 Ia. 469, 103 N. W. 381 [1905]; *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853]; *City of Omaha v. Gsan-*

ter, 4 Neb. Unoff. 52, 93 N. W. 407 [1903].

¹⁴ *Sawyer v. City of Chicago*, 183 Ill. 57, 55 N. E. 645 [1899]; *Cochran v. Village of Park Roads*, 138 Ill. 295, 27 N. E. 939 [1891].

¹⁵ *Oakland Paving Co. v. Rier*, 52 Cal. 270 [1877].

¹ *Doane v. Houghton*, 75 Cal. 360, 17 Pac. 426 [1888]; In the matter of *Murphy*, 20 Hun. 346 [1880]. See § 317.

² *Beniteau v. City of Detroit*, 41 Mich. 116, 1 N. W. 899 [1879].

³ *Beniteau v. City of Detroit*, 41 Mich. 116, 1 N. W. 899 [1879].

⁴ *Blount v. City of Janesville*, 31 Wis. 648 [1872].

⁵ *Moale v. Mayor and City Council of Baltimore*, 61 Md. 224 [1883].

however, a part of a street and is necessary to its continuity. The legislature may and often does provide for including the cost of street intersections in the general cost of the street and assessing the same upon the property benefited by the street.⁶ As long as the assessment does not exceed the benefits it may be left to the city to determine whether to levy assessments for the cost of street intersections, and its determination to assess for such cost is final.⁷ If the statute provides that the assessment shall be "for an amount which shall not exceed the actual cost and value of the improvement," it is left in the discretion of the city whether to levy an assessment for the cost of intersections or not.⁸ If a statute provides originally that the "entire cost of the improvement" is to be divided by the number of feet fronting or abutting on the improvement and that the quotient shall be the sum assessed per front foot; and this statute is modified so as to provide that the "cost of the improvement fronting on the property to be assessed" is to be divided by the number of feet fronting on such improvement, the cost of intersections is to be included in the cost of the improvement under the statute as amended.⁹ Special provisions are occasionally found with reference to the cost of street intersections. Thus it may be provided that lots in a block may be assessed for the cost of work extending to the middle line of the cross streets at each end of the block.¹⁰ The cost of paving intersections may be separated from the general cost of the street and assessed upon the property at or near the intersection paved on the theory that such property is especially benefited thereby.¹¹ Under such statutes it is improper to include the property near the intersection but not within the assessment district for the general street improvement in assessing for the cost of the street improvement gener-

⁶ *Corey v. City of Fort Dodge*, 133 Ia. 666, 111 N. W. 6 [1907]; *Gage v. City of Chicago*, 192 Ill. 586, 61 N. E. 849 [1901]; *Walters v. Town of Lake*, 129 Ill. 23, 21 N. E. 555 [1890]; *Conde v. City of Schenectady*, 164 N. Y. 258, 58 N. E. 130 [1900]; *Young v. City of Tacoma*, 31 Wash. 153, 71 Pac. 742 [1903]; *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902].

⁷ *Gage v. City of Chicago*, 192 Ill.

586, 61 N. E. 849 [1901]; *Walters v. Town of Lake*, 129 Ill. 23, 21 N. E. 555 [1890].

⁸ *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902].

⁹ *Brandhuber v. City of Pierre*. — S. D. —, 113 N. W. 569 [1907].

¹⁰ *Gibson v. Kayser's Executor*, 16 Mo. App. 404 [1885].

¹¹ In the matter of *Murphy*, 20 Hun. 346 [1880].

ally.¹² One-fourth of the cost of the street intersection may be imposed upon each corner lot.¹³ In the absence of statutes specifically providing therefor, the cost of paving street intersections cannot be assessed upon the cross streets and thus indirectly cast upon the city,¹⁴ or upon the owners of the ultimate fee, subject to the public easement.¹⁵ This result is usually reached under statutes which provide for assessing abutting lots or land. Within the meaning of these statutes cross streets are not regarded as lots or land.¹⁶ Since the assessment cannot exceed the cost of the improvement and the proper items incidental thereto even if less than the aggregate amount of the benefits,¹⁷ street intersections cannot be charged for twice in levying assessments.¹⁸ However, where an ordinance providing for paving intersections with asphalt and such ordinance was subsequently repealed by a subsequent ordinance providing for paving such intersections with wooden blocks, it was held that there was no attempt to assess twice for the same intersections.¹⁹ If cross streets are paved with different materials, the intersection evidently can be paved with the same material as only one of the streets. In such a case the city has the right to determine which street shall be regarded as continuous so as to pave intersections with that material.²⁰ The city may determine to which of the intersecting streets it will charge the cost of street intersections or whether it will charge them to both in part.²¹ A resolution

¹² In the matter of Murphy, 20 Hun. 346 [1880].

¹³ Wolf v. City of Keokuk, 48 Ia. 129 [1878].

¹⁴ Holt v. City of East St. Louis, 150 Ill. 530, 37 N. E. 927 [1894]; State ex rel. City of Columbus v. Mitchell, 31 O. S. 592 [1877]. In Dick v. City of Toledo, 11 Ohio C. C. 349 [1896], it was said that a part of the cost of the extra width of a street to make a market space must be borne by the city.

¹⁵ City of Schenectady v. Trustees of Union College, 144 N. Y. 241, 26 L. R. A. 614, 39 N. E. 67 [1894]; reversing City of Schenectady v. Trustees of Union College, 66 Hun. 179, 21 N. Y. Supp. 147 [1892].

¹⁶ See § 587, § 630.

¹⁷ See § 466, § 716, § 719.

¹⁸ Chicago Union Traction Company v. City of Chicago, 208 Ill. 187, 70 N. E. 234 [1904]; (distinguishing Noonan v. People ex rel. Raymond, 183 Ill. 52, 55 N. E. 679 [1899]).

¹⁹ Noonan v. People ex rel. Raymond, 183 Ill. 52, 55 N. E. 679 [1899]; (distinguished in Chicago Union Traction Company v. City of Chicago, 208 Ill. 187, 70 N. E. 234 [1904]).

²⁰ Bates v. Twist, 138 Cal. 52, 70 Pac. 1023 [1902]; Noonan v. People ex rel. Raymond, 183 Ill. 52, 55 N. E. 679 [1899].

²¹ Creighton v. Scott, 14 O. S. 438 [1863].

for providing for paving an avenue from Forty-second to Eighty-sixth street, and for laying cross walks at the several intersecting streets and avenues authorizes the paving of Eighty-sixth street as an intersecting street.²² Whether by the use of "intersection" or some similar expression, the legislature or city council refers to streets or sidewalks, or both, is a question of depending upon the context for its determination, since both streets and sidewalks intersect. Under a statute providing that all improvements of the squares or areas formed by the crossing of streets should be paid by the city out of its general funds, it was held that the cost of the sidewalks at the corners of such squares, as well as the cost of the intersection of the streets, should be paid out of the general funds.²³ In an ordinance which refers to sidewalk improvements and describes intersections as being upon the corners of the streets, the term "intersections" is regarded as applying to sidewalk intersections only and not to intersections of streets.²⁴

§ 441. Curbing and guttering.

Power to curb and gutter is generally given by statute. Provision is often made for including these expenses as items of the assessment upon the owners of property benefited by the improvement.¹ Where specific mention of curbing and guttering is made, and it is provided that assessments may be levied therefor, it is ordinarily immaterial whether curbing and guttering is to be regarded as a part of the street or a part of the sidewalk.² If no specific mention is made of curbing and guttering and a different method is provided for paying for the cost of constructing a street from that which is provided for paying the cost of constructing a sidewalk, it is quite material to determine whether curbing and guttering are to be regarded as parts of the street or parts of the sidewalk. Upon this question there is a plain conflict of authority. From a negative standpoint some of the courts have held that a curb is not a part of a street improvement.³

²² In the matter of Murphy, 20 Hun. 346 [1880].

²³ City of Lawrence v. Killam, 11 Kan. 499 [1873].

²⁴ Gage v. City of Chicago, 203 Ill. 26, 67 N. E. 477 [1903].

¹ Burk v. Altshul, 66 Cal. 533, 6 Pac. 393 [1885]; O'Leary v. Sloo, 7

La. Ann. 25 [1852]; City of Omaha v. Gsanter, 4 Neb. Unoff. 52, 93 N. W. 407 [1903].

² Pittsburg v. Chuley, 66 Pa. St. (16 P. F. Smith) 449 [1870].

³ Beaudry v. Valdez, 32 Cal. 269 [1867]; City to use of Brooks v. Lea, 9 Phila. (Pa.) 106 [1872].

Hence, macadamizing a street does not include curbing the sidewalk.⁴ Other courts have held that a curb and gutter are not a part of a sidewalk improvement.⁵ Whether a curb is a part of a gutter is said to be a question of fact, depending on the usual and customary way of constructing the gutter.⁶ From an affirmative standpoint some courts have held that a curb and a gutter are a part of a street improvement.⁷ Other courts have held that a curb is a part of a sidewalk.⁸ A curb has been regarded as a part of the sidewalk, even if there is not enough of the street left on that side to construct the rest of the sidewalk.⁹ In some jurisdictions this latter result is reached in accordance with the terms of the statute applicable, which seems to treat curbing and guttering as a part of the sidewalk.¹⁰ It has been said to be a question of fact to be determined from the circumstances of each particular case whether a curb and gutter are a part of the street or a part of the sidewalk.¹¹ An assessment for paving is not invalid for

⁴ *Beaudry v. Valdez*, 32 Cal. 269 [1867].

⁵ *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889]. A gutter is not part of the sidewalk; *Harton v. Town of Avondale*, 147 Ala. 458, 41 So. 934 [1906]. A curb is not part of the sidewalk; *Job v. People ex rel. Tetherington*, 193 Ill. 609, 61 N. E. 1079 [1901].

⁶ *Phoenixville Borough v. Miller*, 34 Pa. Super. Ct. 16 [1907].

⁷ *Harton v. Town of Avondale*, 147 Ala. 458, 41 So. 934 [1906]; *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889]; *Allman v. District of Columbia*, 3 App. D. C. 8 [1894]; *Job v. People ex rel. Tetherington*, 193 Ill. 609, 61 N. E. 1079 [1901]; *Gates v. City of Grand Rapids*, 134 Mich. 96, 95 N. W. 998 [1903]; *In Matter of Burmeister*, 76 N. Y. 174 [1879]; reversing in the *Matter of Burmeister*, 9 Hun. 613 [1877]. A curb is a part of the street where there is not sufficient space to construct a sidewalk. *Marshall v. Barber Asphalt Paving Company*, — Ky. — 66 S. W. 734, 23 Ky. Law Rep. 1971 [1902]; substitute for opinion in *Marshall v. Barber Asphalt Paving Company*, 66 S. W. 182, which modi-

fied *Marshall v. Barber Asphalt Paving Company*, — (Ky.) —, 52 S. W. 1117, 21 Ky. L. Rep. 712.

⁸ *Howe v. City of Cambridge*, 114 Mass. 388 [1874]; *Joyes v. Shadburn*, — Ky. —, 13 S. W. 361, 11 Ky. L. Rep. 892 [1890]; *State, Robins, Pros. v. Commissioners of Streets and Sewers in the City of New Brunswick*, 44 N. J. L. (15 Vr.) 116 [1882]. Curbing is held to be a part of the sidewalk and guttering a part of the roadway in *State, Kirkpatrick, Pros. v. Commissioners of Streets and Sewers in the City of New Brunswick*, 42 N. J. L. (13 Vr.) 510 [1880].

⁹ *Marshall v. Barber Asphalt Paving Company*, — (Ky.) —, 66 S. W. 734, 23 Ky. L. R. 1971 [1902]; (substitute for opinion in *Marshall v. Barber Asphalt Paving Co.*, 66 S. W. 182, which modified *Marshall v. Barber Asphalt Paving Co.*, — (Ky.) —, 52 S. W. 1117, 21 Ky. L. R. 712].

¹⁰ *Joyes v. Shadburn*, — Ky. —, 13 S. W. 361, 11 Ky. L. Rep. 892 [1890].

¹¹ *Ehni v. City of Columbus*, 3 Ohio C. C. 494 [1889]; (here held to be a part of the street).

want of curbing and guttering in the absence of evidence to show that such omission rendered the pavement defective.¹²

§ 442. Alleys.

An alley is an improvement for the construction of which an assessment may be levied, if authorized by statute.¹ Under a statute which provides that the grading of new streets and alleys and the repair of all alleys is to be paid out of the general revenue fund of the city, and that materials for the roadways and the repairs of all alleys are to be charged upon the adjoining property as a special tax, property which adjoins an alley may be subject both to a special assessment for repairs, and also for the cost of constructing a roadway or an alley.²

§ 443. Sidewalks.

A grant of power to construct a sidewalk did not confer power to levy special assessments for the cost thereof.¹ Thus, under a statute providing that a city may "regulate and improve all streets, alleys and sidewalks," it was held that the city could not levy an assessment for the cost of constructing a sidewalk.² Power to assess for constructing a sidewalk is very often given by statute and where given may be exercised in the manner provided for by statute.³ Since the term "street" often includes sidewalks, power to assess for paving a street includes power to assess for paving a sidewalk where the term "street" is used with this broad meaning.⁴ Since the construction of a sidewalk is one of the improvements which may be charged against the property owner on the theory of compelling him to pay for the performance of a legal duty which rested upon him primarily, it has been held in jurisdictions which entertain this view of the nature of a sidewalk improvement, that the abutting owners may be com-

¹² *Wilvert v. Sunbury Borough*, 81½ Pa. St. (32 P. F. Smith) 57 [1874].

¹ *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163 [1902]. See § 321.

² *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163 [1902].

¹ *City of Fairfield v. Rateliff*, 20 Ia. 396 [1866].

² *City of Fairfield v. Rateliff*, 20 Ia. 396 [1866].

³ *Ronan v. People ex rel. Shafter*, 193 Ill. 631, 61 N. E. 1042 [1901]; *O'Leary v. Sloo*, 7 La. Ann. 25 [1852]; *Kemper v. King*, 11 Mo. App. 116 [1881]; *In re Beechwood Avenue*, Appeal of O'Mara, 194 Pa. St. 86, 45 Atl. 127 [1899].

⁴ *Warren v. Henly*, 31 Ia. 31 [1870].

pelled to construct sidewalks in front of their property, even if no authority is given to levy assessments therefor on the theory of benefits conferred by such improvements.⁵ Thus, under a statute authorizing a city "to regulate and make improvements to the streets, alleys, sidewalks, public squares, wharves and other public property and places," the city may compel owners of land fronting on a street to construct and keep in repair the sidewalks in front of their respective lands.⁶ In some jurisdictions sidewalk improvements do not seem to be referred to the power to compel the property owner to pay for the cost of performing a legal duty which rested primarily upon him.⁷ Where this theory is entertained the city cannot require the owner to construct a sidewalk in front of his property or pay for the cost of such construction,⁸ at least in the absence of a statute authorizing the imposition of such charge. If a city is empowered to charge property owners with the cost of constructing a sidewalk, it is held in many jurisdictions that this power does not include the power to compel the property owner to grade that part of the street which is to be occupied by the sidewalk when constructed.⁹ Such grading must be done by the city at its own expense, or must be paid for in the manner authorized for paying for the grading of the street. Even under a statute which provides for a lien upon abutting land in case the owner neglects "to perform the thing or things required by an order of the common council for the making, raising, grading, paving or flagging any sidewalks in the city adjacent to such land," it has been held that if the land to be occupied by the

⁵ Mayor and Board of Trustees of the Town of New Iberia v. Fontelieu, 108 La. 460, 32 So. 369 [1901]; State, Agens, Pros. v. Mayor and Common Council of Newark, 37 N. J. L. (8 Vr.) 415, 18 Am. Rep. 729 [1874]; People ex rel. Johnson v. City of Brooklyn, 23 Barb. 180 [1856]; Wilkinsburg Bor. v. Home for Aged Women, 131 Pa. St. 109, 6 L. R. A. 531, 18 Atl. 937 [1890].

⁶ Mayor and Board of Trustees of the Town of New Iberia v. Fontelieu, 108 La. 460, 32 So. 369 [1901].

⁷ See § 420.

⁸ State ex rel. Christopher v. City

of Portage, 12 Wis. 562 [1860].

⁹ Little Rock v. Fitzgerald, 59 Ark. 494, 28 L. R. A. 496, 28 S. W. 32 [1894]; Hillhouse v. City of New Haven, 62 Conn. 344, 26 Atl. 393 [1892]; President and Fellows of Yale College v. City of New Haven, 57 Conn. 1, 17 Atl. 139 [1889]; Dickinson v. City Council of Worcester, 138 Mass. 555 [1885]; State, Cronin, Pros. v. Mayor and Aldermen of Jersey City, 38 N. J. L. (9 Vr.) 410 [1876]; State, Van Tassel, Pros. v. Mayor and Aldermen of Jersey City, 37 N. J. L. (8 Vr.) 128 [1874].

sidewalk is above or below the level of a street, it is the duty of the city to grade the entire width of the street.¹⁰ If the city orders a sidewalk to be constructed upon a sea-wall the city must put such sea-wall in repair so as to make a suitable foundation for such sidewalk. The city cannot, under color of compelling an owner of land to construct a sidewalk, compel him to reconstruct such sea-wall.¹¹ Under authority to grade a street the city may, therefore, grade that part of a street which is to be occupied by a sidewalk.¹² Power to compel the construction of a sidewalk does not include power to compel the building of a railing along the side thereof.¹³ Accordingly, such improvement may be completed without such railing.¹⁴ Authority to construct a sidewalk by assessments does not include authority to levy an assessment for banking the sides of the walk with earth.¹⁵ An ordinance which provides for constructing a new sidewalk in place of the old without specifying the grade of the new walk, in effect leaves the grade as it was before.¹⁶ In the absence of statute it is not necessary that the width of the sidewalk to be constructed should be established before proceedings for doing the work are begun.¹⁷ Under a statute which requires sidewalks to be paved for the full width thereof an ordinance for laying a sidewalk need not specify the width to be paved.¹⁸ Under a statute for assigning the cost of constructing sidewalks at the expense of the property owners benefited and providing that property owners who have built their own walks shall not be charged "except for the pro rata cost of intersections," it was held that a property owner who constructed the sidewalk in front of his property and the intersection adjoining thereto under a permit which made no

¹⁰ *Hillhouse v. City of New Haven*, 62 Conn. 344, 26 Atl. 393 [1892].

¹¹ *President and Fellows of Yale College v. City of New Haven*, 57 Conn. 1, 17 Atl. 139 [1889].

¹² *Dashiell v. Mayor and City Council of Baltimore*, Use of Tax. 45 Md. 615 [1876]; (This holding was justified on the theory that such grading was necessary for laying and protecting the work of the paving and guttering which was included in the general work of paving.)

¹³ *Williams v. Brace*, 5 Conn. 190 [1824].

¹⁴ *Chase v. Board of Aldermen of Springfield*, 119 Mass. 556 [1876].

¹⁵ *People v. Patton*, 223 Ill. 379, 79 N. E. 51 [1906].

¹⁶ *Gaertner v. Louisville Artificial Stone Co.*, 114 Ky. 160, 70 S. W. 293 [1902]; *City of Augusta v. McKibben*, — Ky. —, 60 S. W. 291, 22 Ky. Law Rep. 1224.

¹⁷ *Doane v. Houghton*, 75 Cal. 360, 17 Pac. 426 [1888].

¹⁸ *In the Matter of the Mutual Life Insurance Company*, 89 N. Y. 530 [1882].

reference to the cost of intersections did not thereby relieve himself from liability for his pro rata share of the cost of all the sidewalk intersections contracted for in that improvement.¹⁹ The city may provide that property owners shall pay the cost of sidewalk intersections.²⁰ Where a hearing is given as to the existence of benefits as a fact the property owners may submit the question whether the city should not pay for such intersections, but the finding of the trial court is regarded as final.²¹

§ 444. Sewers.

A sewer is an improvement for the construction of which an assessment may be levied, if authorized by statute.¹ In the absence of a statute specifically authorizing an assessment, mere authority to construct a sewer does not confer authority to assess.² Thus, under a statute which authorizes the construction of a sewer, and which authorizes an assessment for the value of land taken for the construction of roads, streets or highways, the cost of land taken for a sewer or damaged by its construction cannot be included in the assessment.³ Statutes frequently authorize the levy of local assessments for the construction of sewers and full effect is given to such statutes.⁴ A city, acting under a special charter

¹⁹ *Heman Construction Company v. McManus*, 102 Mo. App. 649, 77 S. W. 310 [1903]. The reason assigned for this view was that "the permit under which respondent constructed the sidewalk adjacent to her property was silent respecting intersections." *Heman Construction Company v. McManus*, 102 Mo. App. 649, 656, 77 S. W. 310 [1903].

²⁰ *Hyman v. City of Chicago*, 188 Ill. 462, 59 N. E. 10 [1900].

²¹ *Hyman v. City of Chicago*, 188 Ill. 462, 59 N. E. 10 [1900].

¹ See § 324 *et seq.*

² *Heman v. Handlan*, 59 Mo. App. 490 [1894]; *City of Watertown v. Fairbanks*, 65 N. Y. 588 [1875]; *Borough of Mauch Chunk v. Shortz*, 61 Pa. St. (11 P. F. Smith) 399 [1869]; *Cain v. City of Elkins*, 57 W. Va. 9, 49 S. E. 898 [1905].

³ *Mill Creek Sewer*, 196 Pa. St. 183, 46 Atl. 312 [1900].

⁴ *Park Ecclesiastical Society v.*

City of Hartford, 47 Conn. 89 [1879]; *Clapp v. City of Hartford*, 35 Conn. 66 [1868]; *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894]; *Alley v. City of Lebanon*, 146 Ind. 125, 44 N. E. 1003 [1896]; *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895 [1888]; *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431 [1889]; *Board of Commissioners of Allen Co. v. Silvers*, 22 Ind. 491 [1864]; *Smith v. Mayor and Aldermen of Worcester*, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40 [1902]; *Warren v. City of Grand Haven*, 30 Mich. 24 [1874]; *South Highland Land and Improvement Company v. Kansas City*, 172 Mo. 523, 72 S. W. 944 [1902]; *City of St. Joseph v. Use of Gibson v. Farrell*, 106 Mo. 437, 17 S. W. 497 [1891]; *Akers v. Kolkmeier & Company*, 97 Mo. App. 520, 71 S. W. 536 [1902]; *Shannon v. City of Omaha*, 73 Neb. 507, 103 N. W. 53, 106 N. W. 592 [1905];

which does not authorize the levy of assessments for sewers, may levy such assessments under a general law which the city is authorized to adopt.⁵ A general law authorizing an assessment for the construction of sewers and applicable to any city operating under a special charter and authorized by such charter to construct sewers may be acted upon by any city whose special charter, either expressly or impliedly, authorizes it to construct sewers.⁶ Authority to repair streets and to keep them in order is construed as conferring implied authority to construct sewers.⁷ A statute authorizing a system of drainage in a city or town is regarded as conferring power to construct a system of sewers and not simply as conferring power to construct drainage for surface water.⁸ Under a statute authorizing cities to drain stagnant water off land, to dispose of rubbish and to drain city lots at the expense of the property owner, it has been held that a city cannot assess property owners for the cost of public sewers in its streets and alleys.⁹ A grant of power to construct a sewer does not confer power to fill low land upon which stagnant water may accumulate;¹⁰ nor does it confer power to provide for constructing flagstone crossings upon the street over the sewer.¹¹ The power to construct sewers is ordinarily said to be a continuing one which may be exercised whenever the public need demands its exercise.¹² Accordingly, where a

State, *Vanderbeek, Pros. v. Mayor and Common Council of Jersey City*, 29 N. J. L. (5 Dutch.) 441 [1861]; *Johnson v. City of Milwaukee*, 88 Wis. 383, 60 N. W. 270 [1894].

⁵ *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895 [1888].

⁶ *Johnson v. City of Milwaukee*, 88 Wis. 383, 60 N. W. 270 [1894].

⁷ *Johnson v. City of Milwaukee*, 88 Wis. 383, 60 N. W. 270 [1894].

⁸ *City of Valparaiso v. Parker*, 148 Ind. 379, 47 N. E. 330 [1897]. "It may be true that then the term drainage is used with reference to lands, that ordinarily drainage of waters is intended, but it is clear that when that term is used with reference to a city or town it includes sewerage, that is, such drainage is and may be used for the removal of surface and storm water, the overflow of fountains, cisterns, public fountains, water-troughs, water closets, sinks, all

filth and refuse liquids and the diversion of natural water courses." *City of Valparaiso v. Parker*, 148 Ind. 379, 381, 47 N. E. 330 [1897].

⁹ The statute in question gave power "to cause to be filled up, raised or drained by or at the expense of the owner any town lot or tract of land covered or subject to be covered by stagnant water; . . . and for the proper draining of city lots and other parcels of land by or at the expense of the owner or occupant thereof." *Cain v. City of Elkins*, 57 N. Va. 9, 49 S. E. 898 [1905].

¹⁰ In the *Matter of Van Buren*, 17 Hun. (N. Y.) 527 [1879].

¹¹ In the *Matter of the Contract for the Fifth Avenue Sewer in the City of Pittsburgh*, 4 Brewster (Pa.) 364 [1870].

¹² *Shannon v. City of Omaha*, 73 Neb. 507, 103 N. W. 53 [1905].

system of sewers has been laid out and by reason of the growth of the city, additional sewers become necessary, assessments may be levied therefor as for the sewers constructed in the original system.¹³ On the other hand, it has been held that land which is already drained by a sewer cannot be assessed for the expense of making changes therein which are necessary because a new sewer is to be connected with the pre-existing sewer.¹⁴ If by statute the city is given power to construct sewers and it is further provided that if a city should determine that it was necessary to provide a system of sewerage and drainage for such city, it might provide a general plan therefor, a city may construct separate sewers without reference to any general system as long as it is not formally determined that it is necessary to make a general plan of sewerage.¹⁵ If a proper and reasonable method of providing for drainage requires a city to cover over a running stream and convert it into a sewer, this may be done as a part of the cost of constructing a sewer system.¹⁶ An assessment cannot be levied if the drainage of the property assessed depends upon the construction of another sewer which the city has not undertaken to construct and is in no way obliged to construct.¹⁷ Under a statute authorizing an assessment for the construction of a new sewer, an assessment may be levied for taking land for the construction of a new channel for a sewer.¹⁸ Under authority to assess for the construction of a sewer, an assessment may be levied for the construction of a sewer completed before the assessment was levied where such sewer was constructed upon the assessment plan.¹⁹ If, however, the sewer in question was not constructed upon the assessment plan, persons whose lands are drained by a sewer built subsequently and connecting with such existing sewer cannot be assessed for the cost

¹³ *Shannon v. City of Omaha*, 73 Neb. 507, 103 N. W. 53 [1905].

¹⁴ *Boyden and Herrick v. Village of Brattleboro*, 65 Vt. 504, 27 Atl. 164 [1873].

¹⁵ *Hartwell v. Railroad Co.*, 40 O. S. 155 [1883].

¹⁶ *Hungerford v. City of Hartford* 39 Conn. 279 [1872]; *Butler v. City of Worcester*, 112 Mass. 541 [1873]; *Sherwood v. City of Duluth*, 40 Minn. 22, 41 N. W. 234 [1889].

¹⁷ *Bickerdike v. City of Chicago*

185 Ill. 280, 56 N. E. 1096 [1900]; *Ryder Estate v. City of Alton*, 175 Ill. 94, 51 N. E. 821 [1898]; *Title Guarantee and Trust Co. v. City of Chicago*, 162 Ill. 505, 44 N. E. 832 [1896]; *Vreeland v. Mayor, etc., of Bayonne*, 58 N. J. L. (29 Vr.) 126, 32 Atl. 68 [1895].

¹⁸ *Atkins v. City of Boston*, 188 Mass. 77, 74 N. E. 292 [1905].

¹⁹ *Fairbanks v. Mayor and Aldermen of Fitchburg*, 132 Mass. 42 [1882].

of such existing sewer.²⁰ Under authority to levy an assessment for the construction of a sewer it has been held that the city can include the expense of removing and relaying the pipes of a gas company.²¹ While it was said that the item of damages to gas mains should not be included, the determination of the commissioners that no substantial injustice was done by including such item was regarded as final.²²

§ 445. Public sewer.

A public sewer in the ordinary meaning of the term, that is, one which belongs to and is under control of a city or other public corporation, may be constructed by private individuals on private land and subsequently acquired by the city.¹ Under some statutes the term "public sewer" is applied to sewers to be constructed for the benefit of the city at large and paid for by general taxation.² Under such statute a sewer which is recommended by the board of public improvements in accordance with the statute as a private sewer and the construction of which is directed by an ordinance of the municipal assembly is to be regarded as a private sewer within the meaning of such statute, no matter how beneficial it may be to the public at large.³ On the other hand, a sewer paid for from the general fund is a public sewer, even if authorized in an irregular manner.⁴ Authority to levy assessments for the construction of a public sewer does not confer power to assess for a sewer constructed by a private person under a grant to him by the city of the exclusive right of constructing and operating a system of sewers inside the city limits.⁵

²⁰ *Brown v. Mayor and Aldermen of Fitchburg*, 128 Mass. 282 [1880].

²¹ In the Matter of the Petition of Johnson, 103 N. Y. 260, 8 N. E. 399 [1886].

²² *People of the State of New York ex rel. Jessup v. Kelley*, 33 Hun. (N. Y.) 389 [1884]; (The total assessment was over one hundred twenty-five thousand dollars, of which over four thousand dollars was for the item of damages to gas mains.)

¹ *Slocum v. Selectmen of Brookline*, 163 Mass. 23, 39 N. E. 351 [1895]; To the same effect see *obiter* in *Akers*

v. Kolkmeier, 97 Mo. App. 520, 71 S. W. 536 [1902].

² *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559 [1900].

³ *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559 [1900]; (This rule applies even if a tract of twenty-five acres not within the original sewer district is subsequently drained into the sewer.)

⁴ *Akers v. Kolkmeier*, 97 Mo. App. 520, 71 S. W. 536 [1902].

⁵ *Weaver v. Canon Sewer Company*, 18 Colo. App. 242, 70 Pac. 953 [1902].

§ 446. Main and lateral sewers.

In the absence of a statute authorizing assessments for the cost of constructing main sewers, such assessment cannot be levied.¹ If the statute provides specifically that the cost of a main or trunk sewer is to be paid out of the general revenue funds of the city, assessments cannot be levied therefor.² Under statutes specifically authorizing an assessment for main or trunk sewers, it is usually held that assessments may be levied therefor.³ This principle has been applied even where the main sewer was not intended for local drainage and could not be used for that purpose since it was above the level of the lots to be drained.⁴ Where assessments for main sewers have been held invalid under statutes specifically authorizing assessments therefor, it has usually been because the assessment might be so levied as to exceed the benefits. Thus it has been held that a property owner cannot be assessed with the cost of a fifteen-inch main sewer where sufficient drainage could have been obtained by a local drainage sewer.⁵ This theory, however, is really inconsistent with the one before suggested. The difference between the two results is not merely a question of the apportioning of benefits but turns on the question whether the legislature has power to treat a sewer system as a unit, assessing therefor all the land benefited thereby, whether receiving local drainage from the main sewer or not; or whether the legislature must regard each sewer as a distinct improvement, assessing therefor only the property benefited thereby. In some jurisdictions it is held that to assess all the property which drains into a main sewer for the cost of the construction thereof is to assess property benefited in different degrees by different improvements in one entire assessment.⁶ Lateral sewers connecting with the larger sewers are an essential part of a sewer system and power to levy assessments for such

¹ *Heman v. Handlan*, 59 Mo. App. 490 [1894]; *Cain v. City of Elkins*, 57 W. Va. 9, 49 S. E. 898 [1905].

² *Heman v. Handlan*, 59 Mo. App. 490 [1894].

³ *Bassett v. City of New Haven*, 76 Conn. 70, 55 Atl. 579 [1903]; *DeWitt v. City of Elizabeth*, 56 N. J. L. (27 Vroom) 119, 27 Atl. 801 [1893]; *City of Toledo v. Ford*, 20 Ohio C. C. 290 [1900]; (affirmed

Ford v. City of Toledo, 64 O. S. 92, 59 N. E. 779 [1901]).

⁴ *City of Toledo v. Ford*, 20 Ohio C. C. 290 [1900]; (affirmed *Ford v. City of Toledo*, 64 O. S. 92, 59 N. E. 779 [1901]).

⁵ *Park Avenue Sewers*, Appeal of Parker, 169 Pa. St. 433, 32 Atl. 574 [1895].

⁶ *Park Avenue Sewers*, Appeal of Parker, 169 Pa. St. 433, 32 Atl. 574 [1895].

laterals is included in the power to levy assessments for the construction of sewers.⁷ The fact that a tract of land has been assessed for the construction of a main sewer does not prevent the levy of an assessment for the construction of laterals.⁸ In fact a statute which makes no provision for lateral sewers or connections of any sort has been said to be void as being unreasonable where it provided for an assessment upon land which would have been drained by such sewer had laterals been provided for.⁹ The fact that a public sewer was provided for and begun, but not completed, while the ordinance therefor was repealed, does not, under statute, prevent a city from constructing a local sewer and levying an assessment therefor.¹⁰

§ 447. Outlet to sewer.

An outlet to a sewer system is an essential part thereof. Accordingly an assessment may be levied to secure an outlet for a sewer,¹ even if such outlet is situated outside of the city or other public corporation which constructs such sewer.² However, if the statute provides that the cost and expense of constructing a sewer shall be assessed against the lots or pieces of ground contained in the district in which the same is situated, an assessment cannot be levied for a discharging sewer situated outside of the district upon which the assessment is levied.³ Under some statutes it may be provided that a sewer cannot be constructed at the cost of property owners unless it connects with a public sewer of some kind or with a natural course of drainage. Under such statutes an assessment cannot be levied for a sewer not so connected.⁴ If

⁷ *Snydaeker v. Village of West Hammond*, 225 Ill. 154, 80 N. E. 93 [1907]; *DeWitt v. City of Elizabeth*, 56 N. J. L. (27 Vroom) 119, 27 Atl. 801 [1893].

⁸ *Snydecker v. Village of West Hammond*, 225 Ill. 154, 80 N. E. 93 [1907].

⁹ *Village of Hyde Park v. Carton*, 132 Ill. 100, 23 N. E. 590 [1891]; *Barton v. Kansas City*, 110 Mo. App. 31, 83 S. W. 1093 [1904].

¹⁰ *City of St. Joseph to Use of Gibson v. Farrell*, 106 Mo. 437, 17 S. W. 497 [1891].

¹ *Callon v. City of Jacksonville*, 147 Ill. 113, 35 N. E. 223 [1894];

Cochran v. Village of Park Ridge, 138 Ill. 295, 27 N. E. 939 [1893]; *City of St. Joseph ex rel. Danaher v. Dillon*, 61 Mo. App. 317 [1895].

² *Callon v. City of Jacksonville*, 147 Ill. 113, 35 N. E. 223 [1894]; *Cochran v. Village of Park Ridge*, 138 Ill. 295, 27 N. E. 939 [1893].

³ *City of Fort Scott v. Kaufman*, 44 Kan. 137, 24 Pac. 64 [1890].

⁴ *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800 [1893]; *City of St. Joseph ex rel. Danaher v. Wilshire*, 47 Mo. App. 125 [1891]; *Bayha v. Taylor*, 36 Mo. App. 427 [1889]; *Kansas City v. Ratekin*, 30 Mo. App. 416 [1888].

the sewer empties into what was once the bed of a creek, but has, by obstructions, been turned into a pond, this is not a natural course of drainage and no assessment can be levied for such sewer.⁵ If the sewer does not connect in the manner required by statute when it is constructed, the fact that a public sewer is subsequently so built as to connect therewith, does not authorize the city to levy an assessment therefor.⁶ If the connecting sewer itself connects with another public sewer so as to have an outlet,⁷ or if the connecting sewer is in fact a public one, whether established by ordinance or not,⁸ the statute is complied with substantially. The fact that a private owner has reclaimed land by filling in a river across the outlet to the proposed sewer does not make it impossible to construct such sewer on the assessment plan since, if such owner has the right to make such connection, the city has ample power, under its charter, to open a way to the river.⁹ The ordinance which operates 'for the construction of a sewer need not show upon its face that the sewer to be constructed does in fact connect with a public sewer.¹⁰ The existence of a statute prohibiting the pollution of rivers and lakes does not invalidate an assessment for a sewer system so constructed as to discharge its sewage into a river.¹¹

§ 448. House connections, man-holes and catch-basins.

House connections extending from the sewer to the lots abutting thereon are necessary to afford drainage to such property. The property owner may be required to construct such connections when he wishes to connect his property with a sewer system.¹ At the same time efficiency and economy in the construction of the sewer and due care for the condition of the street under which the

⁵ City of Kansas to the Use of the Frear Stone & Pipe Manufacturing Company v. Swope, 79 Mo. 446 [1883].

⁶ Bayha v. Taylor, 36 Mo. App. 427 [1889].

⁷ Eyermann v. Blakesley, 78 Mo. 145 [1883]; Eyermann v. Blakesley, 9 Mo. App. 231 [1880]; Heman v. Payne, 27 Mo. App. 481 [1887].

⁸ Akers v. Kolkmeier Company, 97 Mo. App. 520, 71 S. W. 536 [1902]; Eyermann v. Blakesley, 9 Mo. App. 231 [1880].

⁹ South Highland Land & Improvement Company v. Kansas City, 172 Mo. 523, 72 S. W. 944 [1902].

¹⁰ City of St. Joseph ex rel. Danaher v. Wilshire, 47 Mo. App. 125 [1891].

¹¹ Walker v. City of Aurora, 140 Ill. 402, 29 N. E. 741 [1893].

¹ Van Wagoner, Pros. v. Mayor and Aldermen of the City of Paterson, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902].

sewer is located require that such house connections should be constructed when the sewer is built.² Under statutes authorizing assessments for the construction of sewers it has been held that the city may include the cost of house connections.³ If the property is not platted into lots, it seems to be held that the house connections may be constructed at intervals which will probably be the distance apart of houses constructed upon the property as finally platted.⁴ It is not unreasonable to provide for a house connection opposite each lot, piece or parcel of land.⁵ A provision for two house connections for each corner lot, one for each street upon which it abuts, is held not to be unreasonable.⁶ The fact that an ordinance which provides for the construction of a sewer authorizes property owners assessed therefor to make connections with such sewer does not grant away the police power of the city to control the method of making such connections but the city can still regulate the manner in which connections are to be made by the property owners who have been assessed for the cost of such sewer.⁷ Under an ordinance authorizing a sewer "for sanitary and drainage purposes" a sewer for drainage purposes only, without house connections, is unauthorized.⁸ Authority to construct a sewer includes authority to provide for man-holes therefor.⁹ A paving ordinance has been held not to be invalid for failure to provide for man-holes, if a sufficient sewer has been constructed.¹⁰ If the ordinance provides for man-holes and catch-basins, and these are omitted, the property owner cannot resist the assessment on

² *Van Wagoner, Pros. v. Mayor and Aldermen of the City of Paterson*, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902].

³ *Smythe v. City of Chicago*, 197 Ill. 311, 64 N. E. 361 [1902]; *City of Chicago v. Corcoran*, 196 Ill. 146, 63 N. E. 690 [1902]; *Vandersyde v. People ex rel. Raymond*, 195 Ill. 200, 62 N. E. 806 [1902]; *Van Wagoner, Pros. v. Mayor and Aldermen of the City of Paterson*, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902].

⁴ *City of Chicago v. Corcoran*, 196 Ill. 146, 63 N. E. 690 [1902]; *Gage v. City of Chicago*, 195 Ill. 490, 63 N. E. 184 [1902]; *Vandersyde v.*

People ex rel. Raymond, 195 Ill. 200, 62 N. E. 806 [1902].

⁵ *Smythe v. City of Chicago*, 197 Ill. 311, 64 N. E. 361 [1902]; *Gage v. City of Chicago*, 195 Ill. 490, 63 N. E. 184 [1902].

⁶ *Duane v. City of Chicago*, 198 Ill. 471, 64 N. E. 1033 [1902].

⁷ *Gray v. Town of Cicero*, 177 Ill. 459, 53 N. E. 91 [1899].

⁸ *Barton v. Kansas City*, 110 Mo. App. 31, 83 S. W. 1093.

⁹ *Steele v. Village of River Forest*, 141 Ill. 302, 30 N. E. 1034 [1893].

¹⁰ *Vane v. City of Evanston*, 150 Ill. 616, 37 N. E. 901.

that ground, but his remedy is by mandamus to compel the city to construct such improvement in accordance with the ordinance.¹¹

§ 449. Drains.

A right to construct a drain through private land does not exist at common law but exists solely by virtue of statutory provisions granting such right.¹ So important and necessary are systems of drainage in many parts of the country, that statutes have been enacted providing specifically for the construction of drains and conferring the right to construct them through private property where necessary.² Such statutes often provide for paying for the cost of these systems of drainage by assessments upon property benefited thereby, and where such statutes exist full force is given to them.³ Assessments cannot be levied, however, except by virtue of statutory provisions.⁴ Thus, if a special statute authorizes the construction of a certain described ditch to be paid for by assessment and the commissioners in charge of that improvement construct in addition to the specified ditch a lateral drain, it is held that the cost of such lateral drain could not be included in the assessment.⁵ The legislature may authorize the officials in charge of the construction of a system of drainage to include an existing water course in such system.⁶ In the absence of specific statutory authority they cannot convert a living stream of water into a ditch by proceedings for locating and constructing a ditch.⁷ Even if a statute provides specifically for the exercise of discretion in locating a ditch, and specifically refers to a water-course, and provides in another section that the word "ditch" shall be held to include a drain or a water-course, it is held that the word "water-

¹¹ *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171 [1898].

¹ *Taylor v. Strayer*, 167 Ind. 23, 78 N. E. 236 [1906].

² *Chicago, B. & Q. Ry. Co. v. People ex rel.*, 212 Ill. 103, 72 N. E. 219 [1904]. See §§ 334-341.

³ *Wurts v. Hoagland*, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]; (affirming matter of drainage of the Great Meadows on Pequest River, 42 N. J. L. (13 Vr.) 553 [1880]; which was affirmed without opinion in *Hoagland v. State*, *Simonton*, *Pros.* 43 N. J. L. (14 Vr.) 456 [1881]); *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091 [1897]; *State, ex rel. Utick*

v. Board of County Commissioners of Polk County, 87 Minn. 325, 335, 60 L. R. A. 161, 92 N. W. 216 [1902]; *Lien v. Board of County Commissioners of Norman County*, 80 Minn. 58, 82 N. W. 1094 [1900]; *Jenal v. Green Island Draining Co.*, 12 Neb. 163, 10 N. W. 547 [1881].

⁴ *In the Matter of the Petition of Van Buren*, 79 N. Y. 384 [1880].

⁵ *Mitchell v. Lane*, 62 Hun. (N. Y.) 253, 16 N. Y. Supp. 707 [1891].

⁶ *Beals v. Inhabitants of Brookline*, 174 Mass. 1, 54 N. E. 339 [1899].

⁷ *Commissioners of Greene County v. Harbine*, 74 O. S. 318, 78 N. E. 521 [1906].

course'' is equivalent to the word drain, and does not, as so used, give authority to convert a living stream into a ditch.⁸ Authority to construct drains and remove obstructions from the natural or artificial channels of streams does not confer power to establish a system of drainage which will destroy a navigable river and lake.⁹ When used with reference to the drainage of land outside of cities the term "drain" is equivalent to the term "ditch."¹⁰ Statutory authority to construct a ditch does not include authority to construct a levee.¹¹ Authority to construct a system of drainage includes authority to incur such incidental and necessary expense as erecting and maintaining a pump.¹² Authority to assess for the construction of a system of drains does not include authority to assess for the construction of a bridge at a point where a large drain crosses a highway.¹³ Authority to county commissioners to locate any ditch does not authorize them to construct ditches in municipal corporations and levy assessments therefor, where by statute it is provided that the council may, by resolution, authorize the mayor to sign a petition for the ditch on behalf of the city and requires notice of the construction of the ditch to be given to the mayor.¹⁴ A drainage district having authority to levy an assessment for the construction of a system of drainage cannot include the cost of a bridge over a drain as an item of such assessment.¹⁵

§ 450. Bridges.

A bridge is an improvement for which a special assessment may be levied if the legislature has authorized such assessment by statute.¹ Under a statute which provides that the city shall pay out of its general funds the cost of all bridges in the city crossing the Mississippi River, or any other natural stream, and all bridges

⁸ Commissioners of Greene County v. Harbine, 74 O. S. 318, 78 N. E. 521 [1906].

⁹ *In re Daney Drainage Dist.*, 129 Wis. 129, 108 N. W. 202 [1906].

¹⁰ Royse v. Evansville & Terre Haute Railroad Company, 160 Ind. 592, 67 N. E. 446 [1903].

¹¹ Royse v. Evansville & Terre Haute Railroad Company, 160 Ind. 592, 67 N. E. 446 [1903].

¹² Swamp Land District No. 150 v.

Silver, 98 Cal. 51, 32 Pac. 866 [1893].

¹³ Rigney v. Fischer, 113 Ind. 313, 15 N. E. 594 [1887].

¹⁴ Village of Pleasant Hill v. Commissioners, 71 O. S. 133, 72 N. E. 896 [1904]; See also City of Dayton v. Taylor's Administrator, 62 O. S. 11, 56 N. E. 480.

¹⁵ Heffner v. Cass and Morgan Counties, 193 Ill. 439, 58 L. R. A. 353, 62 N. E. 201 [1901].

¹ See § 359.

crossing railroad tracks and the immediate approaches thereto, the cost of building and maintaining a bridge across a railroad track cannot be levied upon property abutting on the approaches of the bridge.² After the repeal of a statute authorizing the levy of assessments for constructing a bridge, no further assessments can be levied.³

§ 451. Water-pipes and mains.

If the legislature has by statute provided therefor, an assessment may be levied for laying water-pipes.¹ Where such assessments are held to be invalid, it is ordinarily because of a defective apportionment.² Even if the water-mains are used only to furnish water for the purpose of extinguishing fires assessments may be levied therefor.³ Authority to levy assessments for the cost of constructing water-pipes includes authority to levy assessments for such necessary incidentals thereto as confer local benefit.⁴ Thus, the cost of hydrants may be included in such assessment.⁵ However, if the ordinance provides for an assessment for cast iron water-pipes, such ordinance gives no authority to include in the assessment the cost of hydrants.⁶ Whether authority to levy assessments for water-pipes includes authority to levy an assessment for the cost of a pumping-station is a question which has arisen in the courts of Illinois more frequently than in other jurisdictions.

²State v. Smith, 99 Minn. 59, 108 N. W. 822 [1906].

³Town of Underhill v. Town of Essex, 64 Vt. 28, 23 Atl. 617 [1891]; Wardsboro v. Jamaica, 59 Vt. 514 [1887]; Tunbridge v. Royalton, 58 Vt. 212 [1885].

¹Murr v. City of Naperville, 210 Ill. 371, 71 N. E. 380 [1904]; Harts v. People ex rel. Kochersperger, 171 Ill. 458, 49 N. E. 538 [1898]; O'Neil v. People ex rel. Kochersperger, 166 Ill. 561, 46 N. E. 1096 [1897]; Hughes v. City of Momence, 163 Ill. 535, 45 N. E. 300 [1896]; Northern Liberties v. St. Johns Church, 13 Pa. St. (1 Harr.) 104; City of Philadelphia v. Neil, 25 Pa. Super Ct. 347 [1904]; City v. McCalmont, 6 Phil. 543 [1868]; Smith v. City

of Seattle, 25 Wash. 300, 65 Pac. 612 [1901].

²Village of Canaseraga v. Green, 88 N. Y. S. 539 [1903]. Even if the general policy of the city has been to pay for the cost of water mains out of its water tax, such city may if authorized by statute levy special assessments for such cost. McChesney v. City of Chicago, 152 Ill. 543, 38 N. E. 767 [1894].

³City v. McCalmont, 6 Phil. 543 [1868].

⁴Lingle v. West Chicago Park Commissioners, 222 Ill. 384, 78 N. E. 794 [1906].

⁵Lingle v. West Chicago Park Commissioners, 222 Ill. 384, 78 N. E. 794 [1906].

⁶Town of Cicero v. Green, 211 Ill. 241, 71 N. E. 884 [1904].

In this state both the constitution and the statutes give authority to levy assessments for local improvements.⁷ While a pumping-station is an essential feature of most systems of water-works, it is held in Illinois not to be a local improvement but to be an improvement of a general character which must be paid for by general taxation and not by special assessment or by special taxation.⁸ A stand-pipe and an engine-house are not within the term "local improvements."⁹ A city has power to regulate the method of making connections between abutting property and water-pipes.¹⁰ It has been held that while this power authorizes the council to prescribe the terms and methods of making connections by ordinance, it does not give power to levy assessments for making such connections.¹¹ It is generally held, however, that a city has power to assess for the cost of such connections,¹² even if the water-pipes belong to a private company.¹³ If providing for connections from water-pipes to abutting property, the city cannot subdivide the platted lots and require a service-pipe to be laid to each half lot.¹⁴ The cost of removing water-boxes, which were put in by the city, is a proper item to include in an assessment for paving a street.¹⁵

§ 452. Lighting.

The lighting of a city by electricity, or other means, is an improvement for which a local assessment may be levied.¹ Assessments may be levied for improvements which are incident to and a part of a general system of lighting, such as cables, lamp posts, are lamps and the like.² If, however, the assessment ordinance provides for the erection of electric lamp posts, it does not justify

⁷ See § 51, § 153.

⁸ *Harts v. People ex rel. Kochersperger*, 171 Ill. 458, 49 N. E. 538 [1898]; *Hughes v. City of Moline*, 164 Ill. 16, 45 N. E. 302 [1896]; *Hughes v. City of Moline*, 163 Ill. 535, 45 N. E. 300 [1896]; *Village of Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611 [1895].

⁹ *O'Neil v. People ex rel. Kochersperger*, 166 Ill. 561, 46 N. E. 1096 [1897].

¹⁰ *Alvord v. City of Syracuse*, 162 N. Y. 158, 57 N. E. 310 [1900].

¹¹ *Alvord v. City of Syracuse*, 163 N. Y. 158, 57 N. E. 310 [1900].

¹² *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249 [1899].

¹³ *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249 [1899].

¹⁴ *Warren v. City of Chicago*, 118 Ill. 329, 11 N. E. 218 [1887].

¹⁵ *Acklin v. Parker*, 29 Ohio C. C. 625 [1907].

¹ *Ewart v. Village of Western Springs*, 180 Ill. 318, 54 N. E. 478 [1899]. See § 368.

² *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901].

an assessment for the cost of conduits, cable switches and lamps in addition to the cost of the posts.³ If an assessment ordinance, as originally passed, assumes that lamp-tops will be donated by the park board, and they are not so donated, a second ordinance providing for special assessments for such lamp-tops does not amount to a double assessment for the same improvement.⁴ A power-house and a generator plant do not constitute a "local improvement" within the meaning of a statute authorizing an assessment for local improvements.⁵

§ 453. Filling and grading lots.

Under a statute authorizing such charge, an assessment may be levied for the cost of filling lots so as to prevent the accumulation of stagnant water.¹ Under such a statute the city may require not merely the removal of the stagnant water then upon the premises but the filling of the lots in question so as to prevent a recurrence of the nuisance.² Whether a land-owner can be compelled, under such power, to remove a nuisance which is due to the construction of public improvements, such as streets by the city, without providing for drainage, as incident thereto, is a question upon which there is some conflict of authority. It is generally held that assessments cannot be levied under such circumstances. In other jurisdictions it seems to be held that the assessment is valid, although the property owner has a right of action against the city.³ The right of a city to require lots to be filled as a part of a street improvement has been discussed but not passed upon.⁴ Under authority to fill slips, it has been held that where the filling of a slip resulted in the extension of a street, the improvement might be regarded by the city as the filling of the slip and an assessment levied under such statute.⁵

³ *Smith v. City of Chicago*, 169 Ill. 257, 48 N. E. 445 [1897].

⁴ *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901].

⁵ *Ewart v. Village of Eastern Springs*, 180 Ill. 318, 54 N. E. 478 [1899].

¹ In the *Matter of Tappen*, 36 How. 390 [1869]. See § 342.

² *Bliss v. Kraus*, 16 O. S. 54 [1864].

³ *Smith v. City of Milwaukee*, 18 Wis. 63 [1864]. See § 342.

⁴ *Blake v. City of Brooklyn*, 26 Barb. 301 [1857]. (The decision in this case turned upon the fact that the plaintiff had sued in equity when his remedies in law were adequate.)

⁵ *Mayor, etc., of New York v. Whitney*, 7 Barb. (N. Y.) 485 [1849].

§ 454. Market places.

Under statutory authority, assessments may be levied in some jurisdictions for market places.¹ Such power must be conferred expressly, or by necessary implication, however. Under a statute conferring power to assess for improving streets and alleys the city council cannot provide for paving a space to be used as a market place.²

§ 455. Improvement on private land.

A city or other public corporation may levy assessments for the construction of improvements upon private property, if such city or public corporation has the means of securing an easement in such property by subsequent proceedings in eminent domain.¹ If, however, the statute provides for levying assessments only for the improvement of a public street, road and the like, such statute does not authorize an improvement unless the public easement has been secured in some way before the improvement is made.² Such objection must, however, be made in the proper way. If the objection is not made until after confirmation, the judgment of confirmation is regarded as conclusive in favor of the validity of the assessment.³ In Illinois such assessment may be levied before the easement is acquired, and accordingly such objection cannot be made even at confirmation.⁴ No objection can be made that a part of the interest of the complainant in the street has not been condemned but that he has been allowed to keep it.⁵

§ 456. River and harbor improvements.

In some jurisdictions assessments for river and harbor im-

¹ *Donovan v. Coles*, 33 Mo. App. 161 [1888]. "The statute here considered gave specific power to vacate streets and establish market places. The space for the paving on which the assessment was levied was used for a market for a small part of the day and in other respects the space was used as any other public street in St. Louis." *Donovan v. Coles*, 33 Mo. App. 161, 164 [1888].

² *City of Fort Wayne v. Shoaff*, 106 Ind. 66, 5 N. E. 403 [1885].

³ See § 390 *et seq.*; *Holmes v. Village of Hyde Park*, 121 Ill. 128, 13 N. E. 540 [1888].

² *Barker v. Board of Commissioners of Wyandotte County*, 45 Kan. 681, 26 Pac. 585 [1891]; In the Matter of One Hundred and Twenty-Seventh Street, 56 How. (N. Y.) 60 [1878]; *McKeesport Borough to Use of McKeesport City v. Busch*, 166 Pa. St. 46, 31 Atl. 49 [1895].

³ *People ex rel. Raymond v. Talmadge*, 194 Ill. 67, 61 N. E. 1049 [1901]; *Lehmer v. People ex rel. Miller*, 80 Ill. 601 [1875].

⁴ *Holmes v. Village of Hyde Park*, 121 Ill. 128, 13 N. E. 540 [1889].

⁵ *Fagan v. City of Chicago*, 84 Ill. 227 [1876].

provements have been held to be valid, if authorized by statute.¹ A statute authorizing an assessment for widening a river does not authorize an assessment for deepening such river, except as far as the deepening is a mere incident to widening.² In jurisdictions in which the validity of such assessments was recognized the power of a city to levy such assessments has since been denied.³ This conclusion has since been reached under constitutional and statutory provisions authorizing assessments for local improvements. The improvement of a navigable river is held not to be a local improvement within the meaning of these provisions. An additional consideration rendering such assessment invalid is the fact that navigable rivers are under the control of the United States.⁴ However, where a bridge had been constructed across a navigable river connecting two parts of a street separated by such river, it was held that the authority of the Secretary of War might be presumed. The bridge in this case was to be paid for by general taxation.⁵ Whether such assessments can be levied has been discussed but not decided in some of the cases.⁶ Where such assessments have been held valid, it has been held that an assessment may be levied for removing an obstruction from a navigable stream, even if caused by the negligence of the city.⁷

§ 457. Removal of ice and snow.

In some jurisdictions, it has already been pointed out,¹ a city may compel a property owner to remove ice and snow from sidewalks adjoining his property under a statutory grant of

¹ *Bond v. City of Kenosha*, 17 Wis. 284 [1863]; (*In Hale v. City of Kenosha*, 29 Wis. 599, it was doubted whether such a charge was an assessment or a tax in the narrower sense. See § 360.

² *Wright v. City of Chicago*, 20 Ill. 252 [1858]; *Elston v. City of Chicago*, 40 Ill. 514, 89 Am. Dec. 361 [1866].

³ *City of Chicago v. Law*, 144 Ill. 569, 33 N. E. 855 [1893].

⁴ *City of Chicago v. Law*, 144 Ill. 569, 33 N. E. 855 [1893]; (distinguished in *Pearson v. City of Chi-*

cago, 162 Ill. 383, 44 N. E. 739 [1896]).

⁵ *Pearson v. City of Chicago*, 162 Ill. 383, 44 N. E. 739 [1896].

⁶ *Hamilton v. City of Fon du Lac*, 25 Wis. 490 [1870].

⁷ *Buffalo Union Iron Works v. City of Buffalo*, 13 Abb. Pr. N. S. (N. Y.) 141 [1870]. (In this case the obstruction consisted of a float which the city had negligently towed out into the stream and allowed to sink and about which the wrecks of other vessels had accumulated.)

¹ See § 58.

power.² This power is sometimes granted specifically by statute.³ It may be granted by statutes which confer in general terms power to regulate nuisances.⁴ In other jurisdictions cities are held not to have the power to compel property owners to remove ice and snow from the adjoining sidewalks,⁵ and questions of this sort accordingly do not arise. Thus a statutory grant of power to construct local improvements has been held not to give authority to compel property owners to remove ice and snow.⁶

§ 458. Sprinkling streets.

The sprinkling of city streets is a public benefit and may be paid out of funds raised by general taxation.¹ In many jurisdictions as has been said before,² it is held that local assessments cannot be levied for sprinkling.³ In some cases the reason for this holding is based on constitutional grounds and statutes giving specific authority for such assessments are held unconstitutional.⁴ A statute conferring power to levy assessments for "local improvements" is held not to confer power to levy assessments for sprinkling.⁵ A statute authorizing local assessments for "sewerage, paving and other like purposes," is held not to confer power to assess for sprinkling.⁶ In other jurisdictions, assessments for sprinkling may be levied.⁷ A statute which provides that the board of public works shall let sprinkling contracts

² *State v. McMahon*, 76 Conn. 97, 55 Atl. 591 [1903]; *Union Railway Company v. Mayor and Aldermen of Cambridge*, 11 All. 287 [1865]; *Goddard, Petitioner*, 16 Pick. (Mass.) 504, 28 Am. Dec. 259 [1835]; *City of Helena v. Kent*, 32 Mont. 279, 80 Pac. 258 [1905]; *Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490, 10 L. R. A. 178, 25 N. E. 480.

³ *State v. McMahon*, 76 Conn. 97, 55 Atl. 591 [1903].

⁴ *City of Helena v. Kent*, 32 Mont. 279, 80 Pac. 258 [1905].

⁵ *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640 [1884]; *Grideley v. City of Bloomington*, 88 Ill. 554, 30 Am. Rep. 566 [1878]; *State v. Jackman*, 69 N. H. 318, 42 L. R. A. 438, 42 Atl. 347 [1898].

⁶ *Grideley v. City of Bloomington*,

88 Ill. 554, 30 Am. Rep. 566 [1878].

¹ *Maydwell v. City of Louisville*, 116 Ky. 885, 76 S. W. 1091 [1903].

² See § 370.

³ *New York Life Ins. Co. v. Prest*, 71 Fed. 815 [1896]; *City of Chicago v. Blair*, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829 [1894]; *Kansas City v. O'Connor*, 82 Mo. App. 655 [1899]; *Pettit v. Duke*, 10 Utah 311, 37 Pac. 568 [1894].

⁴ *New York Life Ins. Co. v. Prest*, 71 Fed. 815 [1896].

⁵ *City of Chicago v. Blair*, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829 [1894].

⁶ *Pettit v. Duke*, 10 Utah 311, 37 Pac. 568 [1894].

⁷ *Palmer v. Nolting*, 13 Ind. App. 581, 41 N. E. 1045 [1895].

and that the cost of such sprinkling shall be assessed pro rata upon the property owners along the line of the street sprinkled as the cost of public improvements is assessed authorizes such assessment.⁸

§ 459. Other types of improvement.

A culvert is a part of a street improvement or of a system of drainage. Assessments may be levied therefor under statutory authority.¹ Whether a provision in a contract for grading includes constructing culverts was not decided, since if the contractor constructed culverts he could not recover therefor from the property owners under the head of grading, as by statute, grading was to be paid for by the city.² Under statutory authority an assessment may be levied to compensate a railroad for giving up its right to use steam power within the city limits.³ A road in the country is an improvement for which in some jurisdictions local assessments may be levied.⁴ A statute providing for the method of levying and collecting assessments for such improvement is applicable to a road partially constructed at the time of the passage of such statute, if the construction of such road is begun upon the assessment plan.⁵ If there is statutory authority therefor assessments may be levied for the purchasing of land for use as a park and the improvement thereof.⁶ Under a statute which gives to the park department the exclusive power to pave roads in a park while the city council has exclusive power to pave roads outside of the park, the park department may include in an assessment for park purposes, work done on streets outside of the park necessary to complete the paving in the park, to make the connecting streets and approaches safe for travelers, and to furnish the park with proper drainage.⁷ Even where assessments can be levied for the cost of removing garbage no such

⁸ *Palmer v. Nolting*, 13 Ind. App. 581, 41 N. E. 1045 [1895].

¹ *Shannon v. Village of Hinsdale*, 180 Ill. 202, 54 N. E. 181 [1899].

² *City of Covington v. Dressman*, 69 Ky. (6 Bush.) 210 [1869].

³ *People ex rel. Crowell v. Lawrence*, 36 Barb. (N. Y.) 178 [1862].

⁴ See § 322.

⁵ *Fall Creek and Warren Township*

Gravel Road Company v. Wallace, 39 Ind. 435 [1872].

⁶ *Kittinger v. City of Buffalo*, 148 N. Y. 332, 42 N. E. 803 [1896]; *In the Matter of the Commissioners of Central Park*, 63 Barb. (N. Y.) 282 [1872]. See § 356.

⁷ *Kittinger v. City of Buffalo*, 148 N. Y. 332, 42 N. E. 803 [1896].

assessment can be levied in the absence of statutory authority therefor.⁸

§ 460. Temporary improvements.

A temporary improvement which is incident to an improvement of a permanent character is one for which a local assessment may be levied under a statutory grant of power.¹ Thus a statute which provides for assessments for grading and paving streets and further provides, "the work done in constructing any street may be protected from surface water by temporary drains and culverts put in under the direction of the city engineer," authorizes the expense of temporary culverts used to protect the work already done from surface water, to be assessed upon the property to be benefited by the permanent improvement.²

§ 461. Repairs.

The question of the power of the legislature to authorize assessments for improvements of this type has already been discussed.¹ Questions of constitutional and statutory construction are so closely connected that some repetition of questions already discussed is necessary to a clear presentation of the subject. Power to provide for constructing and maintaining streets is a continuing power.² The repair of pre-existing streets is an improvement for which a local assessment may be levied under statutory authority.³ By statute in many jurisdictions it is expressly provided that the repair of an existing street is to be paid for by general taxation.⁴ Statutes providing for general taxation for repairs frequently describe such improvements as "ordinary re-

⁸ *Trephagen v. City of South Omaha*, 69 Neb. 577, 111 Am. St. Rep. 570, 96 N. W. 248 [1903].

¹ *Russell v. Adkins*, 24 Mo. App. 605 [1887].

² *Russell v. Adkins*, 24 Mo. App. 605 [1887].

³ See §§ 373-378.

⁴ *Estes v. Owen*, 90 Mo. 113, 2 S. W. 133 [1886]; *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440 [1873].

⁵ *Estes v. Owen*, 90 Mo. 113, 2 S. W. 133 [1887].

⁶ *Bush v. City of Peoria*, 215 Ill.

515, 74 N. E. 797 [1905]; *Perkinson v. Schnaake*, 108 Mo. App. 255, 83 S. W. 301 [1904]; *Barber Asphalt Paving Company v. Muehenberger*, 105 Mo. App. 47, 78 S. W. 280 [1903]; *O'Meara v. Green*, 25 Mo. App. 198; *O'Meara v. Green*, 16 Mo. App. 118 [1884]; *Robertson v. City of Omaha*, 55 Neb. 718, 44 L. R. A. 534, 76 N. W. 442 [1898]; *Brenn v. City of Troy*, 60 Barb. (N. Y.) 417 [1871]; *In the Matter of Fulton Street*, 29 Howard 429 [1865]; *Blount v. City of Janesville*, 31 Wis. 648 [1872].

pairs.”⁵ Under a statute authorizing assessments for “local improvements” repairs are held not to be local improvements.⁶ An assessment may be levied for repairs, although the contractor who constructed such improvement was bound by contract to keep the improvement in repair for a given space of time which has not yet elapsed. While the primary duty in such cases rests upon the contractor, yet in case he is insolvent the contract does not discharge the property owners from liability to assessment for such improvement.⁷ By statute it is frequently provided that the cost of repairing sidewalks must be paid for by general taxation.⁸ Other statutes authorize the city to require the abutting property owners to repair sidewalks on which their property abuts.⁹ Such a statute authorizes the city to make a contract for the repair of sidewalks in case the abutting property owners neglect or refuse to make such repairs when notified to do so.¹⁰ Under a statute authorizing the same, assessments may be levied for repairing and maintaining an existing sewer.¹¹ The repair of ditches constructed for drainage purposes is an improvement for which an assessment can be levied under a statute authorizing the same.¹² Under such statute a new ditch cannot be constructed under color of proceedings to repair a ditch.¹³ However, the fact that the ditch is made wider by the process of cleaning it out does not invalidate the assessment.¹⁴ Under authority to construct drains it is doubtful whether the item of filling land below the level of the surrounding land can be included.¹⁵ Authority to

⁵ *Robertson v. City of Omaha*, 55 Neb. 718, 44 L. R. A. 534, 76 N. W. 442 [1898]; *Brenn v. City of Troy*, 60 Barb. (N. Y.) 417 [1871].

⁶ *Crane v. West Chicago Park Commissioners*, 153 Ill. 348, 26 L. R. A. 311, 38 N. E. 943 [1894].

⁷ *State ex rel. Woulfe v. St. Paul*, 107 La. 777, 32 So. 88 [1902].

⁸ *Bonnet v. City and County of San Francisco*, 65 Cal. 230, 3 Pac. 815 [1884].

⁹ *Young v. Village of Waterville*, 39 Minn. 196, 39 N. W. 97 [1888].

¹⁰ *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331 [1905].

¹¹ *Smith v. Mayor and Aldermen of Worcester*, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40 [1902].

¹² *Village of Hyde Park v. Speneer*, 118 Ill. 446, 8 N. E. 846 [1887]; *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953 [1892]; *Weaver v. Tempelin*, 113 Ind. 298, 14 N. E. 600 [1887]; *State ex rel. French v. Johnson*, 105 Ind. 463, 5 N. E. 553 [1885]; *Dean v. Treasurer of Clinton County*, 146 Mich. 645, 109 N. W. 1131 [1906]; *Angell v. Cortright*, 111 Mich. 223, 69 N. W. 486 [1896].

¹³ *Millikan v. Wall*, 133 Ind. 51, 32 N. E. 828 [1892].

¹⁴ *Angell v. Cortright*, 111 Mich. 223, 69 N. W. 486 [1896].

¹⁵ It was held that filling was not authorized in *The Matter of Van Buren*, 55 Howard (N. Y.) 513 [1878]; but this question was not

construct an improvement of which a culvert is a part does not confer authority to levy an assessment for repairs to such culvert which became necessary during the progress of the work.¹⁶

§ 462. What constitutes original construction.

In New York by statute assessments for reconstruction may be set aside upon many grounds upon which assessments for original construction could not be set aside. Under the New York statute, therefore, the question of what an original construction was became material and was frequently discussed. To constitute an original improvement of a street there must have been a substantial paving of the part of the street improved.¹ Accordingly, a street which was curbed and guttered, but upon each side of which a narrow strip was laid with cobble stones to protect the gutter and by which sidewalks had been laid was held not to be paved within the meaning of this statute.² Since the term "street" in its broad sense includes "sidewalks," the work of paving and setting curb stones and gutter stones is a part of the work of paving the street and the reconstruction of such improvements subsequently is a repavement within the meaning of these statutes.³ These statutes apply only where the prior improvement was constructed upon the assessment plan and such assessments have in fact been paid. The mere presumption of payment arising from a lapse of time is not sufficient to protect the property only in such cases.⁴ The paving of a street at the expense of the property owners voluntarily and without any assessment does not constitute an original improvement within the meaning of these statutes.⁵ Where the city owns certain property at the time that a former improvement was made and the city paid the assessment thereon and subsequently conveyed the

decided in the Court of Appeals, in *In the Matter of Petition of Van Buren*, 79 N. Y. 384 [1880].

¹⁶ *Spangler v. City of Cleveland*, 35 O. S. 469 [1880].

¹ *In the Matter of the Petition of Brady*, 85 N. Y. 268 [1881].

² *In the Matter of the Petition of Brady*, 85 N. Y. 268 [1881]; (Accordingly a subsequent pavement was not a repavement.)

³ *In the Matter of Petition of Bur-*

meister, 76 N. Y. 174 [1879]; (reversing *In the Matter of Petition of Burmeister*, 9 Hun. (N. Y.) 613 [1877]); *In the Matter of Burke*, 62 N. Y. 224 [1875]; *Matter of Phillips*, 60 N. Y. 16.

⁴ *In the Matter of Willet*, 70 N. Y. 490 [1877]; *In the Matter of Serrell*, 9 Hun. (N. Y.) 233 [1876].

⁵ *Petition of Astor*, 2 Sup. Ct. (T. & C.) 488 [1874].

property to a third person, such improvement is not an original improvement within the meaning of the statutes.⁶ In Pennsylvania the attitude of the courts was from the first strongly against permitting assessments for reconstruction. Under statutes authorizing the paving of streets but not providing specifically for reconstruction, the court declined to construe such statutes so as to permit the repaving of a street in place of a pre-existing street in good condition.⁷ Even where authority to pave was construed not to include authority to repave, it was said that a statute authorizing local assessments for such repaving would be unconstitutional.⁸ Subsequently under statutes which provided specifically for assessments for repaving it was held that such statutes were unconstitutional,⁹ whether the original improvement was paid for by local assessments,¹⁰ or whether it was paid for by general taxation,¹¹ or whether a pavement not constructed by the city on either plan is subsequently adopted or acquiesced in.¹² This principle has not, however, been applied to improvements such as sidewalks, assessments for which are justified not on the theory of benefits but on the theory that the owner of property may be required to pay the cost of performing a legal duty which he has neglected to perform.¹³ Since in Pennsylvania the legislature has no power to authorize an assessment for reconstruction, the question of what is an original construction is material. An original construction within the meaning of the

⁶ In the Matter of Welsh, 30 Hun. (N. Y.) 372 [1883].

⁷ Wistar v. Philadelphia, 80 Pa. St. (30 P. F. Smith) 505, 21 Am. Rep. 112 [1876]; Hammett v. Philadelphia, 65 Pa. St. (15 P. F. Smith) 146, 3 Am. Rep. 615 [1870]. (This improvement was undertaken for the purpose of making a great public driveway by widening and repaving with wooden blocks a street upon which there was a good cobble stone pavement.)

⁸ Hammett v. Philadelphia, 65 Pa. St. (15 P. F. Smith) 146, 3 Am. Rep. 615 [1870].

⁹ Scranton City v. Sturges, 202 Pa. St. 182, 51 Atl. 764 [1902]; City of Harrisburg v. Segelbaum, 151 Pa. St. 172, 20 L. R. A. 834, 24 Atl.

1070 [1892]; West Third Street Sewer, Appeal of the City of Williamsport, 187 Pa. St. 565, 41 Atl. 476 [1898]; Appeal of the Protestant Orphan Asylum of Pittsburgh and Allegheny, 111 Pa. St. 135, 3 Atl. 217 [1885].

¹⁰ Appeal of the Protestant Orphan Asylum of Pittsburgh and Allegheny, 111 Pa. St. 135, 3 Atl. 217 [1885].

¹¹ City of Harrisburg v. Segelbaum, 151 Pa. St. 172, 20 L. R. A. 834, 24 Atl. 1070 [1892]; West Third Street Sewer, Appeal of the City of Williamsport, 187 Pa. St. 565, 41 Atl. 476 [1898].

¹² Dick v. Philadelphia, 197 Pa. St. 467, 47 Atl. 750 [1901].

¹³ Smith v. Kingston Borough, 120 Pa. St. 357, 14 Atl. 170 [1888].

rule which protects a property owner from assessments for reconstructions is said to be one which is put down originally or adopted or acquiesced in subsequently by the authorities of the public corporation for the purpose and with the intent of changing an ordinary road into a street.¹⁴ The existence of an original construction depends therefore in part upon the nature of the improvement and the material with which it is made and in part upon the intention with which it is done.¹⁵ If there is no intention of changing the road into a street, a surfacing of the road, no matter how carefully or expensively done, does not amount to an original construction.¹⁶ Macadamizing a road is said *prima facie* to be an original construction in a small town or city but not an original construction in a large city.¹⁷ Repairing a pre-existing highway and maintaining it in use as such does not amount to an original construction.¹⁸ Still less does use of a turnpike as a road amount to a construction where the turnpike company has stoned less than one-half the width of the road, and at the time it ceased to own such road the stoning was in a ruinous condition, was removed by the borough in paving such street and the borough has never used nor adopted such road as a street.¹⁹ Repairing a plank road to keep it in condition fit for travel until a permanent improvement could be made is not an original construction within the meaning of the statute.²⁰ Repairing a roadway with broken limestone is not an

¹⁴ *Dick v. Philadelphia*, 197 Pa. St. 467, 47 Atl. 750 [1901]; *Philadelphia to Use of Mack v. Eddleman*, 169 Pa. St. 452, 32 Atl. 639 [1895].

¹⁵ *East Street, Evans' Appeal*, 210 Pa. St. 539, 60 Atl. 154 [1904]; *In re Lincoln Ave., Rodger's Appeal*, 193 Pa. St. 432, 44 Atl. 1102 [1899]; *Philadelphia to Use of Mack v. Eddleman*, 169 Pa. St. 452, 32 Atl. 639 [1895].

¹⁶ *Dick v. Philadelphia*, 197 Pa. St. 467, 47 Atl. 750 [1901]; *Philadelphia to Use of Mack v. Eddleman*, 169 Pa. St. 452, 32 Atl. 639 [1895].

¹⁷ *Dick v. Philadelphia*, 197 Pa. St. 467, 47 Atl. 750 [1901]; *Philadelphia to Use of Mack v. Eddleman*,

169 Pa. St. 452, 32 Atl. 639 [1895]; Macadamizing may be an original paving. *City of Harrisburg v. Segelbaum*, 151 Pa. St. 172, 20 L. R. A. 834, 24 Atl. 1070 [1892].

¹⁸ *East Street, Evans' Appeal*, 210 Pa. St. 539, 60 Atl. 154 [1904]; *Harrisburg v. Funk*, 200 Pa. St. 348, 49 Atl. 992 [1901]; *Philadelphia to Use of Mack v. Eddleman*, 169 Pa. St. 452, 32 Atl. 639 [1895]; *Philadelphia to Use v. Dibeler*, 147 Pa. St. 261, 23 Atl. 567 [1892].

¹⁹ *In re Lincoln Ave., Rodger's Appeal*, 193 Pa. St. 432, 44 Atl. 1102 [1899].

²⁰ *East Street, Evans' Appeal*, 210 Pa. St. 539, 60 Atl. 154 [1904].

original construction.²¹ The use of a plank road after freeing it from tolls, and subsequent regrading of it so as to destroy the planking does not amount to an original construction so as to relieve the abutting owners from assessment for a vitrified brick pavement.²² If a part of a street has been paved and a part left unpaved,²³ as where a part of a street was left for use as a market place,²⁴ or has been left as a parkway down the center of a street,²⁵ the subsequent paving of such previously unpaved part of the street is not a reconstruction but is regarded itself as an original construction. In Kentucky under statutes specifically authorizing it, assessments for the reconstruction of streets have been held to be valid.²⁶ Original constructions are controlled by some statutes different from those applicable to subsequent constructions, and the question of what an original construction is, is therefore material.²⁷ The ordinance for an original improvement must be enacted with certain specified formalities.²⁸ By statutes applicable to some cities original construction of public ways is to be at the exclusive cost of the abutting owners while the reconstruction is to be one-half at the cost of the abutting owners and one-half at the cost of the city.²⁹ By such a statute a sidewalk is held not to be a public way and hence the reconstruction of a sidewalk may be entirely at the cost of the abutting owners.³⁰ Under statutes applicable to other cities it is provided that the cost of reconstruction must be borne entirely by the city.³¹ Under the statutes in force in Kentucky applicable to some cities, assessments cannot be levied for a recon-

²¹ *Harrisburg v. Funk*, 200 Pa. St. 348, 49 Atl. 992 [1901]; *Philadelphia to Use v. Dibeler*, 147 Pa. St. 261, 23 Atl. 567 [1892].

²² *Dick v. Philadelphia*, 197 Pa. St. 467, 47 Atl. 750 [1901].

²³ *Philadelphia to Use v. Evans*, 139 Pa. St. 483, 21 Atl. 200 [1891]; *Alcorn v. City of Philadelphia*, 112 Pa. St. 494, 4 Atl. 185 [1886].

²⁴ *Philadelphia to Use v. Evans*, 139 Pa. St. 483, 21 Atl. 200 [1891].

²⁵ *Alcorn v. City of Philadelphia*, 112 Pa. St. 494, 4 Atl. 185 [1886].

²⁶ *Broadway Baptist Church v. McAttee*, 8 Bush. (71 Ky.) 508, 8 Am. Rep. 480 [1871]; *Bradley v. McAttee*, 7 Bush. (70 Ky.) 667, 3 Am. Rep. 309 [1870].

²⁷ "The word 'original' when used

in connection with an improvement refers to an improvement when first made." *Thomas v. Woods*, — Ky. —, 108 S. W. 878, 880 [1908].

²⁸ *Thomas v. Woods*, — Ky. —, 108 S. W. 878 [1908].

²⁹ *Mudge v. Walker*, — (Ky.) —, 28 Ky. Law Rep. 996, 90 S. W. 1046 [1906].

³⁰ *Mudge v. Walker*, — (Ky.) —, 28 Ky. Law Rep. 996, 90 S. W. 1046 [1906]; (The probability of this construction is aided by the fact that the statute contained a specific provision for assessing the cost of sidewalks upon abutting owners.)

³¹ *City of Louisville v. Tyler*, 111 Ky. 588, 64 S. W. 415, 65 S. W. 125 [1901].

struction even if the original construction was not at the cost of the abutting owners.³² It is not necessary that the original construction should have been authorized by ordinance when made.³³ The fact that the street was originally improved by building a "turnpike" road which was said to mean a macadam pavement, does not prevent such improvement from being an original construction so that no assessment can be levied for a subsequent improvement.³⁴ The fact that no sidewalk was built on the side of the street does not prevent the improvement from being an original construction.³⁵ Property owners were allowed to improve a strip sixteen feet wide in the center of a thirty-foot street, by paving the same. This was held to be an original construction so that assessment could not be levied for a subsequent construction, although the city had given such permission under a resolution that the street was not then "in condition for a more perfect and complete construction."³⁶ Grading a dirt road so as to level the center for drainage purposes and leveling inequalities upon its surface,³⁷ or temporarily repairing a street from time to time by putting crushed stone upon it,³⁸ or grading and covering the surface of a street with cinders and mill ashes,³⁹ or covering a strip eighteen feet wide in the center of a road with macadam a foot deep without curbing or guttering,⁴⁰ are none of them original constructions of the street. Accordingly, a subsequent paving of such streets is regarded as an original construction and not a reconstruction. If a macadamized road,⁴¹ or a turnpike road,⁴² is taken into the city limits, the subsequent paving thereof is regarded as an original construction and not a reconstruction.

³² *City of Louisville v. Tyler*, 111 Ky. 588, 64 S. W. 415, 65 S. W. 125 [1901].

³³ *City of Louisville v. Tyler*, 111 Ky. 588, 64 S. W. 415, 65 S. W. 125 [1901].

³⁴ *City of Louisville v. Tyler*, 111 Ky. 588, 64 S. W. 415, 65 S. W. 125 [1901].

³⁵ *City of Louisville v. Tyler*, 111 Ky. 588, 64 S. W. 415, 65 S. W. 125 [1901].

³⁶ *Gleason v. Barnett*, 115 Ky. 890, 61 S. W. 20 [1903].

³⁷ *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964, 23 Ky. Law Rep. 128

[1901]; (citing *Mackin v. Wilson*, 45 S. W. 663, 20 Ky. L. R. 218; *Ormsby v. Jamison*, 9 Ky. L. R. 325).

³⁸ *Lindsey v. Brawner*, — Ky. —, 97 S. W. 1 [1906].

³⁹ *Adams v. City of Ashland*, — Ky. —, 80 S. W. 1105, 26 Ky. Law Rep. 184 [1904].

⁴⁰ *Heim v. Figg*, — Ky. —, 89 S. W. 301, 28 Ky. Law Rep. 396 [1905].

⁴¹ *City of Catlettsburg v. Self*, 115 Ky. 669, 74 S. W. 1064, 25 Ky. Law Rep. 161 [1903].

⁴² *McHenry v. Selvage*, 99 Ky. 232, 35 S. W. 645 [1896].

§ 463. Distinction between repairs and reconstruction.

Since the method of paying for the cost of reconstructions is in many jurisdictions different from the cost of paying for repairs, the question whether a given improvement is a reconstruction or a repair is often material. Whether an improvement is a repair or a reconstruction has been said to be a question of fact.¹ It is more accurate to say that it is a mixed question of law and fact to be determined largely by the character of the work and the relation of the new work to the old.² The council cannot change the legal character of a repair by calling it a reconstruction.³ If new material is used in the improvement of a different kind from the old, and the old material is entirely replaced, the improvement is evidently a reconstruction and not a repair.⁴ Thus if a street which has been graded and paved with stone is subsequently regraded and paved with a Nicholson block pavement, the latter improvement is not a repair but a reconstruction.⁵ Accordingly it has been said that the difference between reconstruction and repairs is that in reconstruction a new material is used and it may be a different kind of material; and changes in the structure of the improvement may also be involved; while in repairs the same kind of material of which the improvement was originally composed is used, and the structure of the improvement must not be changed in any material way.⁶ It is not, however, necessary to remove all the old material in cases of reconstruction.⁷ Furthermore, a rule of a street commissioner which designates as reconstruction, only the work in which a new and different kind of paving is used, is held to be a rule which may often be incorrect, and which if incorrect, cannot control the true character of the work.⁸ Specific examples may be helpful in illustrating the difference between reconstruc-

¹ O'Meara v. Green, 16 Mo. App. 118 [1884].

² O'Meara v. Green, 25 Mo. App. 198 [1887].

³ O'Meara v. Green, 25 Mo. App. 198 [1887].

⁴ Santa Cruz Rock Pavement Company v. Broderick, 113 Cal. 628, 45 Pac. 863 [1896]; In the Matter of Repaving Fulton Street, 39 Howard (N. Y.) 429 [1865]; Blount v. City of Janesville, 31 Wis. 648 [1872].

⁵ Blount v. City of Janesville, 31 Wis. 648 [1872].

⁶ Farrell v. Rammelkamp, 64 Mo. App. 425 [1896].

⁷ Field v. City of Chicago, 198 Ill. 224, 64 N. E. 840 [1902]; Rackliffe v. Duncan, — Mo. App. —, 108 S. W. 1110 [1908].

⁸ Ritterskamp v. Stifel, 59 Mo. App. 510 [1894].

tion and repairs. An improvement consisted of a concrete base, a binder course and a surface of asphalt. The asphalt surface had become badly worn and in many places both the asphalt surface and the binder coat has disintegrated and had worn away through to the concrete base. The street had been repaired twice and finally the asphalt coat and the binder coat were removed and a new asphalt coat and binder coat were placed upon the concrete foundation. This was held to be a reconstruction and not a repair.⁹ In a case presenting similar facts the asphalt coat was removed and the old concrete base was left wherever it was in good condition, and where necessary, was built up so as to bring it to a certain level. Upon the base thus made a coat of asphalt was laid. The trial court found that this was a reconstruction and not a repair and the court of appeals held that such finding could be supported upon the evidence.¹⁰ However, an improvement consisting of relaying a new three-inch asphalt surface on the original macadam base without disturbing the latter is held to be a repair and not a reconstruction.¹¹ An improvement consisted of wooden blocks laid upon a concrete base. After the blocks were worn out they were removed and vitrified brick was laid on the old base. This was held to be a reconstruction and not a repair.¹² The old paving stones were removed and new paving stones were used in paving an alley, and the grade was changed a few inches, although it was not at the outset intended that the grade should be changed. This was held to amount to reconstruction and not to a repair.¹³ A street had been covered with refuse stone from a neighboring quarry without gutters or curbstones. Seven years afterward it was in bad condition, below the grade and lower in the middle than at the sides. At the time it was ordered that the street should be graded, curbstones set, the gutters paved with stone and the street macadamized with six inches of broken stone covered with two inches of gravel. This was held to be a reconstruction and not a repair.¹⁴ A street which had never been so improved was paved

⁹ *Bush v. City of Peoria*, 215 Ill. 515, 74 N. E. 797 [1905].

¹⁰ *Barber Asphalt Paving Company v. Muehenberger*, 105 Mo. App. 47, 78 S. W. 280 [1903].

¹¹ *City of Covington v. Bullock*, — Ky. —, 103 S. W. 276 [1907]: (The city is therefore liable, by stat-

ute, and not the property owners.)

¹² *Robertson v. City of Omaha*, 55 Neb. 718, 44 L. R. A. 534, 76 N. W. 442 [1898].

¹³ *Ritterskamp v. Stifel*, 59 Mo. App. 510 [1894].

¹⁴ *Koons v. Lucas*, 52 Ia. 177, 3 N. W. 84 [1879].

with bituminous rock on a macadam foundation. This was held to be a reconstruction.¹⁵ A macadamized roadbed was scraped, cleaned, filled and rolled so as to present an even surface and covered with a new coating of macadam six and one-half inches thick. This was held to be a reconstruction and not a repair, since it was not necessary to constitute a reconstruction that the old material should be removed entirely and replaced with material of a different character.¹⁶ A brick sidewalk was taken up, a new trench dug, a new foundation of sand laid and a number of new bricks used in relaying the walk. This was held to amount to a reconstruction and not a repair.¹⁷ A street was graded and paved so as to leave grass plots between the sidewalks and the roadways in which shade trees grew. Subsequently the grass plots and trees were destroyed and the space formerly occupied by them was covered with an extension of the paving of a street. This was regarded as a repaving and not as an original construction.¹⁸ However, where a sidewalk consisted of two strips of cement walk with a wooden walk between the two and, as the wooden walk was in bad condition, the owner was ordered to construct a cement sidewalk in place thereof, this was held to be a proper exercise of power under a statute giving the Board of Public Works power to specify, in the notice to the property owners, what material should be used in repairs.¹⁹ Straightening a curb and replacing rotten stones with new ones where the old stones were in bad condition is a repair and not a reconstruction.²⁰ Resetting flagstones and curbstones is a repair.²¹ An ordinance requiring a turnpike to be put in repair requires the holes in such

¹⁵ *Santa Cruz Rock Pavement Company v. Broderick*, 113 Cal. 628, 45 Pac. 863 [1896].

¹⁶ *Field v. City of Chicago*, 198 Ill. 224, 64 N. E. 840 [1902].

¹⁷ *Farragher v. City of Peokuk*, 111 Ia. 310, 82 N. W. 773 [1900]. (An assessment for such an improvement was accordingly void since the property owners had not petitioned therefor.)

¹⁸ *Wreford v. City of Detroit*, 132 Mich. 348, 93 N. W. 876 [1903]. See for a similar case, *Dickinson v. City of Detroit*, 111 Mich. 480, 69 N. W. 728 [1897].

¹⁹ *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331 [1905].

²⁰ *Perkinson v. Schnaake*, 108 Mo. App. 255, 83 S. W. 301 [1904]. In *Rackliffe v. Duncan*, — Mo. App. —, 108 S. W. 1110 [1908] an improvement which consisted of making the street over, although the old curb and gutter stones were used wherever serviceable, was held to be a reconstruction.

²¹ *State, Cronin, Pros. v. Mayor and Aldermen of Jersey City*, 38 N. J. L. (9 Vr.) 410 [1876].

pike to be filled and the surface made even. It does not require the construction of a new road to a new grade.²² Improvements which from their nature would amount to repairs cannot be treated as reconstructions because the original construction was made by property owners who at the time such construction was made were outside of the city limits, even if such repairs are the first improvement made after such road has been taken into the city.²³ In Wisconsin, by statute, an original permanent improvement in case of graveling a street is defined as placing gravel at least one foot in depth by sixteen feet in width. Under such a statute, the placing of crushed stone on a street ten feet in width and eight inches in depth was held not to be an original permanent improvement.²⁴

§ 464. Reconstruction.

Whether the legislature may authorize a special assessment for the reconstruction of an improvement which has once been constructed is a question which has been discussed heretofore.¹ Where such assessments are held to be valid statutes are frequently found authorizing assessments for reconstructions. Full effect is given to such statutes.² Under a statute which provides that the

²² *Milford v. Cincinnati*, *Milford & Loveland Trac. Co.*, 26 Ohio C. C. 271 [1904].

²³ *O'Meara v. Green*, 16 Mo. App. 118 [1884].

²⁴ *McMillan v. Fond du Lac County*, — Wis. —, 114 N. W. 1119 [1908]. Hence the abutting property could be assessed for a subsequent improvement.

¹ See § 379 *et seq.*

² *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 24 S. 784, 48 L. 1142 [1904]; (modifying *Field v. Barber Asphalt Paving Co.*, 117 Fed. 925 [1902]); *McVeery v. Boyd*, 89 Cal. 304, 26 Pac. 885 [1891]; *Bush v. City of Peoria*, 215 Ill. 515, 74 N. E. 797 [1905]; *Gurnee v. City of Chicago*, 40 Ill. 165 [1866]; *Lux & Talbot Stone Company v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903]; *City of Lafayette v. Fowler*, 34 Ind. 140 [1870]; *Schmidt v. City of New*

Orleans, 48 La. Ann. 1440, 21 So. 24 [1896]; *State ex rel. Wheeler v. District Court of Ramsey County*, 80 Minn. 293, 83 N. W. 183 [1900]; *Skinker v. Heman*, 148 Mo. 349, 49 S. W. 1026 [1898]; (reversing 64 Mo. App. 441 [1895]); *Smith v. Tobener*, 32 Mo. App. 601 [1888]; *Morley v. Carpenter*, 22 Mo. App. 640 [1886]; *State, Jelliff, Pros. v. Mayor and Common Council of the City of Newark*, 48 N. J. L. (19 Vr.) 101, 2 Atl. 627 [1886]; *Conde v. City of Schenectady*, 164 N. Y. 258, 58 N. E. 130 [1900]; *Moran v. City of Troy*, 9 Hun. (N. Y.) 540 [1877]; *In the Matter of Repaving Fulton Street*, 29 Howard (N. Y.) 429 [1863]; *Adams v. City of Beloit*, 105 Wis. 363, 47 L. R. A. 441, 81 N. W. 869 [1900]; *Warner v. Knox*, 50 Wis. 429, 7 N. W. 372 [1880]; *Blount v. City of Janesville*, 31 Wis. 648 [1872].

“expense of maintaining, relaying, keeping in repair, and cleaning of streets” is to be borne by general taxation, “relaying” means only relaying in the course of ordinary repairs and does not mean repaving.³ Authority to construct an original improvement, such as paving, is regarded as a continuing power and in the absence of some specific statutory provision to the contrary confers authority to assess for repaving.⁴ So under a statute authorizing the city to charge seventy-five cents per foot of frontage upon land which borders on streets through which water pipes are laid, the city may make such charge where new pipes are laid in place of the old pipes which had been laid by a water company.⁵ The discretion of the city in determining when reconstruction is necessary is final,⁶ if not grossly abused. Where this power exists an assessment may be levied for a reconstruction, even though the property owner has already paid an assessment for the original improvement.⁷ Under many statutes it is provided that the expense of repaving must be borne by the city out of funds raised by general taxation.⁸ Under other statutes repaving is to be paid out of the general funds of the city except in special cases.⁹ Thus it may be provided that repaving cannot be paid for by special assessment unless a majority of the property owners to be assessed, petition therefor.¹⁰ By statute it may be provided that no assessment can be levied

³ *Adams v. City of Beloit*, 105 Wis. 363, 47 L. R. A. 441, 81 N. W. 869 [1900].

⁴ *City of Lafayette v. Fowler*, 34 Ind. 140 [1870]; *State ex rel. Wheeler v. District Court of Ramsey County*, 80 Minn. 293, 83 N. W. 183 [1900]; *Smith v. Tobener*, 32 Mo. App. 601 [1888]; *Morley v. Carpenter*, 22 Mo. App. 640 [1886]; *State, Jelliff, Pros. v. Mayor and Common Council of the City of Newark*, 48 N. J. L. (19 Vr.) 101, 2 Atl. 627 [1886]; *Conde v. City of Schenectady*, 164 N. Y. 258, 58 N. E. 130 [1900]; *Blount v. City of Janesville*, 31 Wis. 648 [1872]. “To repave is to pave,” *Schmitt v. City of New Orleans*, 48 La. Ann. 1440, 1442, 21 So. 24 [1896].

⁵ *Doughten v. City of Camden*, 71 N. J. L. (42 Vr.) 426, 59 Atl. 16 [1904]; (reversed in *Doughten v. City of Camden*, 72 N. J. L. (43 Vr.)

451, 63 Atl. 170 [1906] as not apportioned according to benefits).

⁶ *Dumesnil v. Louisville Artificial Stone Co.*, 109 Ky. 1, 58 S. W. 371 [1900]; (A case in which a sidewalk which had been laid twenty-two years but was in fair condition was rebuilt.)

⁷ *McVeery v. Boyd*, 89 Cal. 304, 26 Pac. 885 [1891].

⁸ *Dickinson v. City of Detroit*, 111 Mich. 480, 69 N. W. 728 [1897]; *Heman v. Ring*, 95 Mo. App. 231 [1900]; *Winnebago Furniture Manufacturing Company v. Fond du Lac County*, 113 Wis. 72, 88 N. W. 1018 [1902].

⁹ *Blanchard v. Biedeman*, 18 Cal. 261 [1861].

¹⁰ *Farrar v. City of Keokuk*, 111 Ia. 310, 82 N. W. 773 [1900]; *In the Matter of Garvey*, 77 N. Y. 523 [1879].

for repaving unless the street is unsafe.¹¹ Under such statute it was held that a street which was impassable for heavily loaded teams, but was not otherwise unsafe, could not be paved on the assessment plan.¹² By statute it may be provided that assessments may be levied for new work, or improvements or alterations not in the nature of ordinary repairs.¹³ Under such statutes the expense of grading a new street is regarded as new work.¹⁴ Under a statute providing that "all expenses of making, maintaining and altering highways" should be paid for by general taxation, but that the expenses of "any sewer or other public work or improvement might be paid for by special assessment," it was held that the former provision, being more specific, controlled in the case of street improvements and that macadamizing a street was "maintaining" it within the former provision and was not a "public improvement" within the meaning of the last provision.¹⁵ Whether an ordinance which requires the reconstruction of an improvement while the old improvement is still in existence is so unreasonable and oppressive as to be void is regarded as a question of fact to be determined by the tribunal trying disputed questions of fact.¹⁶ If regrading is necessary to prepare the surface of a street for paving and the cost of regrading is not included in the assessment, the property owners cannot be heard to object to the regrading.¹⁷ Under a statute authorizing the city to take up a defective sewer and rebuild it, the city cannot, if the existing sewer becomes defective construct a new and different sewer at the expense of the abutting property owners.¹⁸ If water pipes have once been laid they may subsequently, if it is necessary, be lowered and relaid at the cost of the owners of abutting property.¹⁹

¹¹ *Smith v. Minto*, 30 Or. 351, 48 Pac. 166 [1897].

¹² *Smith v. Minto*, 30 Or. 351, 48 Pac. 166 [1897].

¹³ *Breen v. City of Troy*, 60 Barb. (N. Y.) 417 [1871].

¹⁴ *Breen v. City of Troy*, 60 Barb. (N. Y.) 417 [1871].

¹⁵ *City of New Haven v. Whitney*, 36 Conn. 373 [1870].

¹⁶ *Lamb v. City of Chicago*, 219 Ill. 229; 76 N. E. 343 [1906].

¹⁷ *Amberson Avenue*, Appeal of Childs, 179 Pa. St. 634, 36 Atl. 354 [1897].

¹⁸ *State, Fiacre, Pros. v. Mayor and Common Council of Jersey City*, 34 N. J. L. (5 Vr.) 277 [1870].

¹⁹ *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 424 [1874]; *Ankeny v. Palmer*, 20 Minn. 431 [1874]; (A charge therefor cannot, however, exceed the actual expense of the change.)

CHAPTER X.

SPECIFIC ITEMS INCLUDED IN ASSESSMENT.

§ 465. Necessity of statutory authority to include items in assessment.

Since the only authority which a public corporation has to levy an assessment for local improvements is that conferred by statute,¹ a public corporation cannot levy an assessment for items not authorized by statute.² What items are included within the terms and the meaning of the different statutes must therefore be considered in detail.

¹ See § 223.

² *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082 [1893]; *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891]; *Donnelly v. Howard*, 60 Cal. 291 [1882]; *Dyer v. Chase*, 52 Cal. 440 [1877]; *Spalding v. City of Denver*, 33 Colo. 172, 80 Pac. 126 [1905]; *McClellan v. District of Columbia*, 7 Mackey (D. C.) 94 [1889]; *Chicago Union Traction Company v. City of Chicago*, 208 Ill. 187, 70 N. E. 234 [1904]; *Farr v. West Chicago Park Commissioners*, 167 Ill. 355, 46 N. E. 893 [1897]; *Morris v. City of Chicago*, 11 Ill. 650 [1850]; *Ross v. Van Natta*, 164 Ind. 557, 74 N. E. 10 [1905]; *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890]; *Board of Commissioners of Montgomery County v. Fullen*, 118 Ind. 158, 20 N. E. 771 [1888]; *Naltner v. Blake*, 56 Ind. 127 [1877]; *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898]; *City of Louisville v. Selvage*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899]; *Wells v. Street Commissioners of City of Boston*, 187

Mass. 451, 73 N. E. 554 [1905]; *Power v. City of Detroit*, 139 Mich. 30, 102 N. W. 288 [1905]; *Neenan v. Smith*, 60 Mo. 292 [1875]; *Kansas City v. O'Connor*, 82 Mo. App. 655 [1899]; *City of St. Joseph ex rel. Danaher v. Dillon*, 61 Mo. App. 317 [1895]; *Davis v. Mayor and Common Council of the City of Newark*, 54 N. J. L. (25 Vr.) 595, 25 Atl. 336 [1892]; *State, Randolph, Pros. v. Inhabitants of the City of Plainfield*, 38 N. J. L. (9 Vr.) 93 [1875]; *Poth v. Mayor, Aldermen and Commonalty of the City of New York*, 151 N. Y. 16, 45 N. E. 372 [1896]; *In the Matter of the Petition of Deering to Vacate an Assessment*, 93 N. Y. 361 [1883]; *In the Matter of Upson to Vacate an Assessment*, 89 N. Y. 67 [1882]; *In the Matter of the Petition of Merriam to Vacate an Assessment*, 84 N. Y. 569 [1881]; *Mitchell v. Lane*, 62 Hun. (N. Y.) 253, 16 N. Y. Supp. 707 [1891]; *In the Matter of Auchumty*, 18 Hun. (N. Y.) 324 [1879]; *People ex rel. Knox, v. Village of Yonkers*, 39 Barb. (N. Y.) 266 [1863]; *Annie Wright*

§ 466. Assessment limited to cost of improvement and incidental items.

While an assessment is levied upon the theory of benefits to the property conferred by the public improvement in which the assessment is levied, it is also, in theory, levied for the cost of such improvement. Accordingly, if the benefits exceed the cost the assessment can only be for the actual cost of the work together with the proper items incident thereto. The excess of benefit over such expenses inures to the benefit of the property owner. He cannot be required to pay such excess into the public treasury.¹ Thus, where the cost of lowering and relaying a water main was three hundred and thirty dollars and an assessment therefor of one dollar per foot was levied aggregating an amount of six hundred and sixty dollars, such assessment was held to be invalid.² If, however, the cost of maintenance and repair may be properly included in the assessment, the fact that the amount of the assessment exceeds the actual cost of the work does not invalidate the assessment.³ Thus a water pipe was laid at a cost of one dollar and fifty cents per foot. An assessment of one dollar and twenty-five cents per front foot was levied on the property on each side of the street, making the assessment two dollars and fifty cents per foot of pipe. Such assessment was held to be valid.⁴ A statute limiting the assessment to the cost of the improvement paid by the city means the entire cost without deduction for any re-imbursement by assessment.⁵

Seminary v. City of Tacoma, 23 Wash. 109, 62 Pac. 444 [1900]; *McAllister v. City of Tacoma*, 9 Wash. 272, 37 Pac. 447, 658 [1894]; *Wells v. Western Paving & Supply Company*, 96 Wis. 116, 70 N. W. 1071 [1897]; *Dean v. Borchsenius*, 30 Wis. 236 [1872].

¹ *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; *Union Building Association v. City of Chicago*, 61 Ill. 439 [1871]; *State on the Relation of Lingenfelter v. Danville and North Salem Gravel Road Company*, 33 Ind. 133 [1870]; *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468 [1874]; *Eno v. Mayor, Aldermen and*

Commonalty of the City of New York, 68 N. Y. 214 [1877]; *City of Asheville v. Wachovia Loan & Trust Co.*, 143 N. C. 360, 55 S. E. 800 [1906]; *In re Mill Creek Sewer*, 196 Pa. St. 183, 46 Atl. 312 [1900].

² *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468, followed without opinion in *Ankeny v. Palmer*, 20 Minn. 477 [1874].

³ *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898].

⁴ *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898].

⁵ *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870].

In jurisdictions where an assessment may be levied and confirmed before the improvement is constructed and the cost of the improvement definitely determined, the property owner can resist collection of the assessment over the actual cost of the improvement and the proper items of incidental expense even after confirmation.⁶ If a property owner is obliged to pay the entire assessment he may recover the excess of such assessment over the actual cost of improvement and the proper items of incidental expense.⁷ The actual cost of doing the work, is, in the absence of fraud, an item for which the assessment may be levied,⁸ subject always to the rule that the assessment must not exceed the actual or theoretical amount of benefits. If inquiry as to the cost of the work is material, the cost must be that of doing the work at that time in that city and not the price charged in other cities at other times.⁹ The expense of prospecting to find material suitable for use in the improvement is not an item which can be included in the cost of the assessment.¹⁰

§ 467. Credit for material used by contractor.

In constructing a new improvement the contractor occasionally makes use of the material of the old improvement. It has been said that the value of the material so used by the contractor should be deducted from the assessments levied on the property owners.¹ On the other hand, the city cannot credit itself for the value of such material, since it belongs to the property owner.² Under an ordinance which requires that the granite paving on the old driveways should be sold to the highest bidder and the proceeds of the sale used in paying the cost of the improve-

⁶ *People ex rel. McCormack v. McWethy*, 177 Ill. 334, 52 N. E. 479 [1898]; *People ex rel. McCormack v. McWethy*, 165 Ill. 222, 46 N. E. 187 [1897]. Conversely if it is not shown that the cost of the improvement has been collected the objection that the amount of the assessment is too large cannot be raised. *Gross v. People ex rel. Raymond*, 193 Ill. 260, 86 Am. St. Rep. 322, 61 N. E. 1012 [1901].

⁷ However he must sue within the time limited: *Grosbeck v. Cincinnati*, 51 O. S. 365, 37 N. E. 707 [1894].

⁸ *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953 [1892].

⁹ *Amberson Avenue*, Appeal of Childs, 179 Pa. St. 634, 36 Atl. 354 [1897].

¹⁰ *Manor v. Board of Commissioners of Jay Co.*, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101 [1893]; (A case where it is sought to include the cost of prospecting for gravel to improve a gravel road.)

¹ *Hastings v. Columbus*, 42 O. S. 585 [1885].

² *Fisher v. City of Rochester*, 6 Lansing (N. Y.) 225 [1872].

ment, it is not necessary that such pavement be sold before the assessment is levied. It is sufficient if it is sold within a reasonable time.³ If old material is used but no charge therefor is included in the assessment, the property owner cannot object to an assessment for the labor necessary in making such improvement.⁴ If two or more streets are graded under separate contracts, it has been held that the contractor may make use of the surplus material excavated from one street to fill depressions in the other and that the assessments for such streets may include the cost of excavation and the cost of filling as separate items.⁵ If the contract provides that the surplus dirt accumulating from excavations shall be the property of the contractor, it has been said that the validity of such provision cannot be questioned in proceedings to enforce an assessment.⁶ Under a contract which provides that credit shall be given for dirt furnished by the city and used in filling depressions, it has been said not to amount to fraud if the contractor presents a bill for the entire contract price without any allowance for earth taken from another street and used upon the street in question to fill in depressions.⁷ Earth furnished by the city for filling a street but which is, without the fault of the contractor, used to fill up a lot and not to fill up the street, is an item which should not be deducted from the contract price.⁸ If a contractor hires a steam roller from the city, the price paid by him therefor should not be deducted from the amount of the assessment.⁹

§ 468. Compensation of surveyor and engineer.

Whether surveyor's fees form an item which may be included in the assessment is a matter within the discretion of the legislature. If such an item is provided for by statute it may be

³ *Aldis v. South Park Commissioners*, 171 Ill. 424, 49 N. E. 565 [1898].

⁴ *In the Matter of Anderson*, 60 Barb. (N. Y.) 375 [1871]; *In the Matter of Anderson*, 39 Howard (N. Y.) 184 [1870].

⁵ *Schenley v. Commonwealth for the Use of the City of Allegheny*, 36 Pa. St. (12 Casey) 64 [1859].

⁶ *Jenkins v. Stetler*, 118 Ind. 275, 20 N. E. 788 [1888]; (This result was reached, however, under a pro-

cedure which made it impossible in an action to enforce an assessment to go back to matters arising prior to the execution of the contract.)

⁷ *Darlington v. Commonwealth for Use of City of Allegheny*, 41 Pa. St. (5 Wright) 68 [1861].

⁸ *Richards v. City of Cincinnati*, 31 O. S. 506 [1877].

⁹ *McGlynn v. City of Toledo*, 22 Ohio C. C. 34 [1901].

included in the assessment.¹ Only the actual fees can be included in the assessment.² It was held, however, on error, that if the exact cost of such fees is not given, yet an approximation thereto is given and if the charge does not appear to be unreasonable or excessive, the assessment is valid.³ The cost of supervision is a necessary item of expense in a public improvement and may be included in the assessment under statutory authority therefor.⁴ The services of an engineer are necessary in all public improvements of any magnitude. The cost of securing such services is a proper item of assessment, if authorized by statute.⁵ Any objection to the propriety of such item is waived if appeal is not taken in the manner provided for by statute.⁶ The fact that the engineer is employed by the city at a monthly or annual salary does not in some jurisdictions prevent the city from reimbursing itself by including a fair compensation for his services in assessments.⁷ The city engineer, who has constructed maps and plans under an abandoned resolution, cannot recover compensation by having his services included in an assessment under a new resolution, if such new resolution referred to his plans and the new city engineer was, to some extent, aided by the former plans.⁸

¹ *Burns v. City of Duluth*, 96 Minn. 104, 104 N. W. 714 [1905]; *State, Kohler, Pros. v. Town of Guttenberg*, 38 N. J. L. (9 Vr.) 419 [1876]; *In the Matter of Johnson*, 103 N. Y. 260, 8 N. E. 399 [1886]; *In the Matter of Lowden*, 89 N. Y. 548 [1882]; *In the Matter of Merriam*, 84 N. Y. 596 [1881]; *In the Matter of Lowden to Vacate Assessment*, 25 Hun. (N. Y.) 434 [1881].

² *In the Matter of Lowden*, 25 Hun. (N. Y.) 434 [1881].

³ *In the Matter of Lowden*, 89 N. Y. 548 [1882].

⁴ *Gibson v. City of Chicago*, 22 Ill. 567 [1859]; *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605 [1891]; *Beniteau v. City of Detroit*, 41 Mich. 116, 1 N. W. 899 [1879]; *Burns v. City of Duluth*, 96 Minn. 104, 104 N. W. 714 [1905].

⁵ *Gibson v. City of Chicago*, 22 Ill. 567 [1859]; *McGilvery v. City of Lewiston*, 13 Ida. 338, 90 Pac. 348

[1907]; *Vandalia Levee & Drainage District v. Hutchins*, 234 Ill. 31, 84 N. E. 715 [1908]; *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605 [1891]; *Cuming v. City of Grand Rapids*, 46 Mich. 150, 9 N. W. 141 [1881]; *City of St. Paul v. Mullen*, 27 Minn. 78, 6 N. W. 424 [1880]; *The State v. Council of City of Elizabeth*, 30 N. J. L. (1 Vr.) 365 [1863]; *In the Matter of Lowden*, 89 N. Y. 543 [1882]; *In the Matter of Tappen*, 36 How. Pr. 390 [1869]; *Adkins v. Toledo*, 27 Ohio Cir. Ct. R. 417 [1905].

⁶ *Boyle v. Hitchcock*, 66 Cal. 129, 4 Pac. 1143 [1884].

⁷ *Gibson v. City of Chicago*, 22 Ill. 566.

⁸ *Fitzhugh v. Ashworth*, 119 Cal. 393, 51 Pac. 635 [1897]. (The question whether the former city engineer had any legal remedy, and if so, what it was, was not passed upon.)

In other jurisdictions the value of the services of a city engineer employed on a salary does not form a proper item of assessment.⁹ The value of the services of a city engineer, who is employed on a fixed salary, is properly omitted from the ordinance and the estimate, even if by the terms of the contract the contractor is bound to pay all engineering expenses.¹⁰ The assignment of an assessment to a contractor cannot include the expense of an engineer's services.¹¹

§ 469. Expense of levying assessment.

Whether the cost of levying an assessment can be included in the assessment depends upon the provisions of the statute. It is an item which the legislature is authorized to include and which in many jurisdictions, the legislature has included.¹ Only the actual cost of the levy can be included.² Accordingly, if the city has resisted the original claim for the cost of the levy and has succeeded in having such item reduced, only the actual cost thus paid by the city should be included in the assessment, and the owner should be given the benefit of such reduction.³ It is so necessary to include the cost of levying an assessment in the assessment that the failure of a committee to include such cost

⁹ Board of Commissioners of Montgomery County v. Fullen, 118 Ind. 158, 20 N. E. 771 [1888]; Longworth v. City of Cincinnati, 34 O. S. 101 [1877]; Smith v. City of Portland, 25 Or. 297, 35 Pac. 665 [1894]; In the Matter of the Contract for the Fifth Avenue Sewer in the City of Pittsburgh, 4 Brewster (Pa.) 364 [1870].

¹⁰ City of Excelsior Springs, to Use of McCormick v. Ettenson, 120 Mo. App. 215, 96 S. W. 701 [1906]; (Such contract is not invalidated thereby).

¹¹ Corry v. Gaynor, 22 O. S. 584 [1872]; (It was not decided whether such item could have been included in the assessment.)

¹ Nevada National Bank v. Board of Supervisors of Kern County, 5 Cal. App. 638, 91 Pac. 122 [1907]; Vandalia Levee & Drainage District v. Hutchins, 234 Ill. 31, 84 N. E.

715 [1908]; Dobler v. Village of Warren, 174 Ill. 92, 50 N. E. 1048 [1898]; Ware v. City of Jerseyville, 158 Ill. 234, 41 N. E. 736 [1895]; Davis v. City of Litchfield, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; Kimble v. City of Peoria, 140 Ill. 157, 29 N. E. 723 [1892]; Thayer v. City of Grand Rapids, 82 Mich. 298, 46 N. W. 228 [1890]; Mayer v. Mayor, Aldermen and Commonalty of the City of New York, 101 N. Y. 284, 4 N. E. 336 [1886]; In the Matter of Tappan, 54 Barb. 225 [1869].

² Mayer v. Mayor, Aldermen and Commonalty of the City of New York, 101 N. Y. 284, 4 N. E. 336 [1886].

³ Mayer v. Mayor, Aldermen and Commonalty of the City of New York, 101 N. Y. 284, 4 N. E. 336 [1886].

in its estimate is a fatal defect.⁴ The fact that the assessment is made by salaried officers does not prevent the city from including the actual cost of making the levy in the assessment.⁵ On the other hand, many states, and among them some of which had regarded the cost of the levy as included in the assessment where not specifically provided for, have provided that such cost must be paid by general taxation.⁶ Under such statutes it is error to include the cost of making and levying the assessment in the assessment on confirmation upon the statement of the counsel for the city that it would be deducted from the judgment.⁷ Where the statute has been changed so as to require the cost of levying an assessment to be paid out of the general funds, such change of statute applies to proceedings pending when such act took effect.⁸ If a petition for confirmation is filed after such act takes effect the new statute is applicable.⁹ If the cost of levying the assessment is included erroneously, the reviewing court cannot strike out such item and direct the County Court to deduct such amount from its judgment but it must refer the case to the trial court for a new assessment.¹⁰ The trial court may recast the assessment and eliminate such improper item.¹¹

⁴ Ware v. City of Jerseyville, 158 Ill. 234, 41 N. E. 736 [1895].

⁵ In the Matter of Tappen, 36 How. (N. Y.) 390 [1869].

⁶ Gage v. People ex rel. Hanberg, 207 Ill. 377, 69 N. E. 840 [1904]; Thompson v. People ex rel. Hanberg, 207 Ill. 334, 69 N. E. 842 [1904]; McChesney v. City of Chicago, 205 Ill. 528, 69 N. E. 38 [1903]; Thompson v. City of Chicago, 197 Ill. 599, 64 N. E. 392 [1902]; Gage v. City of Chicago, 196 Ill. 512, 63 N. E. 1031 [1902]; Gage v. City of Chicago, 195 Ill. 490, 63 N. E. 184 [1902]; Kerfoot v. City of Chicago, 195 Ill. 229, 63 N. E. 101, [1902]; In the Matter of Wood, 51 Barb. 275 [1868]; In the Matter of Lewis, 51 Barb. 82 [1868]; In the Matter of Lewis, 35 Howard 162 [1868]. Such was the effect of the act of 1901 in Illinois. Gage v. People ex rel. Hanberg, 207 Ill. 377, 69 N. E. 840 [1904]; Me-

Chesney v. City of Chicago, 205 Ill. 528, 69 N. E. 38 [1903]; McChesney v. City of Chicago, 201 Ill. 344, 66 N. E. 217 [1903]; Thompson v. City of Chicago, 197 Ill. 599, 64 N. E. 392 [1902]; Gage v. City of Chicago, 196 Ill. 512, 63 N. E. 1031 [1902]; Gage v. City of Chicago, 195 Ill. 490, 63 N. E. 184 [1902].

⁷ Kerfoot v. City of Chicago, 195 Ill. 229, 63 N. E. 101 [1902].

⁸ Gage v. City of Chicago, 196 Ill. 512, 63 N. E. 1031 [1902].

⁹ Gage v. City of Chicago, 195 Ill. 490, 63 N. E. 184 [1902].

¹⁰ Thompson v. City of Chicago, 197 Ill. 599, 64 N. E. 392 [1902].

¹¹ Thompson v. People ex rel. Hanberg, 207 Ill. 334, 69 N. E. 842 [1904]; Gage v. People ex rel. Hanberg, 207 Ill. 377, 69 N. E. 840 [1904]; McChesney v. City of Chicago, 205 Ill. 528, 69 N. E. 38 [1903].

A new ordinance is not necessary.¹² The cost of making out the tax duplicate cannot be charged to a fund raised by assessment in the absence of statutory authority.¹³ The expense of maintaining a board of local improvements, not being incurred solely for the specific assessment in question, cannot be included in such assessment.¹⁴ If the board of local improvement is made up of members of the council and the statute does not contemplate payment to them of any additional compensation as members of such board, they cannot be paid out of the assessment, even under a statutory provision for including the cost of levying the assessment as an item of expense.¹⁵ If no provision is made for compensating the county auditor for services rendered in an assessment proceeding, compensation for such services cannot be made a proper item of assessment.¹⁶ Plans and specifications are necessary to the successful construction of most improvements and are generally required by statute.¹⁷ If there is statutory authority therefor it is ordinarily proper to include the cost of such plans and specifications in the assessment as an item thereof.¹⁸ The cost of making estimates, plans and assessments, and making up the books of assessment may be included.¹⁹ The cost of probable jury trials, which will be necessary if objections to an application for judgment of confirmation are filed, cannot be estimated in advance and included as part of the cost of making and levying the assessment.²⁰

§ 470. Printing.

Various items of expense for printing are ordinarily required by the assessment statutes. If the statute so provides the expense of such printing may be included as an item of assessment.¹ Thus

¹² *Gage v. People ex rel. Hanberg*, 207 Ill. 377, 69 N. E. 840 [1904]; *McChesney v. City of Chicago*, 205 Ill. 528, 69 N. E. 38 [1903].

¹³ *Manor v. Board of Commissioners of Jay County*, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101 [1893].

¹⁴ *Betts v. City of Naperville*, 214 Ill. 380, 73 N. E. 752 [1905].

¹⁵ *Gage v. Village of Wilmette*, 230 Ill. 428, 82 N. E. 656 [1907].

¹⁶ *Board of Commissioners of Montgomery County v. Fullen*, 118 Ind. 158, 20 N. E. 771 [1888].

¹⁷ See § 819 *et seq.*

¹⁸ *Burns v. City of Duluth*, 96 Minn. 104, 104 N. W. 714 [1905].

¹⁹ *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 228 [1890].

²⁰ *Dobler v. Village of Warren*, 174 Ill. 92, 50 N. E. 1048 [1898].

¹ *Burk v. Altschul*, 66 Cal. 533, 6 Pac. 393 [1885]; *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 228 [1890]; *Cuming v. City of Grand Rapids*, 46 Mich. 150, 9 N. W. 141 [1881]; *State, Kohler, Pros. v. Town of Guttenberg*, 38 N. J. L. (9 Vr.) 419 [1876].

the cost of printing abstracts of title to the land upon which the improvement was to be located may be included in the assessment.² Any question as to the propriety of including such items is waived if an appeal is not taken in a manner provided for by statute.³

§ 471. Advertisement and notice.

Under most assessment statutes advertisement of various kinds is required. If the statute so provides, the cost of such advertisement may be included as an item of assessment.¹ A special assessment judgment for the "special assessment, printer's fees and costs," is not subject to the objection of allowing a double recovery for printer's fees.² If the number of papers in which the advertisement is to be inserted is not fixed by law, the discretion of the city, if not abused, controls and the cost thus incurred is a proper item of assessment.³ Thus it is proper to include in the assessment the cost of advertising for bids.⁴ If an assessment is assigned to a contractor for compensation for his work, such assignment cannot include the assessment for advertising.⁵ Under assessment statutes notice of various forms is frequently required and is indeed often indispensable.⁶ If the statute so provides, the cost of making and serving such notices may be included in the assessment.⁷ If they are made and served by one who is not bound in law to do such work without compensation, it is proper to charge therefor.⁸ If the statute provides what fees shall be charged for making and serving notices no

² *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 228 [1890].

³ *Boyle v. Hitchcock*, 66 Cal. 129, 4 Pac. 1143 [1884]; *Burke v. Altschul*, 66 Cal. 533, 6 Pac. 393 [1885].

¹ *Gage v. People ex rel. Hanberg*, 219 Ill. 369, 76 N. E. 498 [1906]; *Michael v. City of Mattoon*, 172 Ill. 394, 50 N. E. 155 [1898]; *Beniteau v. City of Detroit*, 41 Mich. 116, 1 N. W. 899 [1879]; *City of St. Paul v. Mullen*, 27 Minn. 78, 6 N. W. 424 [1880]; *Cincinnati v. Davis*, 58 O. S. 225, 50 N. E. 918 [1898]; *Adkins v. Toledo*, 27 Ohio Cir. Ct. R. 417 [1905].

² *Gage v. People ex rel. Hanberg*

225 Ill. 144, 80 N. E. 90 [1907].

³ *Cincinnati v. Davis*, 58 O. S. 225, 50 N. E. 918 [1898].

⁴ *Beniteau v. City of Detroit*, 41 Mich. 116, 1 N. W. 899 [1879].

⁵ *Corry v. Gaynor*, 22 O. S. 584 [1872]. (The propriety of including such item in the assessment was not passed upon.)

⁶ See Chapter XIV.

⁷ *Watkins v. State ex rel. Van Auker*, 151 Ind. 123, 49 N. E. 169, 51 N. E. 79 [1898]; *Adkins v. Toledo*, 27 Ohio Cir. Ct. R. 417 [1905].

⁸ *Watkins v. State ex rel. Van Auker*, 151 Ind. 123, 49 N. E. 169, 51 N. E. 79 [1898].

charge can be made as an item of assessment in excess of such statutory rate.⁹ In the absence of statutory authority such expenses cannot be included in the assessment.¹⁰

§ 472. Cost of collection.

The cost of collecting an assessment is a necessary item of expense and may be included in the assessment if the statute so provides.¹ Failure to include the cost of collecting in the estimate of expenses is, under such statutes, fatal to the proceedings.² A statute may provide for adding a certain percentage of the total amount of the assessment for the expense of collection.³ No charge can be made in the assessment for fees for collection in excess of those allowed by law.⁴ If the statute provides a certain percentage for collection, it is improper to add a percentage in excess of that fixed by statute.⁵ If the court has power to deduct such erroneous charge, including it does not invalidate the assessment; but it may be so deducted.⁶ Unless specifically provided for by statute, only the actual cost of collection can be included.⁷ In the absence of statutory authority it is improper to add a certain percentage of the assessment as the estimated

⁹ *McGlynn v. City of Toledo*, 22 Ohio C. C. 34 [1901]. (A charge of \$2.50 as a fee for writing a letter to a non-resident giving him notice of the assessment.)

¹⁰ *Manor v. Board of Commissioners of Jay Co.*, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101 [1893].

¹ *Gage v. Village of Wilmette*, 230 Ill. 428, 82 N. E. 656 [1907]; *Gage v. People ex rel. Hanberg*, 225 Ill. 144, 80 N. E. 90 [1907]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1891]; *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; *Gibson v. City of Chicago*, 22 Ill. 567 [1859]; *Board of Commissioners of Pulaski County v. Vurpillat*, 22 Ind. App. 422, 53 N. E. 1049 [1899]; *Dashiell v. Mayor and City Council of Baltimore*, Use of Hav., 45 Md. 615 [1876]; *Warren v. City of Grand Haven*, 30 Mich. 24 [1874]; *Williams v. Mayor, etc., of Detroit*, 2

Mich. 560 [1853]; *State, Kohler, Pros. v. Town of Guttenberg*, 38 N. J. L. (9 Vr.) 419 [1876]; *In the Matter of Eager*, 58 Barb. 557 [1871]; *In the Matter of Eager*, 41 How. 107 [1870]; *Matter of Eager*, 12 Abb. Pr. 151 [1871].

² *Ware v. City of Jerseyville*, 158 Ill. 234, 41 N. E. 736 [1895].

³ *Warren v. City of Grand Haven*, 30 Mich. 24 [1874]; *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853]; *In the Matter of Eager*, 58 Barb. 557 [1871]; *In the Matter of Eager*, 41 How. 107 [1870].

⁴ *In the Matter of McCormack*, 60 Barb. 128 [1870]; *Matter of McCormack*, 10 Abb. Pr. N. S. 234 [1870].

⁵ *In the Matter of McCormack*, 60 Barb. 128 [1870].

⁶ *In the Matter of McCormack*, 60 Barb. 128 [1870]; *Matter of McCormack*, 10 Abb. Pr. N. S. 234 [1870].

⁷ *The Northern Liberties v. St. Johns Church*, 13 Pa. St. 104 [1850].

cost of collection.⁸ The fact that this percentage was to be paid to the treasurer, if the assessment was collected by him, did not justify including such item if other means of collection were available by statute.⁹ By some statutes it is provided that the cost of collection cannot be included in the assessment but must be paid for out of the general funds of the city. Under such statutes the cost of collection is not a proper item of assessment.¹⁰ Where by statute it is provided that assessments must be paid to the county treasurer, that he shall receive three-fourths of one per cent. on all money collected by him as taxes, and that the cost of a street improvement shall be assessed upon adjacent property without making specific provision for including the cost of collection, it is held that such cost cannot be included in the assessment.¹¹ Under a statute giving to the collector of assessments a certain commission, it has been held that he cannot collect such commission upon any assessment assessed against the city.¹² Printing the list of property-owners who have been delinquent in paying assessments is, under many statutes, a necessary item of expense in collecting the assessments. If the statute so provides, such item of expense may be included in the assessment.¹³ Indeed, it has been held that such item of expense cannot be paid out of the general fund of the city but that it must be paid solely out of the special fund raised by assessment.¹⁴ The court costs which will be incurred in the ordinary course of the assessment proceedings may be included in the assessment.¹⁵ Such costs, if excessive, may be retaxed by the trial court.¹⁶ It is not necessary that the property owner bring a separate suit in equity therefor.¹⁷ If there is statutory authority therefor, a

⁸ *Spangler v. City of Cleveland*, 35 O. S. 469 [1880]; *The Northern Liberties v. St. Johns Church*, 13 Pa. St. 104 [1850].

⁹ *Spangler v. City of Cleveland*, 35 O. S. 469 [1880].

¹⁰ *McChesney v. City of Chicago*, 201 Ill. 344, 66 N. E. 217 [1903]; *Higman v. City of Sioux City*, 129 Ia. 291, 105 N. W. 524 [1906].

¹¹ *Higman v. City of Sioux City*, 129 Ia. 291, 105 N. W. 524 [1906].

¹² *People of the State of New York v. Starkweather*, 42 N. Y. Sup. Ct. Rep. 325 [1877].

¹³ *Brooks v. City of San Luis Obispo*, 109 Cal. 50, 41 Pac. 791 [1895]; *The Chicago & Northwestern Railroad Company v. People ex rel. Miller*, 83 Ill. 467 [1876].

¹⁴ *Brooks v. City of San Luis Obispo*, 109 Cal. 50, 41 Pac. 791 [1895].

¹⁵ *Michael v. City of Mattoon*, 172 Ill. 394, 50 N. E. 155 [1898].

¹⁶ *Mayor, etc., of the City of New York v. Cornell*, 9 Hun. (N. Y.) 215 [1876].

¹⁷ *Mayor, etc., of the City of New York v. Cornell*, 9 Hun. (N. Y.) 215 [1876].

part of the fund raised by special assessment may be appropriated to retain special counsel to collect unpaid assessments.¹⁸ By special statutory authority, an attorney's fee may be recovered in a suit to collect an assessment or to enforce the lien thereof.¹⁹ This is in the nature of a penalty.²⁰ A statute providing for such attorney's fee is applicable to an assessment levied before the statute is passed where the suit to enforce the lien is begun subsequently.²¹ Only one attorney's fee can be recovered in one suit, no matter how many causes of action are involved.²²

§ 473. Penalties for delinquency.

As a means of compelling prompt payment of assessments the legislature may provide that a penalty shall be added to the amount of the assessment in case of non-payment thereof.¹ Such penalties cannot be added unless there is statutory authority therefor, however.² If a penalty is added without authority the property owner cannot enjoin the collection of the assessment and penalty unless he has offered to pay that part of the assessment which is properly due.³

§ 474. Excess charges due to failure to pay cash.

If the credit of the city, or the method proposed for paying an assessment, is such that a greater sum must be paid for the

¹⁸ Reclamation District No. 108 v. Hagar, 66 Cal. 54, 4 Pac. 945 [1884].

¹⁹ Reid v. Clay, 134 Cal. 207, 66 Pac. 262 [1901]; Scott v. Hayes, 162 Ind. 548 [1903]; 70 N. E. 879 [1903]; Brown v. Central Bermudez Company, 162 Ind. 452, 69 N. E. 150 [1903]; Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Porter, 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179 [1905]; Palmer v. Nolting, 13 Ind. App. 581, 41 N. E. 1045 [1895]. Such act has been held to be unconstitutional because the title thereof did not express the subject matter. Turnquist v. Cass County Drain Commissioners, 11 N. D. 514, 92 N. W. 852 [1902].

²⁰ Brown v. Central Bermudez Company, 162 Ind. 452, 69 N. E. 150 [1903].

²¹ Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Porter, 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179 [1905].

²² Hughes v. Alsip, 112 Cal. 587, 44 Pac. 1027 [1896].

¹ Eyerman v. Blaksley, 78 Mo. 145 [1883]; City of St. Louis to Use of Seibert v. Allen, 53 Mo. 44 [1873]; Baker v. French, 18 Ohio C. C. 420 [1899]; Yates v. Borough of Meadville, 56 Pa. St. (6 P. F. Smith) 21 [1867].

² Annie Wright Seminary v. City of Tacoma, 23 Wash. 109, 62 Pac. 444 [1900].

³ Annie Wright Seminary v. City of Tacoma, 23 Wash. 109, 62 Pac. 444 [1900].

improvement than would be necessary if the contractor were assured of prompt payment in cash, the question arises whether the loss thus suffered must be borne by the city out of its general funds or whether it may be assessed upon the property owners benefited. In some jurisdictions it seems to be assumed that the expense of the improvement may be computed with reference to the manner of payment and on the basis thereof.¹ Accordingly, if bonds are issued to pay the cost of the improvement in anticipation of the assessment and by statutory authority, such bonds are sold below par, the discount can be included in the assessment and charged upon the owners of property benefited.² If the contractor is paid in city warrants, and by reason of their depreciation the city is obliged to pay more in such warrant to such contractor than it would have to pay in cash, it has been held that such loss may be charged upon the property-owners and an assessment may be levied for the full amount paid by the city.³ A fencing district is held to have authority to levy an assessment for the amount which, discounted at six per cent. will pay the cost of the improvement.⁴ In other jurisdictions the discount due to the bad financial standing of the city or the uncertainty of payment must be borne out of the general funds of the city.⁵ This result is often reached under statutes providing expressly or by implication for charging such items upon the city. If bonds can be sold only for less than par it has been held that the discount must be borne by the city and cannot be charged upon the property owners.⁶ So if the credit of a city is such that in constructing sidewalks on credit it must pay more than it would have to pay in cash, such losses cannot be charged upon the property owners.⁷ Where a contractor offers to do certain work for a certain amount in cash and for a larger amount in assessments to be assigned to him and collected by him,

¹Yarnold v. City of Lawrence, 15 Kan. 103 [1875].

²Ricketts v. Spraker, 77 Ind. 371 [1881]; State, Baker, Pros. v. City of Elizabeth, 37 N. J. L. (8 Vroom) 142 [1874].

³Warren v. Henly, 31 Ia. 31 [1870].

⁴Stiewel v. Fencing District No. 6

of Johnson County, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1902].

⁵Doyle v. Austin, 47 Cal. 353 [1874]; City of Galveston v. Heard, 54 Tex. 420 [1881].

⁶Doyle v. Austin, 47 Cal. 353 [1874].

⁷City of Galveston v. Heard, 54 Tex. 420 [1881].

a property owner cannot be assessed for more than the cash value of the work, even if the city agreed to pay the larger amount in assessments.⁸ If, however, a contract provides for a certain rate of compensation, if the contractor was paid at the regular time for paying taxes, about nine months after the performance of the contract; and also provides that the lot owner may, by paying a much smaller sum at once, discharge all liability for such improvement, a lot owner who has not elected to make prompt payment cannot subsequently object because of the increase in the contract price due to such owner's act in deferring payment.⁹

§ 475. Interest.

The legislature has power to determine in advance whether interest may be included in assessments or whether interest is not an item which can be included. The question is entirely one of policy.¹ It may fix the rate of interest which tax certificates shall draw.² The legislature may delegate to the city the power of fixing the rate of interest.³ Thus, the city may be authorized to fix any rate of interest not exceeding eight per cent.⁴ The ordinary rule is that in the absence of some statute expressly or impliedly authorizing interest, interest cannot be allowed on an assessment nor included therein.⁵ Statutes which provide for interest on judgments do not authorize interest on assessments, even in jurisdictions in which an assessment is regarded for many purposes as analogous to a judgment.⁶ A statute authorizing interest on taxes is not regarded as authorizing an interest on assessments since the word "tax" is regarded as being

⁸Bliss v. Kraus, 16 O. S. 54 [1864].

⁹City of Lawrence v. Killam, 11 Kan. 375 [1873].

¹Germond v. City of Tacoma, 6 Wash. 365, 33 Pac. 961 [1893].

²Edwards & Walsh Construction Co. v. Jasper County, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902].

³Hellman v. Shoulsters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057 [1896].

⁴Barber Asphalt Paving Company

v. Gogreve, 41 La. Ann. 251, 5 So. 848 [1889].

⁵People of the State of California v. Hagar, 52 Cal. 171 [1877]; Doyle v. Austin, 47 Cal. 353 [1874]; Haskell v. Bartlett, 34 Cal. 281 [1867]; Himmelmann v. Oliver, 34 Cal. 246 [1867]; Weber v. City of San Francisco, 1 Cal. 455 [1851]; Sargent & Company v. Tuttle, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. 1028 [1895]; Morrow v. Geeting, 23 Ind. App. 494, 55 N. E. 787 [1899].

⁶Morrow v. Geeting, 23 Ind. App. 494, 55 N. E. 787 [1899].

used in this connection in its narrower meaning.⁷ A statute which provides that neither the principal nor interest of an assessment shall be collected until the work is completed may recognize the right of the legislature to add interest to an assessment, but it does not of itself operate as a provision for such interest.⁸ Authority to a city to divide an assessment into installments bearing interest does not authorize the city to charge interest where the assessment is to be paid in one payment.⁹ If a city is authorized to borrow money for the purpose of constructing an improvement, the interest on such loan may be included in the assessment as a proper item of expense.¹⁰ An assessment may be levied so as to include the cost of the improvement and the rate of discount necessary to obtain the present value of such assessment.¹¹ If the statute authorizes a city to issue bonds in anticipation of the subsequent payments of the assessments in order to pay for the improvements, the interest on such bonds may be included in the assessment as a proper item thereof.¹² If, however, the money borrowed by the city by the sale of bonds to pay for an improvement, has been used in the meantime for other purposes, property owners cannot be charged with interest thereon for such time as a part of the assessment.¹³ The legislature has power to fix the rate of interest in advance,¹⁴ or to authorize the city to fix the rate of interest.¹⁵ Naming the rate of interest which bonds are to bear in an ordinance which provides for issuing the bonds is a sufficient fixing of the rate of interest.¹⁶ Interest which is due to the contractor upon the contract price for his work may be

⁷ *Sargent & Company v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. 1028 [1895].

⁸ *Sargent & Company v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. 1028 [1895].

⁹ *McChesney v. City of Chicago*, 213 Ill. 592, 73 N. E. 368 [1905].

¹⁰ *Davis v. City of Newark*, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891]; *State, Skinkle, Pros. v. Inhabitants of the Township of Clinton*, 39 N. J. L. (10 Vr.) 656 [1877].

¹¹ *Stiewel v. Fencing District No. 6 of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1902].

¹² *Hulbert v. City of Chicago*, 213 Ill. 452, 72 N. E. 1097 [1905]; *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879 [1903]; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902].

¹³ *State, Baker, Pros. v. City of Elizabeth*, 37 N. J. L. (8 Vroom) 142 [1874].

¹⁴ *Hulbert v. City of Chicago*, 213 Ill. 452, 72 N. E. 1097 [1905].

¹⁵ *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879 [1903].

¹⁶ *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879 [1903].

included in the assessment by statutory authority.¹⁷ The statute may provide for paying the contractor by issuing warrants or vouchers to him for the amount of work done. In the absence of statute such warrants or vouchers do not bear interest.¹⁸ If, however, the statute so provides such vouchers may bear interest and the interest so added may be included in the assessment.¹⁹ If, by ordinance, vouchers are to be issued which do not bear interest, interest upon such vouchers cannot be included in the assessment.²⁰ If it is erroneously so included and the amount of such interest can be separated from the amount lawfully due, the amount of the assessment may be eliminated without invalidating the entire assessment.²¹ If, however, the amount allowed for the payment of such interest does not appear from the assessment the entire assessment is void.²² Assessment vouchers issued by a city for its proportionate share of assessments may, by statutory provisions, bear interest until paid.²³ If the value of land to be appropriated is to be estimated and the title thereto is to pass before payment of the amount fixed by appropriation proceedings, interest may, by statute, be allowed thereon.²⁴ Statutes frequently provide for interest upon assessments after they are due. Full effect is given to such statutes.²⁵ Such a provision is

¹⁷ In the Matter of Deering, 14 Daly (N. Y.) 89 [1886]. Since a contract does not bear interest until the time fixed for the payment of money thereon unless there is some special provision in such contract for interest, a contract by a city to pay a contractor when the assessments should be collected and if they should not be collected at the end of two years the amount then unpaid to the contractor was to become due, does not bear interest before the end of two years. Booth v. Pittsburg, 154 Pa. St. 482, 25 Atl. 803 [1893].

¹⁸ Haskell v. Bartlett, 34 Cal. 281 [1867]; United States ex rel. Thompson v. Dent, 1 Mackey (D. C.) 463 [1882].

¹⁹ Fitzgerald v. Walker, 55 Ark. 148, 17 S. W. 702 [1891]; Town of Cicero v. Green, 211 Ill. 241, 71 N. E. 884 [1904]; Storrie v. Houston City Street Railway Company, 92

Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898].

²⁰ Cratty v. City of Chicago, 217 Ill. 453, 75 N. E. 343 [1905]; City of Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786 [1903].

²¹ City of Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786 [1903].

²² Cratty v. City of Chicago, 217 Ill. 453, 75 N. E. 343 [1905].

²³ City of Chicago v. People ex rel. Union Trust Company, 215 Ill. 235, 74 N. E. 115 [1905].

²⁴ *In re* Mayor, etc., of New York, 89 N. Y. S. 6, 95 App. Div. 552 [1904]; *In re* East One Hundred and Fifty-Eighth Street, 80 N. Y. S. 594, 39 Misc. 598 [1903].

²⁵ Dougherty v. Henarie, 47 Cal. 9 [1873]; Palmer v. Nolting, 13 Ind. App. 581, 41 N. E. 1045 [1895]; Langan v. Bitzer — Ky. —, 82 S. W. 280, 26 Ky. Law Rep. 579 [1904]; Moale v. Mayor and City Council of

upheld, as in the nature of a penalty.²⁶ If the assessment, as originally levied, is defective, and by reason of such defect the exact amount thereof cannot be determined, it is generally held that interest cannot be charged upon such assessment until the amount thereof is definitely and correctly ascertained.²⁷ This result is reached sometimes under statutes which provide specifically for interest and penalty only "if the assessment proceedings shall appear to be regular."²⁸ Under such statute there is no authority for allowing interest if the assessment proceedings are irregular.²⁹ However, where an item for the fees and expenses of the commissioners who made the assessment was made, it was held that while the property owner could have the benefit of such reduction, he was liable to interest from the date of the assessment.³⁰ The theory of this holding was that this reduction was in the nature of a credit to be applied on a conceded debt. If the assessment proceedings are irregular, but a reassessment is not necessary, the assessment may bear interest in the absence of a statute restricting interest to cases where the proceedings are regular.³¹ Where the court has power, in case of defective assessment proceedings, to determine the amount to be charged against the lot owner, the court may allow interest upon the amount properly due from the time fixed by the city for the

Baltimore, 61 Md. 224 [1883]; *Barber Asphalt Paving Company v. Peek*, 186 Mo. 506, 85 S. W. 387 [1905]; *Eyerman v. Blaksley*, 78 Mo. 145 [1883]; *City of St. Louis to use of Seibert v. Allen*, 53 Mo. 44 [1873]; *City of St. Louis to use of Cornelli v. Armstrong*, 38 Mo. 167 [1866]; *City of St. Louis to use of McGrath v. Clemens*, 36 Mo. 467 [1865]; *City of St. Louis to use of Creamer v. Oeters*, 36 Mo. 456 [1865]; *State, Kohler, Pros. v. Town of Guttenberg*, 38 N. J. L. (9 Vr.) 419 [1876]; *City of Galveston v. Heard*, 54 Tex. 420 [1881].

²⁶ *Eyerman v. Blaksley*, 78 Mo. 145 [1883].

²⁷ *Laffin v. City of Chicago*, 48 Ill. 449 [1868]; *Gesnell v. City of Louisville*, 104 Ky. 201, 46 S. W. 722, 20 Ky. Law Rep. 519 [1898]; *State ex*

rel. Miller v. Love, 37 N. J. L. (8 Vr.) 261 [1874]; *In the matter of Pelton*, 85 N. Y. 651 [1881]; *In the matter of St. Joseph's Asylum*, 69 N. Y. 353 [1877]; *In the matter of Miller*, 24 Hun. (N. Y.) 637 [1881].

²⁸ *City of Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446 [1900].

²⁹ See also *City of St. Joseph ex rel. Gibson v. Forsee*, 110 Mo. App. 237, 84 S. W. 1138 [1905].

³⁰ *Mayer v. Mayor, Aldermen and Commonalty of the City of New York*, 101 N. Y. 284, 4 N. E. 336 [1886]; (affirming *Mayer v. Mayor, Aldermen and Commonalty of the City of New York*, 28 Hun. 587 [1883]).

³¹ *Langan v. Bitzer*, — Ky. —, 82 S. W. 280, 26 Ky. Law Rep. 579 [1904].

payment of the assessment.³² If the time for the payment of an assessment or an installment thereof is postponed to a future date, such assessment or installment thereof does not bear interest until it is due in the absence of some specific provision for interest before maturity.³³ If the original assessment is invalid and a reassessment is authorized by statute, interest upon the amount which should have been charged on the first assessment from the date thereof may be included as a proper item of reassessment.³⁴ It has been said to be proper to include interest at least from the date of the curative act,³⁵ or from the date of the second levy.³⁶ If it is provided by statute that interest shall run from a given time, full effect must be given to such provision since without statutory authority no interest can be allowed.³⁶ Thus the statute may provide for interest upon an unpaid assessment beginning thirty days from the date that the tax bill is issued to the contractor and providing for an increased rate of interest if the tax bill is not paid within six months.³⁷ A provision that an assessment "shall be paid in cash within ninety days after the work is done, or in notes . . . bearing interest at the rate of eight per cent. a year," imposes liability for interest at the end of such period of ninety days.³⁸ If execution may lawfully be issued on an assessment, the assessment bears interest at least from the date of such execution.³⁹ If the statute provides that an assessment is not due or a lien until the title thereof is entered in the record of titles, interest cannot be allowed thereon from the date of confirmation.⁴⁰ If a tax bill is not due until demand for

³² *Gest v. City of Cincinnati*, 26 O. S. 275 [1875]; *Fricke v. City of Cincinnati*, 1 Ohio N. P. 98 [1894].

³³ *Mall v. City of Portland*, 35 Or. 89, 56 Pac. 654 [1899]; *Connor v. City of Paris*, 87 Tex. 32, 27 S. W. 88 [1894].

³⁴ *State, Johnson, Pros. v. Inhabitants of the City of Trenton*, 43 N. J. L. (14 Vr.) 166 [1881]; *State, Watson, Pros. v. City of Elizabeth*, 42 N. J. L. (13 Vr.) 508 [1880]; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898]; *Philadelphia Mortgage & Trust Company v. City of New Whatecom*, 19 Wash. 225, 52 Pac. 1063 [1898].

³⁵ *Blount v. City of Janesville*, 31 Wis. 648 [1872].

³⁶ *Newman v. City of Emporia*, 41 Kan. 583, 21 Pac. 593 [1889].

³⁶ *City of St. Louis to use of Cornelli v. Armstrong*, 38 Mo. 167 [1866].

³⁷ *City of St. Louis to use of Cornelli v. Armstrong*, 38 Mo. 167 [1866].

³⁸ *Second Municipality of the City of New Orleans v. McFarlane*, 3 Robinson (La.) 406 [1843].

³⁹ *Bacon v. Mayor and Aldermen of Savannah*, 105 Ga. 62, 31 S. E. 127 [1898].

⁴⁰ *In the matter of Willis*, 30 Hun. (N. Y.) 13 [1883]; *In the matter of Deering*, 55 How. 296 [1878].

payment, interest does not, in the absence of a specific provision therefor, commence until such demand is made,⁴¹ though interest may run from the date of suit in the absence of a demand.⁴² By statute deferred installments of a special tax bear interest from thirty days after confirmation.⁴³ On the other hand, by statute an assessment may bear interest before it is due.⁴⁴ Whether the legislature may change the law with reference to interest upon an assessment after such assessment has been levied is a question upon which there is some apparent conflict of authority. In some jurisdictions it has been said that the legislature cannot increase the rate of interest upon assessments levied before the statute was passed.⁴⁵ On the other hand, if an improvement is begun when the statute authorizes the council to regulate the rate of interest on overdue assessments and the council fixes the rate at eight per cent., a subsequent statute providing that assessments should be subject to the same interest and penalties as that provided for by other statutes therein referred to, was held not to apply.⁴⁶ If a contract for a street improvement is made and an assessment provided for, a subsequent statute providing that overdue installments shall bear interest, was held to be valid as against constitutional objections, though applying to such prior assessment.⁴⁷ A drainage assessment was divided into installments at a time when the statute provided that such installments should draw interest only from the time they became payable. Subsequently the statute was amended so as to provide that assessments should draw interest from the time of confirmation. Subsequently the original division of assessments into installments was set aside and a new division made. It was held that such installments bore interest from confirmation under the amending statute.⁴⁸ If no judgment is rendered upon an assessment, as where the assessment is collected by a summary sale,

⁴¹ *Storms v. Stevens*, 104 Ind. 46, 3 N. E. 401 [1885]; *Barber Asphalt Paving Company v. Peck*, 186 Mo. 506, 85 S. W. 387 [1905].

⁴² *Eyerman v. Provenchere*, 15 Mo. App. 256 [1884].

⁴³ *Village of Western Springs v. Hill*, 177 Ill. 634, 52 N. E. 959 [1899].

⁴⁴ *Steese v. Oviatt*, 24 O. S. 248 [1873].

⁴⁵ *Jackson Fire Clay Sewer Pipe & Tile Company v. Snyder*, 93 Mich. 325, 53 N. W. 359 [1892].

⁴⁶ *Camp v. Neuscheler*, 67 N. J. L. (38 Vr.) 21, 50 Atl. 597 [1901].

⁴⁷ *Dougherty v. Henarie*, 47 Cal. 9 [1873].

⁴⁸ *People of the State of Illinois v. Weber*, 164 Ill. 412, 45 N. E. 723 [1897].

interest is ordinarily to be calculated down to the date of the sale.⁴⁹ If a judgment is rendered as in a former action to enforce the assessment, interest should be calculated on the assessment down to the date of the judgment,⁵⁰ and the judgment, after its rendition, bears the rate of interest provided for by statute.⁵¹ If interest on deferred installments is made to run from a time later than is provided for by the ordinance, the property owner cannot complain of such irregularity.⁵² If a part of an assessment is apportioned against a municipality, such part bears interest in the same way as an assessment against a private owner of property, in the absence of some statute making specific provision for the assessment against the municipality.⁵³ A statute which provides for a remission of penalties and interest on "taxes" for certain years does not apply to local assessments.⁵⁴ The right to charge interest on overdue assessments is in the nature of enforcing a penalty and may be justified upon that theory.⁵⁵ Under a statute which provides that assessments shall be paid to the treasurer, with six per cent. interest, and shall be collected as other taxes, and provides in another section that if the municipality sues to enforce an assessment, it may recover interest at ten per cent., a private person who sues to enforce an assessment can recover only six per cent.⁵⁶ A property owner who resists an assessment because interest is illegally included therein cannot have affirmative relief in equity unless he first pays or offers to pay the amount legally due.⁵⁷ A statute which provides for compromising an assessment by accepting in full, payment of one-third of the original amount, may provide for computing interest on such one-third.⁵⁸

⁴⁹ *Brookbank v. City of Jeffersonville*, 41 Ind. 406 [1872].

⁵⁰ *City of St. Louis to use of Seibert v. Allen*, 53 Mo. 44 [1873].

⁵¹ *Himmelman v. Oliver*, 34 Cal. 246 [1867]; *City of St. Louis to use of Seibert v. Allen*, 53 Mo. 44 [1873].

⁵² *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901]; *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794 [1897].

⁵³ *City of Chicago v. People*, 215 Ill. 235, 74 N. E. 137 [1905]; (affirming 116 Ill. App. 564 [1904]); *Barber Asphalt Paving Company v. City of St. Joseph*, 183 Mo. 451, 82 S. W. 64 [1904].

⁵⁴ *City of Seattle v. Whittlesey*, 17 Wash. 292, 49 Pac. 489 [1897].

⁵⁵ *Eyermann v. Blaksley*, 9 Mo. App. 231 [1880].

⁵⁶ *Des Moines Brick Manufacturing Company v. Smith*, 108 Ia. 307, 79 N. W. 77 [1899].

⁵⁷ *Spalding v. City of Denver*, 33 Colo. 172, 80 Pac. 126 [1905]; *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898]; *Annie Wright Seminary v. City of Tacoma*, 23 Wash. 109, 62 Pac. 444 [1900].

⁵⁸ *Gilfeather v. Grout*, 91 N. Y. S. 533, 101 App. Div. 150 [1905].

§ 476. Damages.

Damages for which a city is liable by reason of injuries which are caused by negligence in the construction of a public improvement, are not part of the expenses of constructing such improvement. Such items of expense cannot be assessed against the property benefited by the improvement.¹ They must be paid out of the public treasury.² On the same principle the expense incurred in the unsuccessful defense of damage suits brought against a public corporation for its illegal and negligent conduct in constructing a public improvement cannot be included in an assessment for the cost of such improvement.³ So the possible damages which a city may be obliged to pay in a pending suit in case such suit is decided adversely to the city cannot be included in the assessment.⁴

§ 477. Cost of prior defective assessment.

The costs of an unsuccessful attempt to sustain an invalid assessment cannot be included in the costs of an improvement on making a second and valid assessment therefor.¹ Accordingly, neither the attorney's fees in such unsuccessful suit to uphold an assessment,² nor the cost of the copy of the opinion in such unsuccessful suit,³ can be included in such assessment. Under some statutes, however, it seems to be held that the expense of irregular and defective proceedings may be included in the final assessment for the improvement.⁴ Costs made on an unsuccessful

¹ Leeds v. City of Richmond, 102 Ind. 372, 1 N. E. 711 [1885].

² Leeds v. City of Richmond, 102 Ind. 372, 1 N. E. 711 [1885].

³ State, De Witt, Pros. v. Mayor and Common Council of the Borough of Rutherford, 57 N. J. L. (28 Vr.) 619, 31 Atl. 228 [1895].

⁴ Gurnee v. City of Chicago, 40 Ill. 165 [1866].

¹ Farr v. West Chicago Park Commissioners, 167 Ill. 355, 46 N. E. 893 [1897]; Laflin v. City of Chicago, 48 Ill. 449 [1868]; Board of Commissioners of Montgomery County v. Fullen, 118 Ind. 158, 20 N. E. 771 [1888]; (holding that the costs of the former proceeding, reported in Board of Commissioners of Mont-

gomery County v. Fullen, 111 Ind. 410, 12 N. E. 298 [1887]; cannot be included in second assessment.); In the Matter of Opening Locust Avenue in Village of Port Chester, 185 N. Y. 115, 77 N. E. 1012 [1906]; (affirming with modification 97 N. Y. S. 508, 110 App. Div. 774 [1906]).

² Farr v. West Chicago Park Commissioners, 167 Ill. 355, 46 N. E. 893 [1897]; Board of Commissioners of Montgomery County v. Fullen, 118 Ind. 158, 20 N. E. 771 [1886].

³ Farr v. West Chicago Park Commissioners, 167 Ill. 355, 46 N. E. 893 [1897].

⁴ Anketell v. Hayward, 119 Mich. 525, 78 N. W. 557 [1899].

ful remonstrance against the public improvement cannot be included in the cost of the improvement.⁵

§ 478. Contingent expenses.

Since an assessment cannot be levied in an amount exceeding the actual cost of the improvement for which it is levied,¹ an amount for contingent expenses cannot be added to the specific items enumerated in the assessment.² So an assessment cannot be levied for the amount of damages which may possibly be recovered against the city in a suit then pending, where the liability of the city for damages and the amount for which it might be held liable were both contingent on the outcome of the pending suit.³ There is some authority for allowing an amount for contingent and unspecified items of expense. The allowance of one thousand dollars for contingent expenses does not invalidate the contract.⁴ Usually, however, the items of expense must be certain, and they must be specified in advance.

§ 479. Effect of including improper items.

Whether the inclusion of unauthorized items to a substantial amount invalidates the entire assessment or merely avoids the assessment as to such unauthorized items is a question upon which there is some divergence of authority. In some jurisdictions an assessment is regarded as an entirety, possessing no validity excepting that conferred upon it by statute, and accordingly the inclusion of an invalid item is regarded as invalidating the entire assessment.¹ This view is expressed in cases in most of which, probably, the assessment does not afford the means of separating the legal items from the illegal ones. The assessment would

⁵ *Zigler v. Menges*, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782 [1889].

¹ See § 466.

² *People ex rel. Knox v. Village of Yonkers*, 39 Barb. (N. Y.) 266 [1863].

³ *Gurnee v. City of Chicago*, 40 Ill. 165 [1866].

⁴ *Betts v. Williamsburg*, 15 Barb. 255 [1853].

¹ *Ryan v. Altschul*, 103 Cal. 174, 37 Pac. 339 [1894]; (citing *Donnelly v. Howard*, 60 Cal. 291 [1882];

Schirmer v. Hoyt, 54 Cal. 280 [1880]; *Dyer v. Chase*, 52 Cal. 440 [1887]); *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082 [1893]; *Dorland v. Bergson*, 78 Cal. 637, 21 Pac. 537 [1889]; *Wilson v. Poole*, 33 Ind. 443 [1870]; *Poth v. Mayor, Aldermen and Commonalty of the City of New York*, 151 N. Y. 16, 45 N. E. 372 [1896]; *Mitchell v. Lane*, 62 Hun. (N. Y.) 253, 16 N. Y. Supp. 707 [1891]; *McAllister v. City of Tacoma*, 9 Wash. 272, 37 Pac. 447, 658 [1894].

therefore be invalid under a less extreme theory.² At any rate this view is a more extreme one than that entertained in most jurisdictions. If the illegal items are severed from the legal ones by the terms of the assessment so that by inspection of the proceedings the amount, which is properly assessable, can be ascertained, the assessment is invalid as to the illegal items and valid as to those which are legal.³ If the assessment does not sever the legal from the illegal items, it is held in most jurisdictions that the court has no power to determine the amount of the legal items by extrinsic evidence, and that the entire assessment is

² See *post* this section, N. 4.

³ *Spaulding v. Wesson*, 115 Cal. 441, 47 Pac. 249 [1896]; *McDonald v. Mezes*, 107 Cal. 492, 40 Pac. 808 [1895]; *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891]; *Donnelly v. Howard*, 60 Cal. 291 [1882]; *Dyer v. Chase*, 52 Cal. 440 [1877]; *Spalding v. City of Denver*, 33 Colo. 172, 80 Pac. 126 [1905]; *McClellan v. District of Columbia*, 7 Mackey (D. C.) 94 [1889]; *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786; *Shannon v. Village of Hinsdale*, 180 Ill. 202, 54 N. E. 181 [1899]; *Farr v. West Chicago Park Commissioners*, 167 Ill. 355, 46 N. E. 893 [1897]; *Ross v. Van Natta*, 164 Ind. 557, 74 N. E. 10 [1905]; *Board of Commissioners of Montgomery County v. Fullen*, 118 Ind. 158, 20 N. E. 771 [1888]; *New Eel River Draining Association v. Durbin*, 30 Ind. 173 [1868]; *Gallaher v. Garland*, 126 Ia. 206, 101 N. W. 867 [1904]; *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898]; *City of Louisville v. Selva*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899]; *S. D. Moody & Co. v. Sewerage and Water Board*, 117 La. 360, 41 So. 649 [1906]; *Power v. City of Detroit*, 139 Mich. 30, 102 N. W. 288 [1905]; *Neenan v. Smith*, 60 Mo. 292 [1875]; *City of Boonville ex rel. Cosgrove v. Rogers*, — Mo. App. —, 101 S. W. 1120 [1907]; *City of St. Joseph ex rel. Danaher v. Dillon*, 61 Mo. App. 317

[1895]; *Davis v. Mayor and Common Council of the City of Newark*, 54 N. J. L. (25 Vr.) 595, 25 Atl. 336 [1892]; *In the Matter of the Petition of Deering to Vacate an Assessment*, 93 N. Y. 361 [1883]; *In the Matter of the Petition of Auchmuty*, 90 N. Y. 685 [1882]; *In the Matter of the Petition of Auchmuty*, 18 Hun. (N. Y.) 324 [1879]; *In the Matter of the Petition of Upson to Vacate an Assessment*, 89 N. Y. 67 [1882]; *In the Matter of Lord*, 78 N. Y. 109 [1879]; *In the Matter of Schell*, 76 N. Y. 432 [1879]; *In the Matter of Walter*, 75 N. Y. 354 [1878]; *In the Matter of New York Protestant Episcopal School*, 75 N. Y. 324; *In the Matter of Mead*, 74 N. Y. 216 [1878]; *In the Matter of Hebrew Benevolent Orphan Asylum*, 70 N. Y. 476 [1877]; *In the Matter of Cram*, 69 N. Y. 452 [1877]; *In the Matter of the Petition of Merriam to Vacate an Assessment*, 84 N. Y. 596 [1881]; *Matter of McCormack*, 60 Barb. (N. Y.) 128 [1870]; *Matter of McCormack*, 10 Abb. Pr. N. S. (N. Y.) 234 [1870]; *Jaeger v. Burr*, 36 O. S. 164 [1880]; *McGlynn v. City of Toledo*, 22 Ohio C. C. 34 [1901]; *Mason v. City of Sioux Falls*, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770 [1892]; *Annie Wright Seminary v. City of Tacoma*, 23 Wash. 109, 62 Pac. 444 [1900]; *Wells v. Western Paving & Supply Company*, 96 Wis. 116, 70 N. W. 1071 [1897]; *Dean v. Borchsenius*, 30 Wis. 236 [1872].

therefore invalid.⁴ If the record does not show the means of separating the valid items from the invalid it may be proper to set the assessment aside,⁵ while if in another action on the same assessment the record shows the means of separating the legal items from the illegal items, the amount of the assessment may be reduced and the assesment, as reduced, may be upheld.⁶ In other jurisdictions it is held that the court may determine from extrinsic evidence what is proper assessment for the amount of the legal items and may enforce such assessment as to such legal items without regarding it as entirely invalid.⁷ Thus, if the contract for constructing a street was for a gross amount which included both the cost of original construction and the cost of maintenance, and a street railway company could not be charged with the cost of maintenance since it remained liable to the city under its franchise to keep that part of the street between its tracks in repair, it was held that the court might determine, from extrinsic evidence, what part of the contract price was intended for original construction and what part for maintenance and enforce the assessment as to the cost of the original construction.⁸ So where it is held that a guaranty to keep a street in repair for five years, to be secured by the deposit in bonds of ten per cent. of the contract price, cannot be included in the assess-

⁴ *Spaulding v. Wesson*, 115 Cal. 441, 47 Pac. 249 [1896]; *Chicago Union Traction Company v. City of Chicago*, 208 Ill. 187, 70 N. E. 234 [1904]; *Naltner v. Blake*, 56 Ind. 127 [1877]; *Kansas City v. O'Connor*, 82 Mo. App. 655 [1899]; *State. Randolph, Pros. v. Inhabitants of the City of Plainfield*, 38 N. J. L. (9 Vr.) 93 [1875]; *In the Matter of New York Protestant Episcopal School*, 75 N. Y. 324 [1878].

⁵ *In the Matter of New York Protestant Episcopal School*, 75 N. Y. 324 [1878].

⁶ *In the Matter of the Petition of Auchmuty*, 90 N. Y. 685 [1882].

⁷ *Fair Haven & Westville Railroad Company v. City of New Haven*, 77 Conn. 667, 60 Atl. 651 [1905]; *Fehler v. Gospell*, 99 Ky. 380, 35 S. W. 1125 [1896]; *Verdin v. City of St. Louis*, 131 Mo. 26, 33 S. W. 480, 36

S. W. 52 [1895]; *City of Joplin ex rel. v. Freeman*, 125 Mo. App. 717, 103 S. W. 130 [1907]; *City of St. Joseph ex rel. Danaher v. Wilshire*, 47 Mo. App. 125 [1891]; *In the Matter of the Petition of Rosenbaum*, 119 N. Y. 24, 23 N. E. 172 [1890]; *In the Matter of the Petition of the Trustees of Leake and Watts Orphan Home*, 92 N. Y. 116 [1883]; *In the Matter of Mead*, 13 Hun. (N. Y.) 349 [1878]; *Williamsport v. Hughes*, 21 Pa. Super. Ct. 443 [1902]; *Young v. City of Tacoma*, 31 Wash. 153, 71 Pac. 742 [1903]; *Cook v. City of Racine*, 49 Wis. 243, 5 N. W. 352 [1880].

⁸ *Fair Haven & Westville Railroad Company v. City of New Haven*, 77 Conn. 667, 60 Atl. 651 [1905]. See also to the same effect *Williamsport v. Hughes*, 21 Pa. Super. Ct. 443 [1902].

ment, the court may regard the amount of such bond as the amount of the increase in price due to such provision for maintenance.⁹ So if a contract has been let at a price so exorbitant as to amount to fraud, the court may determine from extrinsic evidence what a proper price would be and may reduce the assessment to such price.¹⁰ So if a contract has been let without competitive bidding, the court may determine how great is the excess over the price that could have been obtained under competition.¹¹ A statute authorizing a deduction from the amount of the assessment instead of the vacation of the entire assessment is not retro-active and does not apply to proceedings had before the passage of such statute.¹² In the absence of evidence to the contrary, it will be presumed that improper items have not been included in the assessment.¹³ Thus, where in repairing a ditch more work is done than is authorized, but the amount of the assessment does not exceed the amount actually paid for repairs, it will not be presumed that such assessment is excessive.¹⁴ Where an ordinance for constructing a sidewalk provided, in excess of the authority of the city, that if areas or vaults had not been roofed over, the necessary arching should be built by the contractor under specifications to be furnished by the city engineer, it was held that a tax bill issued under such ordinance which recited that it was for constructing sidewalks and contained no reference to the construction of arches would be presumed to be valid in the absence of a showing that such part of such bill represented the cost of constructing such arches.¹⁵ Under some statutes the only remedy against including improper items in an assessment is an appeal to a designated board. Failure to take such appeal operates as a waiver of such defect.¹⁶ If the objection to certain items as improper is not

⁹ *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125 [1896]; *Young v. City of Tacoma*, 31 Wash. 153, 71 Pac. 742 [1903].

¹⁰ *In the Matter of the Petition of the Trustees of the Leake and Watts Orphan Home*, 92 N. Y. 116 [1883].

¹¹ *In the Matter of the Petition of Rosenbaum*, 119 N. Y. 24, 23 N. E. 172 [1890].

¹² *In the Matter of the Petition of Eager*, 46 N. Y. 100 [1871].

¹³ *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953 [1892]; *Haag v. Ward*, 186 Mo. 325, 85 S. W. 391 [1904].

¹⁴ *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953 [1892].

¹⁵ *Haag v. Ward*, 186 Mo. 325, 85 S. W. 391 [1904].

¹⁶ *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891]; *Dyer v. Scalmanini*, 69 Cal. 637, 11 Pac. 327 [1886]; *Blair v. Luning*, 76 Cal. 134, 18 Pac. 153 [1887]; *Timmelmann v. Hoad-*

taken in the court below, it cannot be raised for the first time in proceedings in error.¹⁷ While appeal may be the exclusive remedy where there is statutory authority for including the items in question if such authority is improperly exercised,¹⁸ it is not exclusive if there is no statutory authority for such items.¹⁹

§ 480. Immaterial errors in including items.

In accordance with the maxim *de minimis non curat lex*, an assessment may include unauthorized items, but the amount of such items may be so small in proportion to the entire assessment that the assessment will not be disturbed by the courts on account of such improper items.¹ On the other hand, the amount of the improper items included may be small and yet it may be of such magnitude with reference to the assessment that it will not fall within this maxim; and the inclusion of such improper items will avoid the assessment.² When the maxim applies and when it does not are questions upon which there is some conflict of authority; and which can better be illustrated by specific examples than by abstract statements. Including in an assessment an unauthorized fee for serving notices amounting to two dollars and fifty cents has been held to be within the maxim.³ In an improvement the total cost of which was over nineteen thousand dollars, there

ley, 44 Cal. 276 [1872]; Loesnitz v. Seelinger, Treas., 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890].

¹⁷ Deady v. Townsend, 57 Cal. 298 [1881].

¹⁸ Himmelmann v. Hoadley, 44 Cal. 276 [1872].

¹⁹ City Street Improvement Company v. Taylor, 138 Cal. 364, 71 Pac. 446 [1903]; Himmelmann v. Hoadley, 44 Cal. 276 [1872].

¹ Chicago Consolidated Traction Company v. Village of Oak Park, 225 Ill. 9; 80 N. E. 42 [1907]; Gardiner v. Street Commissioners of the City of Boston, 188 Mass. 223, 74 N. E. 341 [1905]; Workman v. City of Worcester, 118 Mass. 168 [1875]; State, Raymond, Pros. v. Mayor and Council of the Borough of Rutherford, 55 N. J. L. (26 Vr.) 441, 27 Atl. 172 [1893]; State, Agens, Pros. v. Mayor and Common Council of the City of

Newark, 35 N. J. L. (6 Vr.) 168 [1871]; In the Matter of the Petition of Lowden to Vacate an Assessment, 89 N. Y. 548 [1882]; In the Matter of the Petition of The Mutual Life Insurance Company of New York to Vacate an Assessment, 89 N. Y. 530 [1882]; People of the State of New York ex rel. Jessup v. Eelley, 33 Hun. (N. Y.) 389 [1884]; McGlynn v. City of Toledo, 22 Ohio C. C. 34 [1901].

² Morris v. City of Chicago, 11 Ill. 650 [1850]; In the Matter of the Petition of Deering to Vacate an Assessment, 93 N. Y. 361 [1883]; In the Matter of Willis, 30 Hun. (N. Y.) 13 [1883].

³ McGlynn v. City of Toledo, 22 Ohio C. C. 34 [1901]. (The assessment in this case was, however, set aside upon other grounds.)

was included the cost of constructing thirty-nine additional feet improperly included by the ordinance at a cost of twenty-seven dollars and thirty cents. The proportion of this item, which was charged upon a street railway company, was two dollars and forty-five cents. It was held that this amount was too trifling to render the ordinance unreasonable, oppressive or void.⁴ Under an order for assessing four hundred and fifty thousand dollars for drains and sewers the fact that four hundred and fifty thousand and one dollars were assessed did not invalidate the assessment.⁵ The maxim has been applied in cases where the excess cost bore a larger proportion to the cost of the entire improvement. Thus, where the total amount of the assessment was over one hundred and twenty-five thousand dollars and it included an item improperly allowed for damages to gas mains exceeding four thousand dollars and the commissioners regarded such amount as falling within the application of the maxim *de minimis non curat lex*, it was held that the commissioners could apply such maxim where courts of law could not and their action should be affirmed.⁶ The excess of six cents in an assessment exceeding twenty-nine thousand dollars has been held to be immaterial.⁷ So an excess of five cents upon an assessment has been held to be within the operation of the maxim.⁸ Where an unlawful item has been larger in proportion to the total assessment, the maxim has been held not to apply. Thus, an unlawful and unauthorized item of seven dollars has been held to avoid an assessment of nearly two hundred and fifty dollars;⁹ an unauthorized item of ninety-six dollars has been held to avoid an assessment of nearly nine thousand dollars;¹⁰ and the addition to an assessment of over twelve hundred dollars of an item of four hundred and sixty dollars for contingencies has been held to avoid the assessment.¹¹ In some jurisdictions excesses no greater than those re-

⁴ Chicago Consolidated Traction Company v. Village of Oak Park, 225 Ill. 9, 80 N. E. 42 [1907].

⁵ Workman v. City of Worcester, 118 Mass. 168 [1875].

⁶ People of the State of New York ex rel. Jessup v. Kelley, 33 Hun. (N. Y.) 389 [1884].

⁷ State, Agents, Pros. v. Mayor and Common Council of the City of Newark, 35 N. J. L. (6 Vr.) 168 [1871].

⁸ Coleman v. Shattuck, 68 N. Y. 349.

⁹ In the Matter of the Petition of Deering to Vacate an Assessment, 93 N. Y. 361 [1883].

¹⁰ Morris v. City of Chicago, 11 Ill. 650 [1850].

¹¹ People ex rel. Knox v. Village of Yonkers, 39 Barb. (N. Y.) 266 [1863].

garded in other courts as falling within the application of the maxim have been held to invalidate the assessment. Thus, where a contract for making an improvement was let at one dollar a foot an assessment of eighty-three dollars and eighty-four cents upon a lot, the front of which was eighty-two and one-half feet, was held to be unauthorized.¹² An addition of excessive interest amounting to one dollar has been held to avoid the assessment.¹³ If unauthorized items have been included in computing the cost of an improvement, but the assessment as levied is for less than the amount of the authorized item, the inclusion of the unauthorized items does not invalidate the assessment.¹⁴ If, however, the greater part of the expense is incurred under a contract invalid because bids were not advertised for, it has been held that assessments levied for such improvement were invalid even if an amount in excess of the assessments was expended legally, since the assessment was levied for benefits received from the entire improvement and not merely from the part thereof for which legal expenditures were made.¹⁵ If unauthorized work has been done in an improvement, but there is no evidence to show that a charge therefor is included in the assessment, the fact that such work is done does not make the assessment invalid.¹⁶

¹² *Wilson v. Poole*, 33 Ind. 443 [1870].

¹³ *In the matter of Willis*, 30 Hun. (N. Y.) 13 [1883].

¹⁴ *Morse v. Charles*, — Mass. —, 83 N. E. 891 [1908]; *Gardiner v. Street Commissioners of the City of Boston*, 188 Mass. 223, 74 N. E. 341 [1905]; *Wells v. Street Commissioners of City of Boston*, 187 Mass. 451, 73 N. E. 554 [1905]; *State, Raymond, Pros. v. Mayor and Council of the Borough of Rutherford*, 55 N. J.

L. (26 Vr.) 441, 29 Atl. 172 [1893]; *In the Matter of the Petition of The Mutual Life Insurance Company of New York to Vacate an Assessment*, 89 N. Y. 530 [1882]; *In the Matter of the Petition of Lowden to Vacate an Assessment*, 89 N. Y. 548 [1882].

¹⁵ *Warren v. Street Commissioners of the City of Boston*, 181 Mass. 6, 62 N. E. 951 [1902].

¹⁶ *Field v. Barber Asphalt Pav. Co.*, 117 Fed. 925 [1902].

CHAPTER XI.

THE IMPROVEMENT CONTRACT.

§ 481. Power to let contract.

A grant of power to a city to construct an improvement impliedly confers powers upon such city to let contracts for the construction of such improvements.¹ Thus, statutes which authorize a city to require the owners or occupants of adjoining property to repair streets, alleys or sidewalks which are out of repair,² or a statute authorizing a public corporation to provide for the construction of lateral sewers and to apportion the actual cost of labor or material expended,³ each of them authorizes the public corporation to let a contract for such improvement instead of constructing it by employing laborers and purchasing material. So a statute authorizing municipal corporations to cause any lot upon which water should become stagnant to be filled up or drained or which provides that in case of failure or refusal of the owner to do so it is to be done at the expense of the municipal corporation, authorizes the municipal corporation to let a contract for such work and to assess the cost thereof upon the owners of such property.⁴ So where a city authorizes the majority of the property owners upon a certain street to pave the same, and a majority avail themselves of such privilege and enter into a contract with a third person to pave such street it is held that such contractor has done the work under the authority of the city, that he is to be regarded as the agent of the city for the purpose of doing such work and that accordingly the defense cannot be made that the work was not done by the city or any of its agents.⁵

¹ *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331 [1905]; *Jones v. Holzapfel*, 11 Okla. 405, 68 Pac. 511 [1902]; *Bliss v. Kraus*, 16 O. S. 54 [1864].

² *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331 [1905].

³ *Jones v. Holzapfel*, 11 Okla. 405, 68 Pac. 511 [1902].

⁴ *Bliss v. Kraus*, 16 O. S. 54 [1864].

⁵ *City of Philadelphia v. Wistar*, 35 Pa. St. 427 [1860]. (Such contractor was authorized to file liens in the name of the city for his use.)

§ 482. Necessity of letting contract.

Whether a city is bound to let contracts for the construction of public improvements or whether it has power to employ men and purchase material and so construct improvement itself is a question which depends entirely upon the provisions of the statute conferring power upon public corporations. In the absence of a statute specifically requiring the city to let contracts, it is not necessary that the city should do so. It may, if it pleases, construct an improvement by employing men by the day and by purchasing the necessary material.¹ If there has been no violation of statutory provisions requiring the letting of a contract or competitive bidding, the fact that no competition was invited, no contract was let and the workmen paid by the day, is not in the absence of fraud a defense to the assessment.² A statute which authorizes a public corporation to let contracts does not require them so to do in the absence of some mandatory provision. Thus a statutory provision that a fencing district "may advertise for proposals for doing any work by contract" is a directory and not a mandatory provision and such board may let a contract without advertisement if it sees fit.³ In the absence of a statute requiring the letting of contracts for the construction of public improvements a city may construct a part of a street itself and let contracts for the construction of the rest of the street.⁴ Under a statute requiring a city to let contracts by advertisement and in the absence of bidders to construct the work itself, a city has no power in the absence of bidders to let a contract without advertisement.⁵ Under many statutes it is provided that improvements exceeding a certain amount in value must be constructed by contract, let in the manner prescribed by statute. Such statutes are mandatory and

¹ *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953 [1892]; In the Matter of the Petition of the Trustees of the Leake and Watts Orphan Home in the City of New York, 92 N. Y. 116 [1883]; *Webber v. Common Council of the City of Lockport*, 43 Howard (N. Y.) 368 [1872]; *City of Philadelphia v. Burgin*, 50 Pa. St. (14 Wright) 539 [1865]; *Town of Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353 [1897].

² *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953 [1892].

³ *Stiewel v. Fencing District No. 6 of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1902].

⁴ *Town of Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353 [1897].

⁵ *City of Elsberry v. Black*, 120 Mo. App. 20, 96 S. W. 256, 257 [1906].

an improvement constructed except as provided for by statute, cannot be paid for by assessment upon property owners.⁶ Under a statute which provides that any work involving an expenditure of over one thousand dollars shall be let by contract in a specified manner and providing elsewhere that the department of public works shall have the powers and functions previously possessed by the old department of public works, the new department of public works is bound to let contracts if the expenditure exceeds one thousand dollars, although the old board was not so restricted.⁷ If the statute authorizes a certain majority of the council to dispense with the letting of contracts such power must be exercised by the council in each specific case and cannot be delegated generally by a three-fourths vote to other public officials.⁸ Thus an ordinance adopted by the council by three-fourths vote and authorizing the commissioners of public works to do certain work as they might deem expedient and for the best interests of the city and property owners was held not to authorize the commissioners to do the work which involved an expenditure of over one thousand dollars by day's work and without a contract.⁹ A statute which requires public improvements to be constructed under a contract let in the manner specified by statute does not apply to improvements already commenced under pre-existing statutes.¹⁰ Thus where the work was begun on the day before the act took effect, it was held that such statute did not apply.¹¹ Omission to let a contract where the expenditure exceeds the amount limited has been said not to be a fraud or legal irregularity within the meaning of the statute authorizing the vacation of an assessment on those grounds.¹² Thus

⁶ *City Improvement Company v. Broderick*, 125 Cal. 139, 57 Pac. 776 [1899]; *Town of Clay City v. Bryson*, 30 Ind. App. 490, 66 N. E. 498 [1902]; *In the Matter of the Petition of Blodgett*, 91 N. Y. 117 [1883]; *In the Matter of the Application of Lange to Vacate an Assessment*, 85 N. Y. 307 [1881]; *In the Matter of the Petition of Robbins to Vacate an Assessment*, 82 N. Y. 131 [1880]; *In the Matter of the Petition of the Emigrant Industrial Savings Bank*, 75 N. Y. 388 [1878].

⁷ *In the Matter of the Petition of Blodgett*, 91 N. Y. 117 [1883].

⁸ *In the Matter of the Petition of the Emigrant Industrial Savings Bank*, 75 N. Y. 388 [1878].

⁹ *In the Matter of the Petition of the Emigrant Industrial Savings Bank*, 75 N. Y. 388 [1878].

¹⁰ *Tripler v. Mayor, Aldermen and Commonalty of the City of New York*, 125 N. Y. 617, 26 N. E. 721 [1891].

¹¹ *Smith v. Mayor, Aldermen and Commonalty of the City of New York*, 82 Hun. (N. Y.) 570, 31 N. Y. Supp. 783 [1894].

¹² *Miller's Case*, 12 Abb. Prac. (N. Y.) 121 [1861].

under a statute authorizing a tax for lighting and water to be levied when the town trustees have made a contract for light and water, such tax cannot be levied before such contract is made.¹³ The fact that a drain commissioner has not declared a contract void for non-performance and that he has not relet the contract does not justify the board of supervisors in refusing to levy an assessment for the work.¹⁴

§ 483. Necessity of valid contract.

If a contract for the construction of the public improvement has been let and an assessment levied to pay such contract price, the validity of such contract is essential to the validity of the assessment since otherwise the assessment would be levied to pay the claim not legally due against the city.¹ Thus if a contract is invalid because let without a petition for the improvement by a majority of the lot owners,² or because it is entered into by persons who are not officers of the city either *de facto* or *de jure* and who act only under an unconstitutional statute,³ an assessment therefor is invalid. If a contract has been let under a defective ordinance, such contract cannot be corrected by a subsequent resolution of the council. If it can be corrected at all, it must be by a new ordinance passed in proper form.⁴ If no contract at all exists but a specific statute has been passed for levying an assessment to pay a gratuity to one who performed work, it has been held that such assessment is valid. The propriety of this holding is very doubtful and it seems to be con-

¹³ *Brewer v. Bridges*, 164 Ind. 358, 73 N. E. 811 [1905].

¹⁴ *Nash v. Kenyon*, — Mich. —, 115 N. W. 45 [1908].

¹ *Gray v. Richardson*, 124 Cal. 460, 57 Pac. 385 [1899]; *Schwiesau v. Mahon*, 110 Cal. 543, 42 Pac. 1065 [1895]; *Nicolson Pavement Company v. Painter*, 35 Cal. 699 [1868]; *Butler v. Detroit*, 43 Mich. 552, 5 N. W. 1078 [1880]; *State of Minnesota ex rel. City of St. Paul v. District Court of Ramsey County*, 72 Minn. 226, 71 Am. St. Rep. 480, 75 N. W. 224 [1898]; *Verdin v. City of St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52 [1895]; *City of St. Joseph ex rel. Danaher v. Wilshire*, 47 Mo. App. 125

[1891]; *State, Van Horne, Pros. v. Town of Bergen*, 30 N. J. L. (1 Vroom) 307 [1863]; *Portland v. Bituminous Paving Co.*, 33 Or. 307, 72 Am. St. Rep. 713, 44 L. R. A. 527, 52 Pac. 28 [1898]; *Town of Hamilton v. Chopard*, 9 Wash. 352, 37 Pac. 472 [1894]; *Dean v. Borchsenius*, 30 Wis. 236 [1872].

² *Nicolson Pavement Co. v. Painter*, 35 Cal. 699 [1868].

³ *State of Minnesota ex rel. City of St. Paul v. District Court of Ramsey County*, 72 Minn. 226, 71 Am. St. Rep. 480, 75 N. W. 224 [1898].

⁴ *City of St. Joseph ex rel. Danaher v. Wilshire*, 47 Mo. App. 125 [1891].

trary to the general weight of authority.⁵ If by statute a specific method is provided for testing the validity of the contract, the property owner must resort to the means thus provided. If he omits such method of testing the validity of the contract, he waives his objection thereto and cannot interpose such objection as a defense to an action on the assessment.⁶ A property owner is said not to be a person "aggrieved" and hence not entitled to appeal from the action of the street superintendent in letting the contract even if his property has been assessed under a void contract.⁷ If the invalidity of the contract is due solely to the failure of certain subordinate city officers to comply with the directions of superior city officers, such as the city council, such superior city officers may, by ratification, make valid such contracts, as they could have authorized in advance.⁸ Since the legislature may dispense with advertisement, receipt of bids, or letting a contract,⁹ it may provide that after the contract has in fact been performed, the property owner cannot inquire into its original validity.¹⁰ It may, by provisions for re-assessment, make valid a contract which was originally invalid.¹¹ Especially in assessment proceedings where the cost of an improvement is to be charged upon the owners of property benefited by the improvement is it true that a city cannot incorporate in its contract items for which the city has no authority to contract.¹² If the city acts in good faith in constructing a public improvement, the

⁵ Such a statute was said to be a "very remarkable legislative enactment" and invalid in *Granger v. City of Buffalo*, 6 Abb. N. C. (N. Y.) 238 [1879]; but it was held valid in *Brewster v. City of Syracuse*, 19 N. Y. 116 [1859].

⁶ *Spaulding v. North San Francisco Homestead & Railroad Association*, 87 Cal. 40, 24 Pac. 600, 25 Pac. 249 [1890]; *Oakland Paving Company v. Rier*, 52 Cal. 270 [1877]; *Everett v. Deal*, 148 Ind. 90, 47 N. E. 219 [1897]; *Alley v. City of Lebanon*, 146 Ind. 125, 44 N. E. 1003 [1896]; *City of Greenfield v. State ex rel. Moore*, 113 Ind. 597, 15 N. E. 241 [1887]; *Scranton v. Jermyn*, 156 Pa. 107, 27 Atl. 66 [1893].

⁷ *Brock v. Luning*, 89 Cal. 316, 26 Pac. 972 [1891].

⁸ *Philadelphia to use v. Jewell*, 140 Pa. St. 9, 21 Atl. 239 [1891]; *Philadelphia to use v. Jewell*, 135 Pa. St. 329, 19 Atl. 947 [1890]; *Pepper v. City of Philadelphia to use of Horter*, 114 Pa. St. 96, 6 Atl. 899 [1886]; *City to use of O'Rourke v. Hays*, 93 Pa. St. 72 [1881].

⁹ See §§ 482, 496-504.

¹⁰ *Brientnall v. City of Philadelphia to use*, 103 Pa. St. 156 [1883]. (This case was decided under a procedure in which the city as local plaintiff sued on behalf of the contractor as equitable plaintiff.)

¹¹ *State v. District Court of Blue Earth County*, 102 Minn. 482, 113 N. W. 697, 114 N. W. 654 [1907].

¹² *Inge v. Board of Public Works of Mobile*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678 [1902]; *Chippewa*

fact that, by reason of such improvement, the property of a corporation which has rightfully been laid in or upon a public street is damaged does not render the city liable therefor, since the right of the corporation to keep its property in or upon a public street is always subservient to the right and duty of the city to maintain such street in condition suitable for public use.¹³ As has already been said the city cannot include such items of expenditure in an assessment against an abutting property owner.¹⁴ Accordingly a provision in a contract for a street improvement, whereby the contractor agreed, in making excavations, to support water and gas pipes situated in the street, to be liable to injury to such water and gas pipes, and for waste of water and gas due to any injury caused by such excavations, and to be liable to a street railway company for any damage to its tracks, is invalid.¹⁵ Such provisions operating to increase the cost of the work and being incorporated in the specifications upon which bids were based, make the entire contract illegal and unenforceable.¹⁶ An assessment levied to pay the contractor for work done under a contract which has been held void has been held to be invalid, though specifically authorized by statute.¹⁷ Such contract was held in this case to be unconstitutional. A special statute authorizing a special assessment to pay to the contractor a gratuity over and above his contract was, however, held valid in the same jurisdiction.¹⁸

§ 484. Effect of fraud.

In most jurisdictions an assessment can be attacked by reason of fraud and collusion between the public officials and the contractor whereby the property owners are wronged. Such fraud invalidates the assessment affected thereby.¹ By statute in New

Bridge Co. v. City of Durand, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603 [1904].

¹³ New Orleans Gas Co. v. Drainage Commission of New Orleans, 197 U. S. 453, 49 L. 831, 25 S. 471 [1905]; National Water Works Co. v. City of Kansas, 28 Fed. 921; Kirby v. Citizens Railway Company, 48 Md. 168, 30 Am. Rep. 455.

¹⁴ See § 461.

¹⁵ Anderson v. Fuller, 51 Fla. 380, 41 So. 684 [1906].

¹⁶ Anderson v. Fuller, 51 Fla. 380, 41 So. 684 [1906].

¹⁷ Granger v. City of Buffalo, 6 Abb. N. C. (N. Y.) 238 [1879].

¹⁸ Brewster v. City of Syracuse, 19 N. Y. 116 [1859].

¹ Brady v. Bartlett, 56 Cal. 350 [1880]; Mason v. City of Des Moines, 108 Ia. 658, 79 N. W. 389 [1899]; Pleasants v. City of Shreveport, 110 La. 1046, 35 So. 283 [1903]; Dixon v. City of Detroit, 86 Mich. 516, 49 N. W. 628 [1891]; Weston v. City

York, assessments may be attacked for fraud, although they are made valid as against most other defenses.² It has been said that fraud, in the sense at least of actual fraud, implies collusion between the public officials and the contractors.³ In accordance with this theory the defense of fraud cannot be made if the contractor did not participate therein.⁴ However, it has been held that the fact that the officers of the public corporation are innocent of the fraud does not prevent the existence of fraud which might invalidate the assessment.⁵ If a sufficient remedy against fraud is provided such fraud may not for that reason render invalid an assessment which otherwise would be affected thereby.⁶ Thus the fact that a city fraudulently relieved certain contractors from doing a part of the work contracted for by them and was about to pay other contractors for doing the same work, was said not to be a ground for enjoining the collection of the assessment,⁷ since adequate relief could be obtained by enjoining the city from paying out such funds improperly. Furthermore, the property owner could also maintain an action against the improvement board and the contractor for respectively constructing and accepting the public improvement inferior to that required by the contract.⁸

of Syracuse, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899]; In the Matter of the Petition of Livingston, 121 N. Y. 94, 24 N. E. 290 [1890]; In the Matter of the Trustees of the Leake and Watts Orphan Home, 92 N. Y. 116 [1883]; In the Matter of Righter, 92 N. Y. 111 [1883]; *Eno v. Mayor, Aldermen and Commonalty of the City of New York*, 68 N. Y. 214 [1877]; In the Matter of Raymond, 21 Hun. (N. Y.) 229 [1880]; In the Matter of Meade, 13 Hun. (N. Y.) 349 [1878]; In the Matter of Eager, 41 Howard (N. Y.) 107 [1870]; In the Matter of Beekman, 18 Howard (N. Y.) 460 [1859]; *Matter of Eightieth Street*, 17 Abb. Pr. (N. Y.) 324 [1864]; *Foot v. City of Milwaukee*, 18 Wis. 270 [1864]; *Cook v. City of Racine*, 49 Wis. 243, 5 N. W. 352 [1880]. The public officials who are guilty of the fraud are personally liable to the property owner injured thereby; *Gage v. Springer*,

211 Ill. 200, 103 Am. St. Rep. 191, 71 N. E. 860 [1904]; (*reversing Gage v. Springer*, 112 Ill. App. 103 [1904]).

² *Astor v. The Mayor*, 62 N. Y. 580 [1875]; In the Matter of Meade, 13 Hun. (N. Y.) 349 [1878]; *Miller's Case*, 12 Abb. Pr. (N. Y.) 121 [1861]; *Matter of Keyser*, 10 Abb. Pr. (N. Y.) 481 [1860].

³ *Seaboard National Bank of New York v. Woesten*, 147 Mo. 467, 48 L. R. A. 279, 48 S. W. 939 [1898]; In the Matter of Eightieth Street, 31 Howard (N. Y.) 99 [1865].

⁴ *Seaboard National Bank of New York v. Woesten*, 147 Mo. 467, 48 L. R. A. 279, 48 S. W. 939 [1898].

⁵ *Pleasants v. City of Shreveport*, 110 La. 1046, 35 So. 283 [1903].

⁶ *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171 [1898].

⁷ *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171 [1898].

⁸ *Gage v. Springer*, 211 Ill. 200, 103 Am. St. Rep. 191, 71 N. E. 860

§ 485. Nature of fraud.

The nature of the fraud which invalidates an assessment has been discussed by the courts repeatedly.¹ If a resolution by the common council modifying a sewer contract is passed by means of fraud and corruption, such conduct renders such modification invalid.² The existence of material alterations in a written contract wrongfully and fraudulently increasing the contract price is ground for defeating the assessment.³ The mayor of a city, hearing that the legislature had passed a statute preventing the mayor from making contracts on his sole authority, on April 17th sent for a contractor, and on April 22d without public competition he let a number of contracts to him with the understanding that they should not be of any effect if this new statute had already become a law; and they were accordingly looked up until it could be learned whether such statute had become a law. The statute in fact became a law on April 30th. It was held that this amounted to fraud.⁴ An excessive price for a public improvement may be so grossly excessive as to suggest fraud.⁵ Thus where the contract price was over one hundred and seventy thousand dollars, while a reasonable price for the same work was about forty-one thousand dollars, it was said that fraud existed.⁶ So, where rock excavation worth four dollars a cubic yard was let at fourteen dollars a cubic yard; pipe culvert worth one dollar and fifty cents per foot was let at over seven dollars a foot; and a brick sewer worth about four dollars and fifty cents a foot was let at twenty-five dollars a foot, fraud was held to exist.⁷ So where filling is let at one dollar and forty-seven cents

[1904]; (reversing *Gage v. Springer*, 112 Ill. App. 103 [1904]).

¹ *Matter of Keyser*, 10 Abb. Pr. (N. Y.) 481 [1860].

² *Weston v. City of Syracuse*, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899]; (reversing *Weston v. City of Syracuse*, 82 Hun. (N. Y.) 67, 31 N. Y. S. 186).

³ *Miller's Case*, 12 Abb. Pr. (N. Y.) 121 [1861].

⁴ In the matter of *Raymond*, 21 Hun. 229 [1880].

⁵ *Dixon v. City of Detroit*, 86 Mich. 516, 49 N. W. 628 [1891]; In the Matter of the Petition of *Livingston*,

121 N. Y. 94, 24 N. E. 290 [1890]; In the Matter of the Trustees of the Leake and Watts Orphan Home, 92 N. Y. 116 [1883]; In the Matter of *Righter*, 92 N. Y. 111 [1883]; *Eno v. Mayor, Aldermen and Commonalty of the City of New York*, 68 N. Y. 214 [1877]; In the Matter of *Meade*, 13 Hun. (N. Y.) 349 [1878]; *Cook v. City of Racine*, 49 Wis. 243, 5 N. W. 352 [1880].

⁶ In the Matter of *Livingston*, 121 N. Y. 94, 24 N. E. 290 [1890].

⁷ In the Matter of the Trustees of the Leake and Watts Orphan Home, 92 N. Y. 116 [1883].

per cubic yard when the usual price therefor is eighty cents per cubic yard, such excessive price is at least evidence of fraud.⁸ The fact that a part of the assessment is imposed upon the city as a property owner, leaving to be imposed upon the property owners benefited an assessment not exceeding the reasonable value of the work done, does not make such assessment valid, since the city is to be regarded as a property owner and the assessment should be apportioned among the property owners.⁹ A different result is reached if the given charge is made upon the city, not as property owner, but on the theory that a part of the cost of the improvement is to be borne by general taxation. Unless the excess over a reasonable price is so gross as to suggest fraud, or unless fraud is otherwise shown to exist, the price to be paid for work or materials is within the discretion of the public corporation making the improvement; and the assessment cannot be attacked successfully on the ground that the price was greater than market price.¹⁰ Thus, an agreement to pay a contractor a uniform price per square yard for brick pavement without regard to the streets or the locality to be improved is valid.¹¹ Private contracts entered into between the public contractor and some of the property owners for doing work for them on terms different from those on which the rest of his work is done have been presented for adjudication. Such a contract is said to avoid the public contract which is obtained thereby.¹² If provision is made by statute for testing its validity by a direct attack upon it, it is said that such private contract must be made the ground for a direct attack upon the public contract or such objection will be waived.¹³ A statute forbidding the allowance of rebates to property owners is held not to apply to the remission of a small amount in a settlement made more than four years after the work is accepted in the absence of any evidence to show that there was a prior contract for such remission.¹⁴ If the privilege of entering into the special arrangement in question is given

⁸ *In the Matter of Righter*, 92 N. Y. 111 [1883].

⁹ *In the Matter of Livingston*, 121 N. Y. 94, 24 N. E. 290 [1890].

¹⁰ *Palmer v. City of Danville*, 166 Ill. 42, 46 N. E. 629 [1897].

¹¹ *City of Galveston v. Heard*, 54 Tex. 420 [1881].

¹² *Brady v. Bartlett*, 56 Cal. 350 [1880].

¹³ *Himmelmann v. Hoadley*, 44 Cal. 213 [1872].

¹⁴ *In re Ayers Asphalt Paving Co.*, 118 La. 640, 43 So. 262 [1907].

to all the property owners, no fraud exists.¹⁵ An agreement by certain property owners who had by statute a right to take the contract themselves whereby they agreed to give up such right in consideration of a reduction of twenty-five per cent in their assessment is held not to be fraudulent where it does not appear that the complaining property owner could have done the work below the contract price if the other property owners had combined with him or that he desired to take the contract.¹⁶ An oral agreement between a property owner and the contractor whereby the contractor agrees to accept in payment of the assessment a certain tract of land and to pay to the owner thereof the cash difference between the agreed price thereof and the assessment is unenforceable.¹⁷ If the property owners have by statute the right to elect to do the work, the fact that the city gives an unreasonable short time for their performance of such work when the city has already secured most of the men, teams and material necessary to perform such contract has been regarded as amounting to fraud and avoiding a subsequent assessment.¹⁸ Fraud is also said to exist if an assessment is levied greatly in excess of the ascertained cost of the work,¹⁹ or for work which has been entirely omitted.²⁰ On this question the certificate of the authorized inspector is said to be conclusive in the absence of fraud.²¹ A false certificate by the inspector as to the rates at which the work is done is said to amount to fraud.²² Apart from constructive fraud, which is considered subsequently,²³ fraud which avoids an assessment means actual fraud and not omissions, errors or negligence.²⁴ The fact that an assessment is levied before the work is done,²⁵ or the fact that a man of considerable political experience and influence is employed by a paving company as its agent to secure paving contracts,²⁶ none

¹⁵ *German Savings and Loan Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902].

¹⁶ *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904].

¹⁷ *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893].

¹⁸ *Foote v. City of Milwaukee*, 18 Wis. 270 [1864].

¹⁹ *Union Building Association v. City of Chicago*, 61 Ill. 439 [1871].

²⁰ *In the Matter of Eager*, 41 Howard (N. Y.) 107 [1870].

²¹ *In the Matter of Lewis*, 35 Howard (N. Y.) 162 [1868].

²² *In the Matter of Beekman*, 18 Howard (N. Y.) 460 [1859].

²³ See § 486.

²⁴ *Rich's Case*, 12 Abb. Pr. (N. Y.) 118 [1861].

²⁵ *Beekman's Petition*, 1 Abb. Pr. 449 [1865].

²⁶ *Barber Asphalt Paving Company v. Field*, 188 Mo. 182, 86 S. W. 860 [1905].

of them amount to fraud. The fact that one of the directors of a levee district stated to a land-owner that the approximate cost of the work would be a certain sum when in fact the cost was much greater does not constitute fraud.²⁷ The reservation by the city officials of the right to alter the dimensions and quantities provided for in the contract does not of itself amount to fraud.²⁸ Omitting for good cause a part of the street specified in the ordinance and not levying an assessment for such part is not fraud.²⁹ The fact that one who takes a contract for grading and filling several streets makes use of the earth which he has removed from one street in filling depressions in another is said not to amount to fraud.³⁰ Fraud is said not to exist even if the contractor has agreed to allow a drawback for dirt furnished by the city and he presents a bill for the full contract price without allowance for dirt procured from another street at no cost to him.³¹ Wilfully defective performance,³² as by using much less cement than the specifications call for and thus making an inferior job³³ is said to amount to fraud. Failure to award a contract to the lowest bidder is said not to be technical fraud,³⁴ especially where not required by statute,³⁵ unless done in pursuance of an actually fraudulent scheme.³⁶ Letting a contract after a judgment of confirmation has been reversed is not bad faith so as to preclude a re-assessment.³⁷ If actual fraud is alleged the burden of proof is upon the party who claims fraud.³⁸

²⁷ *Overstreet v. Levee District No. 1 of Conway County*, 80 Ark. 462, 97 S. W. 676 [1906].

²⁸ *In the Matter of Merriam*, 84 N. Y. 596 [1881].

²⁹ *In the Matter of Pinckney*, 22 Hun. (N. Y.) 474 [1880].

³⁰ It is said that the city could reap no benefit from such use of material; *Schenley v. Commonwealth for the use of the City of Allegheny*, 36 Pa. St. (12 Casey) 64 [1859].

³¹ *Darlington v. Commonwealth for the use of the City of Allegheny*, 41 Pa. St. (5 Wright) 68 [1861].

³² *Mason v. City of Des Moines*, 108 Ia. 658, 79 N. W. 389 [1899].

³³ *Mason v. City of Des Moines*, 108 Ia. 658, 79 N. W. 389 [1899].

³⁴ *In the Matter of the New York*

Protestant Episcopal School, 8 Hun. (N. Y.) 457 [1876]; *Horn's Case*, 12 Abb. Pr. (N. Y.) 124 [1861]; *Sanford v. Mayor, etc., of New York*, 12 Abb. Pr. (N. Y.) 23 [1860].

³⁵ *In the Matter of the Delaware & Hudson Canal Company*, 60 Hun. 204, 14 N. Y. Supp. 585 [1891].

³⁶ *Matter of Eightieth Street*, 17 Abb. Pr. (N. Y.) 324 [1864].

³⁷ *City of Chicago v. Clark*, 233 Ill. 404, 84 N. E. 363 [1908].

³⁸ *Field v. Barber Asphalt Paving Company*, 117 Fed. 925 [1902]; not affected in this point by modification in 194 U. S. 618, 48 L. 1142, 24 S. 784 [1904]; *Seaboard National Bank of New York v. Woesten*, 147 Mo. 467, 48 L. R. A. 279, 48 S. W. 929 [1898].

He must allege the specific facts and not merely charge fraud in general terms.³⁹

§ 486. Constructive fraud.

Fraud may, in some cases, be presumed from the relations of the parties and the facts and circumstances of the case. A contract whereby a city enters into a contract with one of its own officials who has duties to perform in the protection of the city's interests in the transaction is invalid, since the same person is thereby placed in a position representing two antagonistic and inconsistent interests.¹ Thus a contract of a city with one of its own school trustees for a street improvement,² or a contract between a town treasurer and the town for the improvement of a public street,³ is each void and cannot serve as the basis of a valid assessment. A member of the council was a large stockholder and business manager for a lumber company. A contractor who sought a public contract after the construction of sidewalks agreed to buy his lumber from such company before the contract was let to him. It was held that under a statute providing that no city official should be interested directly or indirectly in a city contract a claim based on such contract was void.⁴ If there is a specific statute which forbids payment upon such contracts, the doctrine of estoppel is said not to apply and the contract and assessment based thereon is said to be invalid even after performance.⁵ In other jurisdictions under

³⁹ *Harrisburg v. Baptist*, 156 Pa. St. 526, 27 Atl. 8 [1893].

¹ *Capron v. Hitchcock*, 98 Cal. 427, 33 Pac. 431 [1893]; *Benton v. Hamilton*, 110 Ind. 294, 11 N. E. 238 [1886]; *City of Northport v. Northport Townsite Company*, 27 Wash. 543, 68 Pac. 204 [1902]. This result is reached usually under specific statutory provisions.

² *Capron v. Hitchcock*, 98 Cal. 427, 33 Pac. 431 [1893].

³ *Benton v. Hamilton*, 110 Ind. 294, 11 N. E. 238 [1886].

⁴ *City of Northport v. Northport Townsite Company*, 27 Wash. 543, 68 Pac. 204 [1902]. Such statutes make the contract void, as in *Nunnemacher v. City of Louisville*, 98 Ky. 334,

32 S. W. 1091, and do not merely disqualify the councilman. *Bradley v. Jacques*, — Ky. —, 110 S. W. 836 [1908].

⁵ *City of Northport v. Northport Townsite Company*, 27 Wash. 543, 68 Pac. 204 [1902]; (distinguishing as cases where such contract is held to be merely voidable, and if it is affirmed, compensation must be made, *Call Publishing Co. v. Lincoln*, 29 Neb. 149, 45 N. W. 245 [1890], and *Grand Island Gas Co. v. West*, 28 Neb. 852, 45 N. W. 242 [1890], and distinguishing *Pickett v. School District*, 25 Wis. 551, 3 Am. Rep. 105 [1870], as a case where the contract is not forbidden by statute).

such statutes, it has been said that the contract cannot be attacked after performance except in case of actual fraud.⁶ In some jurisdictions it is held that in the absence of actual fraud a contract between the city and the officer thereof cannot be attacked after performance,⁷ and after such performance an assessment for such improvement cannot be resisted upon the ground of such constructive fraud.⁸ Thus under a statute forbidding members of the city council from being interested in any contract for work or service with the city, a property owner who makes no objection until after the work is done and who does not make objection thereto when opportunity is given to him in compliance with statute cannot resist his assessment, it not appearing that the cost of the work was increased in any way.⁹ In the absence of statute it has been held that if the vote of the officer who has entered into a contract with the public corporation is not necessary to give the requisite majority for the allowance of his claim, such contract is valid.¹⁰ Thus, where one of the trustees of a reclamation district had performed work and expended money in the construction of a levee, it was held that if no fraud existed in fact and his vote was not necessary to an allowance of his claim, such claim could be allowed.¹¹ Where a property owner cannot inquire into the validity of the contract between the city and the contractor, he cannot attack the assessment on the ground that certain of the city officials were interested in the contract.¹² A contract entered into between the city and one who was not a public officer when such contract was made is not rendered invalid by the fact that such contractor was, either before or afterwards, a city official.¹³ Thus where a partnership had a contract with the city to build sidewalks and sub-

⁶ *Driver v. Keokuk Savings Bank*, 126 Ia. 691, 102 N. W. 542 [1905].

⁷ *Argenti v. City of San Francisco*, 16 Cal. 256 [1860]; *Mayor v. Huff*, 60 Ga. 221; *Diver v. Keokuk Savings Bank*, 126 Ia. 691, 102 N. W. 542 [1905]; *Currie v. School District*, 35 Minn. 163, 27 N. W. 922 [1861]; *Lucas County v. Hunt*, 5 O. S. 488, 67 Am. Dec. 303 [1856].

⁸ *Diver v. Keokuk Savings Bank*, 126 Ia. 691, 102 N. W. 542 [1905].

⁹ *Diver v. Keokuk Savings Bank*, 126 Ia. 691, 102 N. W. 542 [1905].

¹⁰ *Lower King's River Reclamation District No. 531 v. McCullah*, 124 Cal. 175, 56 Pac. 887 [1899].

¹¹ *Lower King's River Reclamation District No. 531 v. McCullah*, 124 Cal. 175, 56 Pac. 887 [1899].

¹² *Schenley v. Commonwealth for the use of the City of Allegheny*, 36 Pa. St. 29, 78 Am. Dec. 359 [1859].

¹³ *White v. City of Alton*, 149 Ill. 626, 37 N. E. 96 [1894]; *City of Lawrence v. Killam*, 11 Kan. 499 [1873].

sequently a member of such partnership became a member of the city council and was a member while such contracts were being performed,¹⁴ or where an alderman of the city who was a member of the committee to estimate the cost of a proposed street improvement resigned and after his resignation was accepted became a bidder upon such contract and obtained the same,¹⁵ such contracts are valid in each case and assessments may be levied therefor. Where one councilman was a stockholder in a corporation that furnished brick to the contractors, there being no evidence that the contractors were aware of such fact, and another councilman was employed by the contractors as a time-keeper, it was held that a finding by the trial court that no fraud existed could not, as a matter of law, be reversed.¹⁶ A remote relationship between the contractor and the city official does not in the absence of a specific statute affect the validity of the contract.¹⁷ Thus a contract entered into between the city and the son-in-law of a deputy civil engineer of the city was held to be valid.¹⁸

§ 487. Certificate of freedom from fraud.

In some states it has been provided by statute that certain designated officials shall examine the proceedings leading up to the assessment and shall give a certificate that such proceedings are free from fraud if they find such to be the fact. Such statutory provisions are held to be valid.¹ A certificate given under such statute makes valid a contract which was originally invalid because bids were not advertised for, and such contract was not let to the lowest bidder,² or because the price of an item, such as rock excavation, was fixed arbitrarily and not submitted to competition.³ Such statute applies to improvements in which

¹⁴ *City of Lawrence v. Killam*, 11 Kan. 499 [1873].

¹⁵ *White v. City of Alton*, 149 Ill. 626, 37 N. E. 96 [1894].

¹⁶ *Ferguson v. City of Coffeyville*, — Kan. —, 94 Pac. 1010 [1908].

¹⁷ *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768 [1899].

¹⁸ *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768 [1899].

¹ In the matter of *Johnson*, 103 N. Y. 260, 8 N. E. 399 [1886]; In the

Matter of *Kendall*, 85 N. Y. 302 [1881]; In the Matter of *Pengnet*, 67 N. Y. 441 [1876]; *Brown v. Mayor*, 63 N. Y. 239 [1875]; In the Matter of *Auchmuty*, 11 Hun. (N. Y.) 76 [1877].

² In the Matter of *Johnson*, 103 N. Y. 260, 8 N. E. 399 [1886]. To the same effect see In the Matter of *Marsh*, 21 Hun. 582 [1880].

³ In the Matter of *Kendall*, 85 N. Y. 302 [1881].

the work is done after the passage of the act.⁴ Such certificate is said to be final and conclusive.⁵ Under such statute a certificate can be given only as to a contract which has previously been authorized by the council.⁶ The commissioners have no power to change the contract so as to make it conform to such ordinance where, as actually made, it does not so conform.⁷

§ 488. Mistake.

A mistake which goes to an essential element of the contract may invalidate such contract.¹ Thus, where a contractor offered a bid at forty-two cents and his bid was accepted upon the understanding that it was for twenty-two cents and that he was accordingly the lowest bidder, such contract was held to be invalid on the ground of mistake.² The difficulty involved in questions like this is that if the offer is in writing and the adversary party had an opportunity to become acquainted with its terms, he is ordinarily estopped from alleging that he did not know the contents of such offer.³ So it has been held that where A offers in writing to do certain macadamizing at thirty-two cents per square yard, to a depth of eight inches; and council accepts, thinking that A's proposition is thirty-two cents per cubic yard and accordingly rejecting B's bid of thirty-three cents per cubic yard as higher than A's, the contract between A and the city is valid.⁴ However, a contract to grade and remove dirt at twenty-five cents per square yard has been construed as meaning that rate per cubic yard.⁵ If an assessment is attacked as invalid by reason of mistake it has been said that the party objecting cannot show the existence of fraud,⁶ even under a statute authorizing the court to review an assessment in case of fraud or mistake of fact.⁷

¹ In the Matter of Peugnet, 67 N. Y. 441 [1876].

² In the Matter of Auchmuty, 11 Hun. (N. Y.) 76 [1877].

³ People ex rel. Trundy v. Van Nort, 65 Barb. (N. Y.) 331 [1873].

⁴ People ex rel. Trundy v. Van Nort, 65 Barb. (N. Y.) 331 [1873].

⁵ Pettigrew v. Mayor, etc., of the City of New York, 17 How. (N. Y.) 492 [1859].

⁶ Pettigrew v. Mayor, etc., of the City of New York, 17 How. (N. Y.) 492 [1859].

⁷ See Page on Contracts, § 76.

⁸ Blasingame v. City of Laurens,

— S. C. —, 61 S. E. 96 — [1908].

⁹ City of Louisville v. Hyatt, 41 Ky. (2 B. Monroe) 177, 17 Am. Dec. 594 [1841].

¹⁰ State of Minnesota ex rel. Powell v. District Court of Ramsey County, 47 Minn. 406, 50 N. W. 476 [1891]. (The objection here was to assessing lots on another street as much for grading as those on the street where the grading was done.)

¹¹ State of Minnesota ex rel. Powell v. District Court of Ramsey County, 47 Minn. 406, 50 N. W. 476 [1891].

§ 489. Form of contract.

If by statute it is provided that the contract between the city and the contractor must be in writing, such requirements must be complied with.¹ A contract not in writing is, under such statutes, invalid.² Acceptance by the city of a written bid does not constitute a written contract within the meaning of these statutes.³ If the statute does not require such contract to be in writing it may be that wise policy would indicate that it should be in writing in any event, but it is not illegal if not in writing.⁴ A suit on the assessment is said not to rest upon the contract between the city and contractor as a basis. It is therefore not necessary to show affirmatively that such contract is in writing.⁵ Indeed it is held that an averment that a contract was entered into is sufficient, at least in the absence of motion, as it will be assumed that the contract was entered into in such form as to be enforceable unless the contrary is shown.⁶ In other jurisdictions under a statute requiring the contract to be in writing it has been said that if the complaint does not aver that it is in writing and does not have a copy of the contract annexed, it will be presumed that the contract is not in writing.⁷

§ 490. Incorporation of document in the contract.

A contract may so refer to another written document as to incorporate such document in the contract and make its terms a part thereof. Under this principle a contract for a public improvement may so refer to the ordinance or to plans and specifications as to make them a part thereof or they may be made a part thereof by the operation of statute.¹ Thus an ordinance which directs an improvement is a part of the contract and the basis thereof if it is properly referred to.² Plans and specifica-

¹ *Overshiner v. Jones*, 66 Ind. 452 [1879]; *City of Indianapolis v. Imberry*, 17 Ind. 175 [1861]; *Stephens v. City of Spokane*, 11 Wash. 41, 39 Pac. 266 [1895].

² *Overshiner v. Jones*, 66 Ind. 452 [1879]; *Arnott v. City of Spokane*, 6 Wash. 442, 33 Pac. 1063 [1893].

³ *Overshiner v. Jones*, 66 Ind. 452 [1879].

⁴ *Drew v. Town of Geneva*, 159 Ind. 364, 65 N. E. 9 [1902].

⁵ *Drew v. Town of Geneva*, 159 Ind.

364, 65 N. E. 9 [1902]; *Powers v. Town of New Haven*, 120 Ind. 185, 21 N. E. 1083 [1889].

⁶ *Stephens v. City of Spokane*, 11 Wash. 41, 39 Pac. 266 [1895].

⁷ *Overshiner v. Jones*, 66 Ind. 452 [1879].

¹ *Hutt et al. v. City of Chicago*, 132 Ill. 352, 23 N. E. 1010 [1890].

² *State ex rel. Keith v. Common Council of the City of Michigan City*, 138 Ind. 455, 37 N. E. 1041 [1894].

tions prepared under proper authority for a public improvement may if referred to in the order for the public improvement be made a part of such order and therefore a part of the contract.³ Thus where an engineer's report contained a plan in which the course of a proposed sewer was indicated by a red line, it was held that the adoption of such plan by the town located the sewer with sufficient certainty.⁴ Specifications prepared and referred to in the notice are incorporated therein and hence made a part of the estimate.⁵ Accordingly, a notice to bidders is not defective for failure to state the kind of material to be used or the time of performance where the specifications referred to in the notice show such facts.⁶ Specifications may be incorporated in a contract by proper reference made therein and thus may become a part of such contract.⁷ Plans and specifications which are referred to in an ordinance and notice of an improvement are incorporated therein and become a part thereof.⁸ So plans, specifications and profiles of the work referred to in the contract are incorporated therein and become a part thereof.⁹ It is a general rule that the document which is to be incorporated in a written contract by reference therein must be in existence at the time such contract is made. If, however, an ordinance is sufficiently definite, the fact that it refers to plans and specifications not then in existence does not invalidate it.¹⁰ Thus an ordinance which provides that the roadway of a certain street between two specified points shall be of a designated width and shall be improved by grading, curbing and paving with vitrified brick or block pavement, with corner stones at the intersections of streets and alleys, and footways crossing across

³ *City of Stockton v. Skinner*, 53 Cal. 85 [1878]; *Taylor v. Palmer*, 31 Cal. 240 [1866]; *Smith v. Abington Savings Bank*, 171 Mass. 178, 50 N. E. 545 [1898]; *Bowditch v. Superintendent of streets of Boston*, 168 Mass. 239, 46 N. E. 1046 [1897]; *State of Minnesota ex rel. Lewis v. District Court of Ramsey County*, 33 Minn. 164, 22 N. W. 295 [1885]; *Roth v. Hax*, 68 Mo. App. 283 [1896].

⁴ *Smith v. Abington Savings Bank*, 171 Mass. 178, 50 N. E. 545 [1898].

⁵ *Owens v. City of Marion, Iowa*, 127 Ia. 469, 103 N. W. 381 [1905].

⁶ *Owens v. City of Marion, Iowa*, 127 Ia. 469, 103 N. W. 381 [1905].

⁷ *Whitemore v. Sills*, 76 Mo. App. 248 [1898]; *Dunn v. McNeely*, 75 Mo. App. 217 [1898].

⁸ *Louisville & Nashville Railroad Company v. City of East St. Louis*, 134 Ill. 656, 25 N. E. 962 [1891]; *Clinton v. City of Portland*, 26 Or. 410, 38 Pac. 407 [1894].

⁹ *Cuming v. City of Grand Rapids*, 46 Mich. 150, 9 N. W. 141 [1881].

¹⁰ *Richardson v. Mehler*, 111 Ky. 408, 63 S. W. 957, 23 Ky. Law 917 [1901].

all intersecting streets and alleys, in accordance with the plans and specifications on file in the office of the board of public works, is sufficiently definite, although the plans and specifications were not in existence when the ordinance was passed; and accordingly could not be regarded as a part thereof.¹¹ On the other hand, a bid, invalid when made, cannot be made valid by a bond attached thereto executed by the contractors and their sureties and misreciting the bid or proposal to which it is attached.¹²

§ 491. Time within which contract must be entered into.

By statute it is sometimes provided that a contract for certain forms of public improvements must be entered into within a certain time. Such a provision is mandatory and not directory and a failure to comply therewith invalidates the contract and assessment based thereon.¹ Accordingly, if the statute requires a contract to be entered into within fifteen days after the first posting of the notice of the award to the contractor a contract entered into after such time is invalid if it is not shown that the delay in entering into the contract was not caused by any fault of the contractor.² Where by statute an ordinance does not go into effect until it is published, an ordinance approved on the fifteenth of the month and published on the nineteenth requiring a written contract to be entered into in ten days authorizes a contract and bond executed and deposited with the city clerk on the twenty-third of the month, though marked filed on the twenty-fifth and not approved by the mayor until the twenty-eighth; since the ten days run from the publication of the ordinance.³ Every presumption is made under such statutes in favor of the validity of a contract which is apparently otherwise regular.⁴ Thus under a statute requiring the first step for letting a contract to be taken within fifteen days after the final determination of the ap-

¹¹ *Richardson v. Mehler*, 111 Ky. 408, 63 S. W. 957, 23 Ky. Law 917 [1901].

¹² *Williams v. Bergin*, 129 Cal. 461, 62 Pac. 59 [1900].

¹ *Libby v. Elsworth*, 97 Cal. 316, 32 Pac. 228 [1893]; *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893].

² *Libby v. Elsworth*, 97 Cal. 316, 32 Pac. 228 [1893]; *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893].

³ *City of Springfield ex rel. Updegraff v. Mills*, 99 Mo. App. 141; 72 S. W. 462 [1903].

⁴ *Gage v. People ex rel. Hanberg*, 213 Ill. 347, 72 N. E. 1062 [1904].

peal from the judgment of confirmation of the special assessment for the work, the fact that bids were advertised for six months after the affirmance of the judgment of confirmation does not invalidate the assessment in the absence of evidence showing that no step toward letting the contract had been taken within such fifteen days.⁵ So under a statute which provides that the first step towards letting the contract must be taken within ninety days after the expiration of the term at which the judgment of confirmation is entered, a contract will be regarded as valid if the first step is taken on a day which was within ninety days from the day to which such term might have been continued, and there is no evidence as to the fact of such continuance.⁶ In the absence of statute fixing the time within which the contract must be entered into, a delay in entering into the contract may discharge the contractor, but does not invalidate the contract if the contractor does not avail himself of the delay. The fact that the city delays five years after a bid is made before accepting it while it may authorize the contractor to refuse to enter into such contract, does not authorize the property owner to object to an assessment levied to pay the cost of such improvement if the contractor performs the contract and it is not shown that the property owner is obliged to pay more than he would have had to pay had the contract been entered into when the bid was accepted.⁷ Thus, a delay of a year and one-half between the passage of the ordinance and the making of the contract does not invalidate the assessment.⁸

§ 492. Execution of contract.

A corporation may bind itself by a contract made in a name differing from its corporate name if its identity is clear.¹ If the board of trustees or directors of a corporation pass a resolution conferring upon the president of a corporation full power with reference to municipal street work, such president is thereby given authority to contract with the city on behalf of the corporation for the improvement of a public street.² Even if the

⁵ Gage v. People ex rel. Hanberg, 213 Ill. 347, 72 N. E. 1062 [1904].

⁶ Gage v. People ex rel. Hanberg, 213 Ill. 468, 72 N. E. 1108 [1905].

⁷ City of Philadelphia to use v. Hood, 211 Pa. 189, 60 Atl. 721 [1905].

⁸ Jaicks v. Middlesex Inv. Co., 201 Mo. 111, 98 S. W. 759 [1906].

¹ Neff v. Covington Stone & Sand Co., 108 Ky. 457, 55 S. W. 697, 56 S. W. 723 [1900].

² Oakland Paving Company v. Rier, 52 Cal. 270 [1877].

power conferred upon the president were defective, yet if the contract purported to be made with the corporation and it was performed by the corporation, both city and corporation would be estopped to deny the validity of the contract.³ The power of the president of a corporation to bind a corporation by contract for a public improvement will be presumed if the contract has been performed by the corporation and the corporation is seeking to enforce the assessment.⁴ Thus, it has been said that a contract purporting to be that of the corporation, but without the corporate seal, and signed "A., Pres.," is *prima facie* valid.⁵ So if a contract which purports to be made by a corporation is signed in the name of the corporation by its secretary and such contract is performed by the corporation, the authority of the secretary will be presumed,⁶ especially if the corporate seal has been affixed and the corporation has treated such contract as valid.⁷ After a contract has been performed it will be presumed that a power of attorney given by the contractor to another person authorizing such person to enter into a contract with the city on behalf of the contractor will be presumed to be valid.⁸ Statutes which provide how a contract is to be executed on behalf of a city must be complied with in at least a substantial manner. By statute it may be provided that if the mayor of a city signs a contract, such signature makes the contract valid as far as authority is concerned and is *prima facie* evidence of the due observance of all antecedent forms and requirements of law.⁹ Under a statute requiring that contracts should be executed on the part of a city by the president of the board of public works or such of their members as the board should designate, that the seal of the board should be attached thereto and that the contract should then be countersigned by the city comptroller, it was held that a contract executed properly by the president of the board of public works is valid, although the comptroller has not countersigned it, as in such case his countersigning is a mere clerical

³ *Oakland Paving Company v. Rier*, 52 Cal. 270 [1877].

⁴ *City Street Improvement Company v. Laird*, 138 Cal. 27, 70 Pac. 916 [1902].

⁵ *City Street Improvement Company v. Laird*, 138 Cal. 27, 70 Pac. 916 [1902].

⁶ *San Francisco Paving Company*

v. Bates, 134 Cal. 39, 66 Pac. 2 [1901].

⁷ *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262 [1901].

⁸ *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885 [1891].

⁹ *Bruning v. Chadwick*, 109 La. 1067, 34 So. 90 [1903].

duty which the contractor or board could have compelled him to perform.¹⁰ The omission of the signature of the officer who is authorized to make public contracts on behalf of the city invalidates the contract.¹¹ Thus, if by statute the superintendent of streets is to sign such contracts, a contract not signed by him is invalid.¹² Under a statute providing that an assessment should not be set aside except in a case where fraud was shown, a mere defect of authority to enter into a contract was held not to amount to fraud so as to invalidate the assessment.¹³ A contract for a public improvement must ordinarily be made in the name of the public corporation by which such improvement is constructed.¹⁴ Thus where the commissioners of public works of a city entered into a contract in the name of the commissioners of public works, it was said to be questionable whether the contract had any validity. It was said that in such case a contract should be made in the name of the city of which they were officers.¹⁵ By statute it may be provided that a contract cannot be entered into unless the head of the department concerned files a certificate that such work is necessary. A contract entered into under such statute without such certificate is invalid and the contractor cannot recover thereon.¹⁶

§ 493. Vote necessary to validity of contract.

The statutes occasionally provide what vote of the council or other body of public officials is necessary to enter into a contract to make a public improvement. Substantial compliance with such statutes is sufficient.¹ A resolution awarding a public contract and directing the city auditor to enter into a contract with a bidder is not a resolution of a "permanent or general nature," and hence does not require a vote of two-thirds of the council.² A vote of two-thirds of the council to enter into a street

¹⁰ State of Minnesota ex rel. Benz v. District Court of Ramsey County, 32 Minn. 181, 19 N. W. 732 [1884].

¹¹ Manning v. Den, 90 Cal. 610, 27 Pac. 435 [1891].

¹² Manning v. Den, 90 Cal. 610, 27 Pac. 435 [1891].

¹³ In the Matter of the New York Protestant Episcopal Public School, 8 Hun. (N. Y.) 457 [1876].

¹⁴ Lutes v. Briggs, 5 Hun (N. Y.) 67 [1875].

¹⁵ Lutes v. Briggs, 5 Hun (N. Y.) 67 [1875].

¹⁶ Burns v. Mayor, etc., of the City of New York, 3 Hun (N. Y.) 212 [1874].

¹ Brown v. Central Bermudez Company, 162 Ind. 452, 69 N. E. 150 [1903].

² City of Cincinnati for use of Ashman v. Bickett, 26 O. S. 49 [1875].

improvement contract is good as against collateral attack.³ A statutory provision to the effect that no public work which involved an expenditure of more than ten thousand dollars should be undertaken unless it was submitted to a vote of the electors of the city, was held to apply only to improvements which affected the public at large and were to be paid for by the city.⁴

§ 494. Parties to contract.

There is no constitutional requirement making it necessary that the council of a city should approve contracts for the construction of public improvements at the expense of owners of abutting property.¹ Such an act is ministerial and an executive board may be empowered by statute to perform the same.² If the statute specifically provides that the city council shall let contracts for public improvements, such provision is mandatory and a contract let by any other agency is invalid; and a valid assessment cannot be levied therefor.³ Thus, under such a statute a committee of the council cannot accept a bid or award a contract.⁴ In some states, however, it has been held that a contract made by a committee of the council may be ratified by the council and thus made valid.⁵ Thus, under an ordinance which provided that contracts for street improvements should be let to the lowest bidder and that the lowest bid should be submitted to the council for action, it was held that where a committee appointed for the purpose let a contract and subsequently the council with full knowledge of the facts made an order authorizing the committee to employ a superintendent of the work, such order was an acceptance of the bid.⁶ Under a statute requiring all contracts for street improvements to be referred to a committee of the city council, a contract not so referred is invalid.⁷ A contract entered into by the mayor without the con-

³ *Brown v. Central Bermudez Company*, 162 Ind. 452, 69 N. E. 150 [1903].

⁴ *The Park Ecclesiastical Society v. City of Hartford*, 47 Conn. 89 [1879].

¹ *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. R. 128 [1901].

² *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. R. 128 [1901].

³ *City of Stockton v. Creanor*, 45 Cal. 643 [1873]; *State, Van Horne. Pros. v. Town of Bergen*, 30 N. J. L. (1 Vroom) 307 [1863].

⁴ *City of Stockton v. Creanor*, 45 Cal. 643 [1873].

⁵ *Main v. Fort Smith*, 49 Ark. 480, 5 S. W. 801 [1887].

⁶ *Main v. Fort Smith*, 49 Ark. 480, 5 S. W. 801 [1887].

⁷ *Worthington v. City of Covington*, 82 Ky. 265 [1884].

currence of the council is under such statute invalid.⁸ By statute the co-operation and approval of some boards, such as the board of public works, may be necessary to the execution of a contract for a public improvement.⁹ Under such statutes a contract not concurred in by a majority of the board specified is invalid.¹⁰ Thus, where by statute the mayor, the civil engineer and three commissioners were to constitute the board, it was held that the vote of the mayor and civil engineer for the improvement, one commissioner voting against it and the other two being absent, was insufficient, and that an assessment for such improvement was invalid.¹¹ A statute requiring the board of public works to place before the council a detailed estimate of the cost of a public improvement is held to be complied with substantially, where the board of public works places before the council an estimate of the gross cost of such improvement, which estimate the council accepts and 'upon which it acts.'¹² If by statute it is provided that a foreign corporation must comply with certain requirements in order to be permitted to do business in that state and it is held that a contract made by a foreign corporation which has not complied with such requirements is invalid, a city should not make a contract for a public improvement with a foreign corporation which has not complied with such requirements. However, if the improvement is a proper one, for which an assessment may be levied, and the property assessed is benefited thereby to an amount equal to or greater than the amount of the assessment, equity will not relieve the property owner even if the contract is void.¹³ An ordinance which requires persons engaged in the original construction of public works to obtain a license before undertaking such work was held to be unconstitutional.¹⁴ However, it was not shown that such ordinance was enforced or that any one was thereby prevented

⁸ *Murphy v. City of Louisville*, 72 Ky. (9 Bush.) 189 [1872].

⁹ *Goodwillie v. City of Detroit*, 103 Mich. 283, 61 N. W. 526 [1894]; *Baisch v. City of Grand Rapids*, 84 Mich. 666, 48 N. W. 176 [1891]; *Verdin v. City of St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52 [1895]; *Brophy v. Landman*, 28 O. S. 542 [1876].

¹⁰ *Brophy v. Landman*, 28 O. S. 542 [1876].

¹¹ *Brophy v. Landman*, 28 O. S. 542 [1876].

¹² *Goodwillie v. City of Detroit*, 103 Mich. 283, 61 N. W. 526 [1894].

¹³ *Beaser v. Barber Asphalt Paving Company*, 120 Wis. 599, 98 N. W. 525 [1904].

¹⁴ *Richardson v. Mehler*, 111 Ky. 408, 63 S. W. 957, 23 Ky. Law Rep. 917 [1901].

from bidding. The contract was let and the work was performed. The invalidity of such ordinance requiring a license could not then be urged to defeat the validity of the assessment.¹⁵

§ 495. Letting contract on competitive bidding.

In the absence of statute it is not necessary that a contract for a public improvement should be let on competitive bidding or should be let to the lowest bidder.¹ A provision that a public corporation "may advertise for proposals for doing any contract" is directory and does not require advertisement for bids.² A statute which provides "all city improvements of whatever kind or character including the erection of public buildings made or to be erected at the expense of the city shall be let by contract to the lowest and best bidder," has been held not to apply to work done at the expense of the abutting property owner.³ By modern statutes it is, however, often provided that contract must be let to the lowest bidder. Such provisions are intended to protect the property owners and are mandatory.⁴ A statute requiring a contract to be let to the lowest bidder in case of an improvement to be paid for by special assessment and in case of "such improvements as the city council shall by ordinance prescribe" includes a contract for the construction of additions to its existing waterworks system.⁵ The provision requiring contracts to be let to the lowest bidder are generally applicable to contracts for improvements

¹⁵ *Richardson v. Mehler*, 111 Ky. 408, 63 S. W. 957, 23 Ky. Law Rep. 917 [1901].

¹ *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953 [1892]; *Yeomans v. Riddle*, 84 Ia. 147, 50 N. W. 886 [1891]; *In the Matter of the Petition of Knaust*, 101 N. Y. 188, 4 N. E. 338 [1886]; *Tarentum Borough v. Moorhead*, 26 Pa. Super. Ct. 273 [1904].

² *Stiewel v. Fencing District No. 6 of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1903].

³ *Kansas City Transfer Company v. Huling*, 22 Mo. App. 654 [1886].

⁴ *Flickinger v. Fay*, 119 Cal. 590, 51 Pac. 855 [1898]; *Siegel v. City of Chicago*, 223 Ill. 428, 79 N. E. 280 [1906]; *Lake Shore and Michigan*

Southern Railway Company v. City of Chicago, 144 Ill. 391, 33 N. E. 602 [1893]; *City of Elsberry v. Black*, 120 Mo. App. 20, 96 S. W. 256, 257 [1906]; *Mullane v. City of Newark*, — N. J. —, 68 Atl. 412 [1905]; *In the Matter of the Petition of the Emigrant Industrial Savings Bank*, 75 N. Y. 388 [1878]; *Brady v. New York*, 7 Abb. Pr. (N. Y.) 234; *Louchheim v. City of Philadelphia*, 218 Pa. 100, 66 Atl. 1121 [1907]; *Arday v. City of Dallas*, 13 Tex. Civ. App. 442, 35 S. W. Rep. 726; *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29 [1899]; *Dean v. Charlton*, 27 Wis. 522 [1871].

⁵ *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29 [1899].

exceeding a certain amount in value. The contract cannot be valid if based upon proposals which tend to restrict free competition.⁶ A statute providing that contracts shall be let to the lowest bidder, evidently contemplates that the proposals should be made upon a common basis and that there should not be any change therein after the bids are received and before the contract is let; since if a change were allowed it would be impossible to determine who the lowest bidder was. Accordingly it has been held that a city has no power to change the terms of a contract so as to differ materially from the advertisement or specifications which form the basis of the bids.⁷ Under a statute permitting recovery of an assessment if the work has been done and the property is properly to be charged therefor, notwithstanding any informality, irregularity or defect, a variance between the contract and the ordinance or advertisement is said not to be jurisdictional and if not prejudicial to property owners to be an irregularity which should be disregarded.⁸ Under a statute requiring the letting of contracts to the lowest bidder a provision in the contract that the contractor should do such extra work as the street commissioner should direct at a price to be fixed by the commissioner was held not to avoid the contract.⁹ Under such statutes the assessment is invalid if the improvement is not described in the ordinance with sufficient accuracy,¹⁰ since the bidders cannot know in advance for what they are bidding, and the public officials cannot determine who the lowest bidder is.¹¹ If the contract does not define what work is to be done and contains no reference to the ordinance or specifications which might supply such deficiency, such contract is so indefinite that it cannot be enforced and an assessment therefor is invalid.¹² Whether proposals may be advertised for and bids received without specifying the materials to be used, leaving the public corporation free to determine what material is to be used after learning the price at which each can be furnished is a question upon which there

⁶ *Anderson v. Fuller*, 51 Fla. 380, 41 So. 684 [1906].

⁷ *Mohr v. City of Chicago*, 114 Ill. App. 283 [1904].

⁸ *Ottumwa Brick & Construction Co. v. Ainley*, 109 Ia. 386, 80 N. W. 510 [1899].

⁹ *Allen v. Rogers*, 20 Mo. App. 290 [1886].

¹⁰ See § 856 *et seq.*

¹¹ *Piedmont Paving Co. v. Allman*, 136 Cal. 88, 68 Pac. 493 [1902]; *Wells v. Burnham*, 20 Wis. 112 [1865].

¹² *Schwiesau v. Mahon*, 110 Cal. 543, 42 Pac. 1065 [1895].

is a conflict of authority. Under some statutes it is held that such manner of ascertaining the lowest bidder is proper and that the material to be used need not be determined until after bids have been received.¹³ Under other statutes it is said that the object of requiring bids is to secure them for definite amounts for a particular kind of work, and that there can be no competitive bid in which the quality of the material to be furnished is to be considered as well as the price to be charged.¹⁴ A property owner who wishes to object on the ground that the contract was not let to the lowest bidder must interpose his objection before the contract has been performed.¹⁵ If a provision is made for confirming an assessment on a formal hearing, such objection must be interposed at that time. The property owner cannot wait until application is made for a judgment of sale for failure to pay such assessment.¹⁶ If a bid is made for doing work such as excavation at a certain amount per cubic yard instead of at a gross sum it has been held in some jurisdictions that such bid is invalid.¹⁷ In other jurisdictions a contract in which the price is fixed at a certain rate per unit of quantity is valid although the quantity is not fixed.¹⁸ Where it is impossible from the nature of the improvement to determine in advance the amount of excavation necessary, an assessment is valid although the ordinance does not specify the amount of excavation to be made if the contract is let at a certain rate per cubic yard.¹⁹ Where the amount of wood sheeting to be used could not be determined in advance and accordingly no quantity was specified, it was held that an

¹³ *Ex parte* City of Paducah, — Ky. —, 89 S. W. 302, 28 Ky. Law Rep. 412 [1905]; Attorney-General on the Relation of Cook v. City of Detroit, 26 Mich. 263 [1872]; Warren Brothers Co. v. City of New York, 190 N. Y. 297, 83 N. E. 59 [1907]; In the Matter of Ford, 6 Lansing (N. Y.) 92 [1872]; Parker v. City of Philadelphia, — Pa. St. —, 69 Atl. 670 [1908].

¹⁴ Piedmont Paving Co. v. Allman, 136 Cal. 88, 68 Pac. 493; Coggeshall v. City of Des Moines, 78 Ia. 235, 41 N. W. 617, 42 N. W. 650 [1889].

¹⁵ City of Bloomington v. Phelps, 149 Ind. 596, 49 N. E. 581 [1897]; Johnson v. Duer, 115 Mo. 366, 21

S. W. 800 [1893]; Sanford v. Mayor, etc., of the City of New York, 33 Barb. (N. Y.) 147 [1860]; Sanford v. Mayor, etc., of New York, 12 Abb. Pr. (N. Y.) 23 [1860].

¹⁶ Givins v. People ex rel. Raymond, 194 Ill. 150, 88 Am. St. Rep. 143, 62 N. E. 534 [1902].

¹⁷ Brady v. Mayor of New York, 20 N. Y. 312 [1859];

¹⁸ Cady v. City of San Bernardino, — Cal. —, 94 Pac. 242 [1908]; (contract for electric lights); Dickey v. Porter, 203 Mo. 1, 101 S. W. 586 [1907]; (amount of masonry).

¹⁹ Dickey v. Porter, 203 Mo. 1, 101 S. W. 586 [1907].

agreement to pay at one dollar per lineal foot per sewer for such sheeting as should be left in by the direction of the engineer did not invalidate the assessment.²⁰ A contract in which neither the quantity nor the price is fixed is clearly invalid.²¹ The legislature may provide that certain officials shall examine the work and give a certificate that the proceedings are free from fraud if they find such to be the fact. A certificate of this character is held to cure the omission to advertise for bids and let to the lowest bidder.²² Accepting a bid which is not the lowest is not a legal irregularity within the meaning of the New York statutes for vacating assessments and recovering money paid in.²³ If the statute requires the contract to be let to the lowest bidder, the city has no right to provide that it will determine who the lowest bidder is upon certain items only of the work to be done, since the bidder who is the lowest upon the specified items may be the highest upon the entire contract.²⁴ Under such statutes the city has no power to withhold one or more material items from competition by fixing arbitrarily the amount to be paid for the performance of certain kinds of work.²⁵ Thus, the city cannot fix an arbitrary rate for rock excavation.²⁶ Such assessment is not, however, entirely void, but void only as to the amount to be paid

²⁰ *City of Cincinnati v. Anchor White Lead Co.*, 44 O. S. 243, 7 N. E. 11 [1886].

²¹ *McBrien v. City of Grand Rapids*, 56 Mich. 95, 22 N. W. 206.

²² In the Matter of the Petition of Johnson, 103 N. Y. 260, 8 N. E. 399 [1886]; In the Matter of the Petition of Kendall, 85 N. Y. 302 [1881]; In the Matter of the Petition of Marsh, 21 Hun. (N. Y.) 582 [1880].

²³ In the Matter of the Application of Lange to Vacate an Assessment, 85 N. Y. 307 [1881]; *Sanford v. Mayor, etc., of New York*, 12 Abb. Pr. (N. Y.) 23 [1860]; *Horn's Case*, 12 Abb. Pr. (N. Y.) 124 [1861]; *Bennett's Case*, 12 Abb. Pr. (N. Y.) 127 [1861].

²⁴ *Brady v. Mayor, etc., of the City of New York*, 20 N. Y. 312 [1859]; *Brady v. Mayor, etc., of the City of New York*, 18 How. Pr. (N. Y.) 343 (affirming *Brady v. Mayor, Aldermen and Commonalty of New York*, 10

How. Pr. (N. Y.) 432; *Brady v. New York*, 7 Abb. Pr. (N. Y.) 234).

²⁵ *State, Hampton, Pros. v. Mayor and Aldermen of the City of Paterson*, 36 N. J. L. (7 Vr.) 159 [1873]; *Mutual Life Insurance Company of New York v. Mayor, Aldermen and Commonalty of the City of New York*, 144 N. Y. 494, 39 N. E. 386 [1895]; In the Matter of the Petition of Pelton to Vacate an Assessment, 85 N. Y. 651 [1881]; In the Matter of the Petition of Merriam to Vacate an Assessment, 84 N. Y. 596 [1881]; In the Matter of the Petition of the Manhattan Savings Institution to Vacate an Assessment, 82 N. Y. 142 [1880].

²⁶ In the Matter of the Petition of Pelton to Vacate an Assessment, 85 N. Y. 651 [1881]; *Mutual Life Insurance Company of New York v. Mayor, Aldermen and Commonalty of the City of New York*, 144 N. Y. 494, 39 N. E. 386 [1895]; In the

for rock excavation.²⁷ So where the rock excavation was seven-eighths of the work and it was possible to determine the quantity of such rock, a contract let on bids for the rest of the work and allowing to the lowest bidder on such remainder whatever price he chose to ask for the rock excavation is invalid.²⁸ If by statute the contract is to be let to the lowest bidder on the entire contract, the city cannot let the contract to one who bids at a certain rate per unit of quantity. The price thus offered depends upon the quantity of the work to be done which is to be determined later and which may prove much higher than some of the gross bids made in competition therewith. The city has, however, power to fix an arbitrary ratio between the prices of different kinds of work.²⁹ Thus, the action of the city in requiring bids to be made per cubic yard for rock excavation and allowing one-fourth of that price per cubic yard for earth excavation has been held not to be a violation of the statute.³⁰ Accordingly the city has a right to reject the lowest bid offered if in such bid the price for earth excavation was slightly more than one-fourth of that for rock excavation.³¹ Under such a method of bidding, however, the fraudulent conduct of the city officials in overestimating the quantity of rock to be excavated and underestimating the quantity of earth to be excavated, thus letting the contract to one whose bid is the lowest on the estimated quantities but is not the lowest with reference to the actual quantities

Matter of the Petition of Merriam to Vacate an Assessment, 84 N. Y. 596 [1881]; In the Matter of the Petition of the Manhattan Savings Institution to Vacate an Assessment, 82 N. Y. 142 [1880]; *Brady v. Mayor, etc., of the City of New York*, 18 How. Pr. (N. Y.) 343 [1859]; (affirming *Brady v. Mayor, Aldermen and Commonalty of New York*, 16 How. Pr. (N. Y.) 432).

²⁷ *Mutual Life Insurance Company of New York v. Mayor, Aldermen and Commonalty of the City of New York*, 144 N. Y. 494, 39 N. E. 386 [1895]; In the Matter of the Petition of Pelton to Vacate an Assessment, 85 N. Y. 651 [1881]; In the Matter of the Petition of Merriam, 84 N. Y. 596 [1881].

²⁸ *Brady v. Mayor, etc., of the City of New York*, 20 N. Y. 312 [1859]; *Brady v. Mayor, etc., of the City of New York*, 18 How. Pr. (N. Y.) 343; (affirming *Brady v. Mayor, Aldermen and Commonalty of New York*, 16 How. Pr. N. Y. 432).

²⁹ In the Matter of the Petition of Marsh to Vacate an Assessment, 83 N. Y. 431 [1881].

³⁰ In the Matter of Marsh, 83 N. Y. 431 [1881].

³¹ In the Matter of the Petition of Marsh to Vacate an Assessment, 83 N. Y. 431 [1881]. (In this case, while the accepted bid was not the lowest on the estimated quantities, it proved to be the lowest with reference to the actual quantities of earth and rock to be excavated.)

of rock and earth excavation entitles the property owner to relief.³² So does an honest but excessive mistake as to the actual quantities of excavation to be done.³⁴ Under a statute requiring the letting of a contract to the lowest bidder it has been held that the city has power to notify contractors in advance that bids in excess of a certain charge would not be considered.³⁵ The fact that a bid on a single section was lower than the price at which the entire contract was let does not invalidate the contract and assessment.³⁶ Under a statute requiring the contract to be let to the lowest bidder, a private contract between the successful bidder and the owners of some of the land to be assessed whereby he agreed to do the work at a certain rate in place of that awarded by the city was held to operate as a fraud upon the other owners and avoid the contract.³⁷ Conduct of this sort may also amount to fraud so as to invalidate the assessment.³⁸ Under a statute which authorizes the city to do the work if no bids are received, a city has no power to let a contract without competitive bidding, though no bids were received upon the first advertisement for bids,³⁹ or though all bids were rejected.⁴⁰ If the statute authorizing the assessment requires the record of the common council to show that there was a bidder for the performance of a local improvement whose bid was accepted, an assessment made without such record is said to be a nullity.⁴¹ It is frequently provided that certain city officials shall have power to dispense with the letting of contracts to the lowest bidder.⁴² Thus, such requirements may be dispensed with by

³² *Matter of Eightieth Street*, 17 Abb. Pr. (N. Y.) 324 [1864].

³⁴ In the *Matter of the Petition of Anderson*, 47 Hun. (N. Y.) 203 [1888].

³⁵ *Seaboard National Bank of New York v. Woesten*, 147 Mo. 467, 48 L. R. A. 279, 48 S. W. 939 [1898]. The members of the Board of Public Improvements had agreed among themselves not to consider any bid for maintenance in excess of fifty cents per square per annum.

³⁶ *Patterson v. Baumer*, 43 Ia. 477 [1876].

³⁷ *Brady v. Bartlett*, 56 Cal. 350 [1880].

³⁸ See § 485.

³⁹ *City of Elsberry v. Black*, 120 Mo. App. 20, 96 S. W. 256, 257 [1906].

⁴⁰ *Zorn v. Warren-Scharf Asphalt Paving Co.*, — Ind. App. —, 81 N. E. 672 [1907]. (The specifications were changed as to material and the contract let to one of the original bidders after reconsideration of the vote letting the contract to another bidder.)

⁴¹ *Whitney v. Common Council of the Village of Hudson*, 69 Mich. 189, 37 N. W. 184 [1888].

⁴² In the *Matter of the Petition of the Emigrant Industrial Savings Bank*, 75 N. Y. 388 [1878].

three-fourths of the common council,⁴³ or two-thirds of the council.⁴⁴ It may be provided that if the order and contract for an improvement are adopted by a vote of more than two-thirds of the aldermen elected, letting to the lowest bidder is not necessary.⁴⁵ A council cannot delegate to any other official discretion as to dispensing with such requirements.⁴⁶ If it is not shown that the required number of the council dispensed with advertising for bids, advertisement will be presumed to be necessary.⁴⁷ The city council not having authority to dispense with the requirement for letting contracts to the lowest bidder in the first instance cannot ratify a contract which is invalid for that reason.⁴⁸ The legislature has authority to dispense with such requirements in the first instance and accordingly may ratify and make valid contracts otherwise invalid by reason of omission to comply with such requirements.⁴⁹ In some jurisdictions, statutes making valid such contracts have been construed very strictly. Thus, a statute which provided for a re-assessment if the tax had been adjudged void for any irregularity in any of the proceedings in levying it, for any omission to comply with the forms of the law under which it was assessed or for non-compliance with any of the provisions of the city charter, in ordering or letting the work or making the contracts, was held not to include a contract void for failure to let to the lowest bidder, since such conduct was said to be a misfeasance and a violation of a plain provision of the law in fraud of the rights of the property owners.⁵⁰ A bid of a lump sum for several different improvements cannot be the basis of a valid contract, since the cost of each improvement is not fixed by competitive bidding.⁵¹

⁴³ In the Matter of the Petition of the Emigrant Industrial Savings Bank, 75 N. Y. 388 [1878].

⁴⁴ Siegel v. City of Chicago, 223 Ill. 428, 79 N. E. 280 [1906].

⁴⁵ City of Chicago v. Sherwood, 104 Ill. 549 [1882].

⁴⁶ In the Matter of the Petition of the Emigrant Industrial Savings Bank, 75 N. Y. 388 [1878].

⁴⁷ Siegel v. City of Chicago, 223 Ill. 428, 79 N. E. 280 [1906].

⁴⁸ Brady v. New York, 7 Abb. Pr.

(N. Y.) 234; Brady v. Mayor, etc., of New York, 20 N. Y. 312 [1859].

⁴⁹ In the Matter of the Petition of the President, Managers and Company of the Delaware & Hudson Canal Company, 60 Hun. (N. Y.) 204, 14 N. Y. Supp. 585 [1891].

⁵⁰ Dean v. Charlton, 27 Wis. 522 [1871].

⁵¹ People v. Common Council of City of Kingston, 189 N. Y. 66, 81 N. E. 557 [1907]; (order reversed 99 N. Y. S. 657, 114 App. Div. 326 [1906]).

§ 496 Advertising for bids.

There is no constitutional necessity of advertising for bids for a public improvement to be paid for by assessment.¹ The legislature has power to provide for an assessment, although there is no provision for advertising for bids or for letting the contract to the lowest bidder.² Provisions are frequently found in modern statutes which provide that contracts for public improvements must be let to the lowest bidder after letting of such contract has been given.³ It has been suggested that these statutes have been enacted in part for the purpose of affording to all an equal opportunity to obtain the employment which will be afforded by the construction of the public improvement.⁴ While this motive may have existed in part in the mind of the legislature, the real purpose of such statutes is to secure competition, obtain the lowest available price for the work to be done, prevent, as far as possible, fraudulent combinations between public officers and contractors, and thus to benefit tax payers or the property owners against whom assessments are to be levied for the improvement.⁵ Whether it is necessary to give notice of the letting of a contract and to let it to the lowest bidder is therefore a matter of statutory construction. A statute which provides for an estimate to be made by the city engineer and provides that in advertising for bids such estimate shall not be published does not prevent a city from making a valid contract without advertisements for bids and does not require the city to let the contract to the lowest bidder.⁶ If the statute provides that the letting of the contract must be advertised or published in some way, such provision, being for the benefit of the property owners, is mandatory and cannot be dispensed with by the city.⁷

¹ *City of Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142 [1905]; *Yarnold v. City of Lawrence*, 15 Kan. 126 [1875]; *Dean v. Borchsenius*, 30 Wis. 236 [1872].

² *City of Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142 [1905]; *Bennett v. City of Emmetsburg*. — Ia. —, 115 N. W. 582 [1908]; *Dean v. Borchsenius*, 30 Wis. 236 [1872].

³ See § 495.

⁴ *Galbreath v. Newton*, 30 Mo. App. 381.

⁵ *Mayor and City Councilmen of*

Baltimore v. Johnson, 62 Md. 225 [1884]; *Galbreath v. Newton*, 30 Mo. App. 381.

⁶ *Yarnold v. City of Lawrence*, 15 Kan. 126 [1875].

⁷ *City Improvement Co. v. Broderick*, 125 Cal. 139, 57 Pac. 776 [1899]; *Siegel v. City of Chicago*, 223 Ill. 428, 79 N. E. 280 [1906]; *Rogue v. People ex rel. Goedtner*, 224 Ill. 449, 79 N. E. 662 [1906]; *Bennett v. City of Emmetsburg*. — Ia. —, 115 N. W. 582 [1908]; *Comstock v. Eagle Grove City*, 133 Ia. 589, 111 N. W. 51

Under such statutes an assessment cannot be enforced if the contract is let or the improvement is constructed without such advertisement for bids.⁸ On the same principle, if the city by ordinance requires the board of public improvements to give notice of the letting of a public contract, such requirement is mandatory and the board of public improvements cannot dispense therewith.⁹ Bids may be advertised for, submitted and accepted before the improvement ordinance is passed, if the improvement provided for in the contract is the same as that ordered

[1907]; *Brookbank v. City of Jeffersonville*, 41 Ind. 406 [1872]; *McEwen v. Gilker*, 38 Ind. 233 [1871]; *Kretsch v. Helm*, 38 Ind. 207 [1871]; *City of Indianapolis v. Imberry*, 17 Ind. 175 [1861]; *Coggeshall v. City of Des Moines*, 78 Ia. 235, 41 N. W. 617, 42 N. W. 650 [1889]; *Warren v. Street Commissioners of the City of Boston*, 181 Mass. 6, 62 N. E. 951 [1902]; *Bowditch v. Superintendent of the Streets of Boston*, 168 Mass. 239, 46 N. E. 1046 [1897]; *Dickey v. Holmes*, 109 Mo. App. 721, 83 S. W. 982 [1904]; *Galbreath v. Newton*, 30 Mo. App. 381; *Poth v. Mayor, Aldermen and Commonalty of the City of New York*, 151 N. Y. 16, 45 N. E. 372 [1896]; *In the Matter of the Petition of Rosenbaum to Vacate an Assessment*, 119 N. Y. 24, 23 N. E. 172 [1890]; *In the Matter of the Petition of Rosenbaum*, 53 Hun. 478, 6 N. Y. Supp. 184 [1889]; *In the Matter of the Petition of Pennie*, 108 N. Y. 364, 15 N. E. 611 [1888]; *In the Matter of the Petition of Pennie to Vacate an Assessment*, 45 Hun. (N. Y.) 391 [1887]; *In the Matter of the Application of Lange to Vacate an Assessment*, 85 N. Y. 307 [1881]; *In the Matter of the Petition of the Emigrant Industrial Savings Bank*, 75 N. Y. 388 [1878]; *Mutual Life Insurance Company of New York v. Mayor, Aldermen and Commonalty of the City of New York*, 79 Hun. (N. Y.) 482, 29 N. Y. S. 980 [1894]; *Steese v. Oviatt*, 24 O. S. 248 [1873]; *Upton v.*

Oviatt, 24 O. S. 232 [1873]; *Appeal of Harper*, 109 Pa. St. 9, 1 Atl. 791 [1885]; *Breath v. City of Galveston*, 92 Tex. 454, 49 S. W. 575 [1899].

⁸ *Rogne v. People ex rel. Goedtner*, 224 Ill. 449, 79 N. E. 662 [1906]; *Brookbank v. City of Jeffersonville*, 41 Ind. 406 [1872]; *McEwen v. Gilker*, 38 Ind. 233 [1871]; *Kretsch v. Helm*, 38 Ind. 207 [1871]; *Moberry v. City of Jeffersonville*, 38 Ind. 198 [1871]; *City of Indianapolis v. Imberry*, 17 Ind. 175 [1861]; *Coggeshall v. City of Des Moines*, 78 Ia. 235, 41 N. W. 617, 42 N. W. 650 [1889]; *Bowditch v. Superintendent of Streets of Boston*, 168 Mass. 239, 46 N. E. 1046 [1897]; *Dickey v. Holmes*, 109 Mo. App. 721, 83 S. W. 982 [1904]; *Poth v. Mayor, Aldermen and Commonalty of the City of New York*, 151 N. Y. 16, 45 N. E. 372 [1896]; *In the Matter of the Petition of Pennie*, 108 N. Y. 364, 15 N. E. 611 [1888]; *In the Matter of the Petition of Pennie*, 45 Hun. 391 [1887]; *In the Matter of the Application of Lange*, 85 N. Y. 307 [1881]; *In the Matter of the Petition of the Emigrant Industrial Savings Bank*, 75 N. Y. 388 [1878]; *In the Matter of the Petition of Rosenbaum*, 53 Hun. (N. Y.) 478, 6 N. Y. Supp. 184 [1889]; *Appeal of Harper*, 109 Pa. St. 9, 1 Atl. 791 [1885]; *Breath v. City of Galveston*, 92 Tex. 454, 49 S. W. 575 [1899].

⁹ *Keane v. Cushing*, 15 Mo. App. 96 [1884].

by the ordinance.¹⁰ Advertisement for bids is notice of an improvement ordinance but is not notice of an assessment ordinance passed subsequently.¹¹

§ 497. Discretionary power to determine bidder.

Statutes which provide for letting public contracts on competition usually grant some discretionary power to the city or other public corporation which receives bids, to determine what bid is the most advantageous to the public interest. It is usually not required by such statutes that the bid should in all cases be let to the lowest bidder irrespective of other considerations as to the advisability or non-advisability of letting the contract to him. The discretion of the public authorities in determining who the best bidder is, is ordinarily not subject to review if fairly exercised.¹ The language employed in describing the person to whom the contract is to be let frequently shows that some discretion is conferred upon the city. Thus a provision that the contract should be let to the lowest responsible bidder² or the lowest reliable and responsible bidder³ or that bidders must satisfactorily prove their ability to perform their contracts⁴ shows that the city is to exercise its discretion in determining not only which of the bids is lowest in terms but which of the bidders are reliable and responsible. A city has power to reject a bid even of the lowest responsible bidder if it results from a combination of the bidders or if the successful bidder has so acted as to stifle competition and increase the contract price.⁵ If a

¹⁰ *City of Springfield to use of Central National Bank v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276 [1896]; (overruling in part *Feane v. Cushing*, 15 Mo. App. 96 [1884]).

¹¹ *Village of Morran Park v. Gahan*, 35 Ill. App. 646 [1899].

¹ *Inre v. Board of Public Works of Mobile*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678 [1902]; *Girvin v. Simon*, 116 Cal. 694, 48 Pac. 720 [1897]; *City of Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114 [1904]; *Civins v. People ex rel. Raymond*, 194 Ill. 150, 88 Am. St. Rep. 143, 62 N. E. 534 [1902]; *Clarton v. Taylor*, 49 Mo. App. 117 [1892]; *Case v. Inhabitants of City of Trenton*, — N. J. —, 68 Atl. 57 [1907]; *Find-*

ley v. City of Pittsburg, 82 Pa. St. (1 Norris) 351 [1876].

² *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678 [1902]; *Givins v. People ex rel. Raymond*, 194 Ill. 150, 88 Am. St. Rep. 143, 62 N. E. 534 [1902]; *Findley v. City of Pittsburg*, 82 Pa. St. (1 Norris) 351 [1876].

³ *City of Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114 [1904].

⁴ *Case v. Inhabitants of City of Trenton*, — N. J. —, 68 Atl. 57 [1907].

⁵ *Civins v. People ex rel. Raymond*, 194 Ill. 150, 88 Am. St. Rep. 143, 62 N. E. 534 [1902]. (This remark in this case is in the nature of an obiter since the assessment was ultimately held to be valid.)

bidder has been delinquent in a former contract with the city, the city officials may reject his bid even if it is the lowest of those offered.⁶ The determination of the city on questions of fact in determining who is the lowest and best bidder is regarded as final in the absence of fraud or misconduct.⁷ If a contract is awarded to one who is not the lowest and best bidder and there is a clear abuse of the discretion vested in the city officials, the contractor has no right to recover for the work done in any form of action.⁸ He cannot recover upon contract since the contract is invalid as not in compliance with the statute. He cannot recover in *quantum meruit* since the work was done under an express contract which is not merely void for failure to comply with the statute, but is in violation of the positive mandatory requirements of the statute necessary for the benefit of the tax payer.⁹ Under a statute requiring contracts to be let to the lowest responsible bidder, the city cannot by ordinance reserve the right of rejecting any and all proposals.¹⁰ The power to reject all bids if the city shall think it wise so to do is frequently, however, conferred by statute.¹¹

§ 498. Form and contents of bid.

The bid must conform to the terms of the proposal. If the proposal invites bids for the improvement of a street as a whole, bids for a part of the improvement may be disregarded.¹ Omission to distinguish in the bid between the portions of the improvement which are to be paid by property owners and those portions which are to be paid by the city does not invalidate the bid if such portions have been already fixed and the bid is not inconsistent with such determination.² Omission to give the formula of the wearing surface of the paving and to deposit samples may be waived by the city if the bidder names the

⁶ *Girvin v. Simon*, 116 Cal. 604, 48 Pac. 720 [1897].

⁷ *Clapton v. Taylor*, 49 Mo. App. 117 [1892].

⁸ *Brady v. New York*, 7 Abb. Pr. (N. Y.) 234.

⁹ *Brady v. New York*, 7 Abb. Pr. (N. Y.) 234.

¹⁰ *Lake Shore & Michigan Southern*

Railway Company v. City of Chicago, 144 Ill. 391, 33 N. E. 602 [1893].

¹¹ *Girvin v. Simon*, 116 Cal. 604, 48 Pac. 720 [1897].

¹ *Stimson v. Hanley*, 151 Cal. 379, 90 Pac. 945 [1907].

² *Beniteau v. Detroit*, 41 Mich. 116, 1 N. W. 899 [1879].

material and refers to streets paved therewith. A bid in which the name of the bidder is omitted is invalid.⁴ Public officials have no jurisdiction to let the contract to the person who actually presented such bid, and a contract thus let is void.⁵ If the statute requires each bid to contain an affidavit of the bidder that the bid is not collusive or a sham, a bid made by two persons containing the affidavit of but one is insufficient.⁶ The bid must comply with the ordinance under which the work is done. If the ordinance requires bidders to bid on each block of a street improvement separately a bid to grade the entire street at a certain sum per cubic yard is improper and if the contract is let thereon the lot owner can defeat the assessment.⁷ A contract can be awarded only to one who submits a bid thereon.⁸ If a bid is made by Hubbard Smith and Son, a contract cannot be awarded to Hubbard Smith individually.⁹

§ 499. Method of awarding contract.

It is necessary to the validity of a contract let on bids submitted therefor that the contract be awarded in the manner prescribed by law.¹ By statute in some jurisdictions notice of the award must be published. Such publication can be made lawfully only upon the order of the officials empowered to make such order. A publication of the notice without such order has no validity.² The clerk of the board having authority to make such order cannot publish the notice without the authority of the board.² If by statute the award of a contract may be approved in the

³ *Case v. Inhabitants of City of Trenton*, — N. J. —, 68 Atl. 57 [1907].

⁴ *Williams v. Bergin*, 129 Cal. 461, 62 Pac. 59 [1900].

⁵ *Williams v. Bergin*, 129 Cal. 461, 62 Pac. 59 [1900].

⁶ *Flinn v. Strauss*, 4 Cal. App. 245, 87 Pac. 414 [1906]. (Furthermore, neither the instrument or extrinsic evidence disclosed the official character of the person before whom it was sworn; and the name of the purported signer thereof did not appear as an affiant in the body of the affidavit.)

⁷ *City of Stockton v. Creanor*, 45 Cal. 643 [1873].

⁸ *Whitney v. Common Council of the Village of Hudson*, 69 Mich. 189, 37 N. W. 184 [1888].

⁹ *Whitney v. Common Council of the Village of Hudson*, 69 Mich. 189, 37 N. W. 184 [1888].

¹ *Reis v. Graff*, 51 Cal. 86 [1875]; *Himmelmann v. Satterlee*, 50 Cal. 68 [1875]; *Donnelly v. Tillman*, 47 Cal. 40 [1873]. Under some statutes letting the contract is not jurisdictional if notice has been given. *Menzie v. City of Greensburg*, — Ind. App. —, 85 N. E. 484 [1908].

² *Reis v. Graff*, 51 Cal. 86 [1875]; *Donnelly v. Tillman*, 47 Cal. 40 [1873].

³ *Himmelmann v. Satterlee*, 50 Cal. 68 [1875].

first instance either by the mayor or by a three-fourths vote of the city council, such award is not required to be presented in the first instance to the mayor for his approval.⁴ Since the object of these statutes is to protect the property owner by securing competitive bidding, the action of the board in awarding the contract on the day before that fixed for receiving bids, renders the contract and assessment thereon invalid.⁵ If the statute provides the time and place where the bids are to be opened, such provisions must be complied with in at least a substantial manner.⁶ A statute which requires that proposals or bids shall be examined in open session and publicly declared by the city council is mandatory. If the minutes of the board do not show in such proceeding, it must be presumed that it was not done, and that the assessment is thereby made void.⁷ If the proposals are opened and read in open session, they are publicly declared as required by statute.⁸ The proposals may be opened and the contract let at the day mentioned in the notice or at a meeting to which such meeting is adjourned,⁹ or if such adjourned meeting does not take place at some subsequent lawful meeting.¹⁰ This is true even if the statute requires the proposals to be opened on the day mentioned in the notice or upon such other day as the trustees may adjourn to for that purpose.¹¹ A record of the vote of council whereby it lets a contract is valid if made on sheets of roll-calls especially prepared for that purpose, though not set out in full in the general record book.¹² If the successful bidder refuses to make a contract, the city may re-advertise without passing a resolution.¹³ So it has been held that if the lowest bidder does not give the guaranty required by statute,

⁴ *Greenwood v. Morrison*, 128 Cal. 350, 60 Pac. 971 [1900].

⁵ *N. P. Perine Contracting & Paving Company v. Quackenbush*, 104 Cal. 684, 38 Pac. 533 [1894].

⁶ *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432 [1899]; *N. P. Perine Contracting & Paving Company v. Quackenbush*, 104 Cal. 684, 38 Pac. 533 [1894].

⁷ *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432 [1899].

⁸ *City Street Improvement Company v. Laird*, 138 Cal. 27, 70 Pac. 916 [1902].

⁹ *People ex rel. Knox v. Village of Yonkers*, 39 Barb. (N. Y.) 266 [1863];

¹⁰ *People ex rel. Knox v. Village of Yonkers*, 39 Barb. (N. Y.) 266 [1863].

¹¹ *People ex rel. Knox v. Village of Yonkers*, 39 Barb. (N. Y.) 266 [1863].

¹² *Nixon v. City of Burlington*, — Ia. —, 115 N. W. 239 [1908].

¹³ *City of Lexington ex rel. Menefee v. Commercial Bank*, — Mo. App. —, 108 S. W. 1095 [1908].

the engineer may let to the next lowest bidder.¹⁴ If, however, the council accepts a bid as the best, and then rejects it, it has been held that it cannot then accept another bid without a re-advertisement.¹⁵

§ 500. Method of giving notice for bids.

The statute usually provides for the method of giving notice of the letting of a contract, including both the time for which such notice must be given, and the means whereby it is to be given. Such statutes must be complied with at least substantially.¹ Whether under such statutes it is necessary after notice has once been given, to give a second notice if the contract is not let on receipt of the bids, is a question the solution of which depends upon the wording of the particular statutes. It has been said that unless the original order limits the time for receiving bids, a re-advertisement for bids is not necessary.² It will not be presumed that the time was limited in the absence of some evidence tending to establish that fact.³ Bids were advertised for and a contract let to the lowest bidders for paving a portion of the street specified in the advertisements, with a provision that the contractors were to pave further, if ordered. Under such contract it was not necessary for the council to re-advertise for bids if they desired the same contractors to pave the rest of such street.⁴ Proper notice of the letting of a contract was given and bids were received therefor. The council voted to reject all bids. Subsequently it reconsidered its action and accepted one of the bids without re-advertisement of the bids. It was held that such contract was valid and that re-

¹⁴ *Gibson v. Owens*, 115 Mo. 258, 21 S. W. 1107 [1892].

¹⁵ *Zorn v. Warren-Schaaf Asphalt Paving Co.*, — Ind. App. —, 84 N. E. 509 [1908].

¹ *Flickinger v. Fay*, 119 Cal. 590, 51 Pac. 855 [1893]; *Brooks v. Satterlee*, 49 Cal. 289 [1874]; *Hewes v. Reis*, 40 Cal. 255 [1870]; *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723 [1886]; *Kretsch v. Helm*, 45 Ind. 438 [1874]; *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 47 N. E. 397

48 N. E. 1042 [1897]; *Mayor and City Council of Baltimore v. Johnson*, 62 Md. 225 [1884]; *Roth v. Forsee*, 107 Mo. App. 471, 81 S. W. 913 [1904]; *Wilder v. City of Cincinnati*, 26 O. S. 284 [1875].

² *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301 [1901].

³ *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301 [1901].

⁴ *Brevoort v. City of Detroit*, 24 Mich. 322 [1872].

advertisement was not necessary.⁵ If a contract has been let to the lowest bidder on due advertisement but such contractor subsequently makes default and it becomes necessary to relet the contract, it is held under some statutes that it is as necessary to advertise for bids for reletting such contract as it is in the original letting of a contract.⁶ Under other statutes where the contractor is obliged to give bond for the performance of his work, it has been held that it is not necessary to advertise for the reletting of a contract on the theory that the liability of the contractor and his sureties is adequate indemnity against any additional expense in performing the contract and that if the price under the contract as relet is excessive, such loss falls on the defaulting contractor.⁷ If alterations may be made in the contract after it has been let,⁸ it has been held not to be necessary to advertise for bids for such alterations or additional work.⁹ This holding is based on the theory that it would not in most cases be practicable to let the contract to anyone but the original contractor and that to allow him to put in a bid without competition would be a violation of the spirit of the statute requiring advertisement for bids and might make the city or the property owners liable for a contract price greatly in excess of that which could have been obtained without such letting. On the one hand no more extended publication than that specified by statute is required. Under an ordinance requiring advertisement for bids for five days, the publication was made on Saturday, Sunday, Wednesday and Thursday. It was held that this was a substantial compliance with the ordinance since the ordinance did not specify publication upon consecutive dates.¹⁰ Under a statute requiring notice of letting contracts to be published for three weeks, a notice published May twenty-fifth, June first and June eighth for letting a contract on June sixteenth was held to be sufficient.¹¹ A statute requiring publication in a newspaper re-

⁵ *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501 [1887]; *Davies v. City of Saginaw*, 87 Mich. 439, 49 N. W. 667 [1891].

⁶ *Meuser v. Risdon*, 36 Cal. 239 [1868]; *Guinotte v. Egelhoff*, 64 Mo. App. 356 [1895].

⁷ In the matter of the *Petition of Seeds*, 53 N. Y. 400 [1873]; In the

matter of the *Petition of Gardner*, 6 Hun. (N. Y.) 67 [1875].

⁸ See § 495.

⁹ *Hastings v. Columbus*, 42 O. S. 585 [1885].

¹⁰ *Roth v. Forsee*, 107 Mo. App. 471, 81 S. W. 913 [1904].

¹¹ *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042 [1897].

quired such publication in one paper only. If the city by ordinance requires publication in two papers but acts under a publication in one paper only, such publication is sufficient, since the requirement of an additional newspaper, being imposed by the city can be waived by the city.¹² A statute requiring the giving of notice for a certain number of days ordinarily refers, not to the number of publications, but to the time that must elapse between the publication and the expiration of the time for receiving bids.¹³ Thus under a statute requiring at least a week's notice to be given by five consecutive publications, Sundays and legal holidays excepted, a publication from May fifteenth to nineteenth inclusive of a notice of a meeting of the board of contract to receive bids to be held May twenty-first was insufficient.¹⁴ So a statute providing for "giving notice for at least ten days by two publications in a newspaper" requires ten days between the last publication and the end of the time for receiving bids.¹⁵ Under a statute requiring three weeks notice, a notice the first publication of which was on the first and the last on the twenty-second of the month, the thirtieth being the last day for receiving bids, was held to be sufficient.¹⁶ In the absence of statute forbidding it, publication on Sunday is sufficient.¹⁷ Thus if a publication is to be given and continued in a paper for at least ten days a publication which began on the twelfth of a month and continued in each successive daily issue of that paper until the twenty-second inclusive was sufficient although one of the intervening publications was in the Sunday issue and although according to the custom of such paper no paper was issued on the Monday following.¹⁸ So the last publication may be made on Sunday in the absence of a statute specifically for-

¹² *City of Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112 [1895].

¹³ In the matter of the Petition of Pennie to vacate an assessment, 45 Hun (N. Y.) 391 [1887].

¹⁴ In the matter of the Petition of Pennie, 45 Hun. (N. Y.) 391 [1887]; In the Matter of Pennie, 19 Abb. N. C. 117.

¹⁵ *Comstock v. Eagle Grove City*, 133 Ia. 589, 111 N. W. 51 [1907].

¹⁶ *Shirk v. Hupp*, 167 Ind. 509, 78

N. E. 242, 79 N. E. 490 [1906].

¹⁷ *Carpenter v. City of St. Paul*, 23 Minn. 232 [1876]; *City of St. Joseph to the use of the Saxton National Bank v. Landis*, 54 Mo. App. 315 [1893].

¹⁸ *Carpenter v. City of St. Paul*, 23 Minn. 232 [1876]. See to the same general effect *City of St. Joseph to the use of the Saxton National Bank ex rel. v. Landis*, 54 Mo. App. 315 [1893].

bidding it.¹⁹ On the other hand if it is provided by statute that Sunday shall be excluded from the computation of the number of days of publication, full effect must be given to such statute.²⁰ Thus, under a statute requiring a notice inviting proposals for work to be published daily, Sundays excepted, in a daily newspaper for five days, the publication which began on Wednesday and ended on the following Sunday was insufficient.²¹ The last publication should have been on the Monday following.²² Under a statute requiring notice to be published a given number of times, publication on the day on which the contract was to be let should not be counted.²³ If the city council has directed a certain method of publication, the officers of the city must comply, substantially at least, with such method. Under an ordinance directing the city clerk to advertise for proposals in a newspaper and also by posting printed notices in five of the most public places in the city, publication by newspaper alone is not sufficient.²⁴ If a city council has directed publication of notices inviting proposals for work to be made in two newspapers, publication in one only is not a compliance with such order.²⁵ So if the ordinance requires publication in three newspapers, publication in one only is insufficient.²⁶ On the other hand a publication which falls short of a substantial compliance with the requirements of the statute is insufficient.²⁷ Thus a statute requiring a notice inviting sealed proposals for a contract for a street improvement to be posted for five days means five official days; that is, the notice must be posted before nine o'clock a. m. of the first day and must remain until four o'clock p. m. on the fifth day.²⁸ Under a statute which requires notice of proposals for public work to be posted for five days, posting such notice for

¹⁹ *Clapton v. Taylor*, 49 Mo. App. 117 [1892].

²⁰ *Alameda Macadamizing Company v. Huff*, 57 Cal. 331 [1881].

²¹ *Alameda Macadamizing Company v. Huff*, 57 Cal. 331 [1881].

²² *Alameda Macadamizing Company v. Huff*, 57 Cal. 331 [1881].

²³ *Roth v. Hax*, 68 Mo. App. 283 [1896].

²⁴ *Kretsch v. Helm*, 45 Ind. 438 [1874].

²⁵ *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723 [1886].

²⁶ *Mayor and City Council of Baltimore v. Johnson*, 62 Md. 225 [1884].

²⁷ *Hewes v. Reis*, 40 Cal. 255 [1870]; *Kretsch v. Helm*, 45 Ind. 438 [1874]; *Wilder v. City of Cincinnati*, 26 O. S. 284 [1875].

²⁸ *Himmelmann v. Cahn*, 49 Cal. 285 [1874]; *Brooks v. Satterlee*, 49 Cal. 289 [1874].

only three days is insufficient.²⁹ Under a statute requiring four weeks advertisement, advertisement for three weeks is not sufficient.³⁰ Under a statute requiring advertisement in two newspapers, an advertisement in English newspapers is *prima facie* required and an advertisement in one English newspaper and one German newspaper is insufficient.³¹

§ 501. Contents of notice for bids.

Technical accuracy is not necessary in the contents and form of the notice inviting proposals for work; but such notice must show that it is issued by proper authority, and must give such information, either on its face or by reference to specifications and the like, of the nature and kind of work to be done, as to enable the prospective bidders to bid thereon intelligently, and to inform them of the terms of the contract into which they are invited to enter.¹ Anything short of this would not secure the competition in bidding which is necessary to protect the interests of the public. Under a statute requiring the board of public works to advertise for bids, it has been held sufficient that if the advertisement purports to issue from the office of the board and states that bidders must file a satisfactory bond with the board and is signed with the name of the board.² The notice or advertisement must contain the intended requisites of the specifications of the proposed improvement,³ although it may refer to specifications on file for such information.⁴ Under a city ordinance requiring a notice to state the time and place where the contract is to be let and the time within which it is to be performed, a notice that bids would be received by the street committee at the city recorder's office until a specified date according to the ordinance requir-

²⁹ *Hewes v. Reis*, 40 Cal. 255 [1870].

³⁰ *Steese v. Oviatt*, 24 O. S. 248 [1873].

³¹ *Wilder v. City of Cincinnati*, 26 O. S. 284 [1875].

¹ *Owens v. City of Marion, Iowa*, 127 Ia. 469, 103 N. W. 381 [1905]; *Wilkins v. City of Detroit*, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427 [1881]; *State, Ogden, Pros. v. Mayor and Common Council of the City of Hudson*, 29 N. J. L. (5 Dutch.) 104 [1860].

² *Beniteau v. City of Detroit*, 41 Mich. 116, 1 N. W. 899 [1879]. (The board subsequently acted upon such advertisement and treated it as issued by their authority.)

³ *Wilkins v. City of Detroit*, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427 [1881].

⁴ *Owens v. City of Marion, Iowa*, 127 Ia. 469, 103 N. W. 381 [1905]; *Clinton v. City of Portland*, 26 Or. 410, 38 Pac. 407 [1894].

ing such bids to be let to the lowest bidder and that the grading should be completed within sixty days and the graveling within ninety days from the date of letting the contract complies sufficiently with the ordinance.⁵ If the statute requires the advertisement to show the date after which bids will not be received, it is not necessary for council to fix such date.⁶ Thus under a statute requiring a notice and specifications to be posted for five days and also to be published in a newspaper for five days, a resolution passed on December the sixteenth ordered such notice and publication. On December thirtieth the council opened the bids and awarded the contract. This was held to be a sufficient compliance with the statute.⁷ An advertisement announced that proposals would be received up to twelve o'clock M. on Saturday September nineteenth. In that year the nineteenth came on Sunday. The bids were opened and the contract awarded Saturday September eighteenth at seven-thirty p. m. This was held to be a sufficient compliance with the notice.⁸ A three weeks notice that bids would be received up to five o'clock of a certain day was held sufficient although the resolution provided for giving the bids up to six o'clock of such day.⁹ The fact that a notice inviting sealed proposals for grading a street uses the term "regraded" instead of "graded" does not invalidate the notice.¹⁰ If a discrepancy or mistake in a notice is such as to mislead bidders and prevent the competition which it is the purpose of the statute to secure, such notice is insufficient.¹¹ Thus a notice was dated May thirteenth and stated that bids would be received up to Monday evening May thirteenth. Monday came on the eighteenth and on Monday the eighteenth the bids were opened. It was held that the notice was not sufficient.¹² If the time for completing the contract is of the essence thereof, such time should in some way be shown by the advertisement.¹³ How-

⁵ *Roach v. City of Eugene*, 23 Or. 376, 31 Pac. 825 [1893].

⁶ *Beckett v. Morse*, 4 Cal. App. 228, 87 Pac. 408 [1906].

⁷ *Beckett v. Morse*, 4 Cal. App. 228, 87 Pac. 408 [1906].

⁸ *Case v. Fowler*, 65 Ind. 29 [1878].

⁹ *Shirk v. Hupp*, 167 Ind. 509, 78 N. E. 242 [1906].

¹⁰ *Brady v. Feisel*, 53 Cal. 49 [1878].

¹¹ *Yeakel v. City of Lafayette*, 48

Ind. 116 [1874]; *Richardson v. Mehler*, 111 Ky. 408, 23 Ky. Law Rep. 917, 63 S. W. 957 [1901]; *Ladd v. Spencer*, 23 Or. 193, 31 Pac. 474 [1892].

¹² *Yeakel v. City of Lafayette*, 48 Ind. 116 [1874]. (Furthermore, the notice was not published for the required period of time.)

¹³ *Richardson v. Mehler*, 111 Ky. 408, 23 Ky. Law Rep. 917, 63 S. W. 957 [1901].

ever, if no objection is made to the contract on this ground until the contract has been let and performed and the work accepted the objection comes too late.¹⁴ A notice which specifies work not authorized in the ordinance is invalid.¹⁵ The fact that an erroneous notice was published does not invalidate a subsequent correct notice, at least if there is no showing that any one was misled by the first notice.¹⁶ Advertisements for proposals for materials for a number of distinct improvements is held to be valid where the statute does not require the entire contract to be let on bids.¹⁷

§ 502. Proof of publication for bids.

In the absence of a statute requiring proof of publication by affidavit, such form of proof is not necessary.¹ The fact of publication may therefore be proved by oral testimony.² In the absence of evidence it will ordinarily be presumed that the notice was properly given.³ Thus if two notices were published and the first notice was defective as not stating the grade properly, and as not being published for the required time, and the award was made under the second notice, it will be presumed that the second notice was valid.⁴ So if there is no satisfactory evidence to show that bids were advertised for or received except the fact that the contract shows that it was let on bids had for that purpose, it will be presumed that bids were received regularly in the absence of further evidence.⁵

§ 503. Effect of failure to give notice for bids.

The statute which requires a notice inviting proposals for work frequently prescribes what effect shall be given to a failure to comply therewith. Since the legislature has power to dispense

¹⁴ *Richardson v. Mehler*, 111 Ky. 408, 23 Ky. Law Rep. 917, 63 S. W. 957 [1901].

¹⁵ *City of Louisiana v. Shaffner*, 104 Mo. App. 101, 78 S. W. 287 [1903].

¹⁶ *Gilmore v. City of Utica*, 131 N. Y. 26, 29 N. E. 841 [1892].

¹⁷ *Alberger v. Mayor and City Council of Baltimore*, 64 Md. 1, 20 Atl. 988 [1885].

¹ *City of Nevada to Use of Gilfillan v. Morris*, 43 Mo. App. 586 [1891].

² *City of Nevada to Use of Gilfillan v. Morris*, 43 Mo. App. 586 [1891].

³ *Himmelman v. Carpentier*, 47 Cal. 42 [1873]; *Spaulding v. Baxter*, 25 Ind. App. 485, 58 N. E. 551 [1900]; *City of Marshall to Use of Jacoby v. Rainey*, 78 Mo. App. 416 [1898].

⁴ *Himmelman v. Carpentier*, 47 Cal. 42 [1873].

⁵ *City of Marshall to Use of Jacoby v. Rainey*, 78 Mo. App. 416 [1898].

entirely with advertisement, it has power to prescribe the effect of a defective or incomplete advertisement.¹ Accordingly if it is provided that the assessment shall not be void for failure to advertise, but that the increased cost due to failure to secure competition shall be deducted from the amount of the assessment full effect must be given to such provision.² So if it is provided by statute that in case of irregularities an assessment may nevertheless be enforced to the extent that expense has been incurred which is a proper charge upon the property, failure to advertise does not avoid the assessment entirely but is merely ground for reducing it to the amount of the proper charge.³ At what stage of the proceedings the objection can be interposed that there was no sufficient advertisement is a question upon which there is a conflict of authority. In some jurisdictions it is said that such objection cannot be made after the work is completed.⁴ If no objection is made to the contract by reason of defective advertising until after the performance of such contract, it is generally said that objection is then too late and that the defects must be regarded as waived,⁵ at least in the absence of fraud⁶ or of a showing that the price to be paid for the work has been increased by failure to advertise for bids.⁷ In other jurisdictions it is said that such objection cannot be made before any taxes have been levied or assessments made to pay for the work.⁸ In other jurisdictions it is said that a tax payer cannot raise such objection at all by an action against the city and the contractor to restrain payment under such contract.⁹ In jurisdictions where the property owner cannot attack the validity of the contract at all, he cannot show that a contract was defective because proper advertisement for bids was not made.¹⁰

¹ In the Matter of Rosenbaum, 119 N. Y. 24, 23 N. E. 172 [1890].

² In the Matter of Rosenbaum, 119 N. Y. 24, 23 N. E. 172 [1890].

³ Matter of McCormack, 60 Barb. (N. Y.) 126 [1870]; Matter of McCormack, 10 Abb. Pr. N. S. (N. Y.) 234 [1870]; Upington v. Oviatt, 24 O. S. 232 [1873]; Steese v. Oviatt, 24 O. S. 248 [1873]; Taylor v. Wapakoneta, 26 Ohio C. C. 285 [1904].

⁴ Bacas v. Adler, 112 La. 806, 36 So. 739 [1904].

⁵ Wabash Avenue, 26 Pa. Super. Ct. 305 [1904].

⁶ Wabash Avenue, 26 Pa. Super. Ct. 305 [1904].

⁷ Taylor v. Wapakoneta, 26 Ohio C. C. 285 [1904].

⁸ Ballard v. City of Appleton, 26 Wis. 67 [1870].

⁹ Brady v. Mayor of the City of New York, 35 Howard (N. Y.) 81 [1868].

¹⁰ Brientnall v. City of Philadelphia, 103 Pa. St. 156 [1883].

§ 504. Power to order or dispense with advertisement for bids. .

If the statute requires advertisement for bids and such advertisement is in fact had, it is not necessary that the ordinance should contain a provision therefor.¹ The fact that advertisement is made before the passage of the ordinance ordering the streets to be paved does not of itself validate the contract and assessment if the city subsequently acts upon such advertisement, treating it as valid.² If the legislature has conferred upon certain specified public officials authority to order advertisement for bids, such advertisement can be ordered only by the officials specified.³ In the absence of statutory authority a board or council having authority to order advertisement for bids cannot delegate such power to their clerk even by a general resolution giving him such authority.⁴ If the board having authority to provide for advertisement for bids orders such clerk to advertise for a specific improvement, such order is sufficient, although it does not require sealed proposals or specify the time or place of giving notice.⁵ Such general order must be considered with reference to the requirements of statute. Accordingly general authority to advertise for proposals is construed as meaning authority to advertise for the time provided by law.⁶ If an order is made for advertisement for bids in a designated newspaper, a subsequent order to re-advertise without designating the newspaper will be construed as meaning a re-advertisement in the same paper.⁷ An order by the city council for the publication of a notice inviting proposals is not invalid because the clerk of the council and not the council has fixed the time within which proposals are to be presented.⁸ If a resolution for advertisement for bids contains the designation of a newspaper placed thereon with a rubber stamp, it will be presumed that the clerk did his duty and read such name to the council and not the name of another newspaper which was subsequently inserted after erasure of the

¹ *Bambrick v. Campbell*, 37 Mo. App. 460 [1889].

² *City of Springfield to Use of Central National Bank v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276 [1896]; (overruling in part *Keane v. Cushing*, 15 Mo. App. 96 [1884]).

³ *Meuser v. Risdon*, 36 Cal. 239 [1868].

⁴ *Meuser v. Risdon*, 36 Cal. 239 [1868].

⁵ *Himmelman v. Byrne*, 41 Cal. 500 [1871].

⁶ *Shepard v. Colton*, 44 Cal. 628 [1872].

⁷ *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301 [1901].

⁸ *Belser v. Allman*, 134 Cal. 399, 66 Pac. 492 [1901].

former name.⁹ Accordingly if the advertisement was in fact made in such other newspaper and its name was inserted later, such publication is insufficient.¹⁰ If by statute some official or board is given authority to dispense with advertisement for bids, such power can be exercised only by such official and not by any other person.¹¹ Thus, if council is authorized to dispense with advertisement by a three-fourths vote it cannot by a general resolution delegate such power to any other official.¹² Thus, council cannot by a three-fourths vote authorizing the commissioner of public works to construct an improvement "by days work or in such manner as the said commissioner may deem expedient for the best interests of the city and the property owners" empower him to dispense with letting contracts.¹³ A statute authorizing the mayor to give written authority to dispense with advertising for bids does not empower him to ratify a contract by indorsing his approval thereon after it is made.¹⁴

§ 505. Statutes requiring appropriation or sufficient funds in the treasury.

By recent statutes in some jurisdictions it is provided that contracts for improvements cannot be made unless there is sufficient money in the treasury to pay the cost thereof, or under some statutes, unless some designated official has filed a certificate to the effect that there is sufficient money in the treasury. Statutes of this class have been enacted in order to prevent the city from plunging deeper into debt. Such statutes do not accordingly apply to improvements which are to be paid for by a special assessment and not out of the general treasury.¹ Such a statute

⁹ California Improvement Company v. Moran, 128 Cal. 373, 60 Pac. 969 [1900].

¹⁰ California Improvement Company v. Moran, 128 Cal. 373, 60 Pac. 969 [1900].

¹¹ Warren v. Street Commissioners of the City of Boston, 181 Mass. 6, 62 N. E. 951 [1902].

¹² Phelps v. Mayor, Aldermen and Commonalty of the City of New York, 112 N. Y. 216, 2 L. R. A. 626, 19 N. E. 408 [1889].

¹³ In the Matter of the Petition of the Trustees of the Presbytery of

New York, 9 Daly (N. Y.) 116 [1879].

¹⁴ Warren v. Street Commissioners of the City of Boston, 181 Mass. 6, 62 N. E. 951 [1902].

¹ Risley v. City of St. Louis, 34 Mo. 404 [1864]; Eddy v. City of Omaha, 72 Neb. 550, 101 N. W. 25 [1904]; (modified on rehearing, 102 N. W. 70, 103 N. W. 692 [1905]); Comstock v. Incorporated Village of Nelsonville, 61 Ohio St. 288, 56 N. E. 15 [1899]; City of Cincinnati v. Holmes, 56 Ohio St. 104, 46 N. E. 514 [1897].

is, however, applicable to so much of the cost of the improvement as is to be paid by the city out of the funds raised by general taxation.² The contractor must ascertain at his peril whether such certificate has been made and filed or not.³ After the city has in fact paid its share of the cost of an improvement a property owner who is assessed for his share cannot object on the ground that the city had not money in the treasury when it entered into such contract.⁴ By some statutes it is provided that a public contract cannot be entered into unless an appropriation of the funds necessary therefor has first been made.⁵ Such statutes do not apply to the cost of improvements which are to be paid for by special assessment and not out of the general treasury.⁶ Such a provision does, however, apply to the share of an assessment to be borne by the city.⁷

§ 506. Necessity of collecting assessment in advance of contract.

It may be provided that public officials cannot make contracts for improvements unless the money therefor is already in their hands.¹ Such statute, however, has been regarded as applicable to expenses payable out of funds raised by general taxation and not to expenses payable by local assessment.² In California the constitution once provided that an assessment must be levied and collected for a given improvement before a contract could be made for the construction of such improvement. This provision was held to be self executing, to require no legislation to enforce it; and when it went into effect, to invalidate prior statutes permitting the contract to be made before the assessment was levied.³ A constitutional amendment which abrogated this provision was attacked as invalid on the ground that it was not copied

² *Comstock v. Incorporated Village of Nelsonville*, 61 Ohio St. 288, 56 N. E. 15 [1899].

³ *Comstock v. Incorporated Village of Nelsonville*, 61 Ohio St. 288, 56 N. E. 15 [1899].

⁴ *Eddy v. City of Omaha*, 72 Neb. 550, 101 N. W. 25 [1904]; (modified, on rehearing, 102 N. W. 70, 103 N. W. 692 [1905]).

⁵ *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304 [1885].

⁶ *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304 [1885]; *Hill v. Swing-*

ley, 159 Mo. 45, 60 S. W. 114 [1900]; *In the Matter of Lewis*, 51 Barb. (N. Y.) 82 [1868]; *In the Matter of Lewis*, 35 Howard (N. Y.) 162 [1868].

⁷ *City of Harrisburg v. Shepler*, 190 Pa. St. 374, 42 Atl. 893 [1899].

¹ *Badger v. Inlet Swamp Drainage District*, 42 Ill. App. 79 [1890].

² *State of Kansas on the Relation of Young v. City of Neodesha*, 3 Kans. App. 319, 45 Pac. 122 [1896].

³ *McDonald v. Patterson*, 54 Cal. 245 [1880].

on the journal but was referred to by title and number, but such amendment was held to be valid.⁴

§ 507. Constitutional or statutory limit of indebtedness.

By the provisions of many recent statutes a limit of indebtedness has been fixed for cities and other public corporations beyond which they have no authority to go. Such provisions have no application to contracts for public improvements where no liability of any kind is undertaken by the city, but the contractor has agreed to look solely to the assessments to be levied and collected for his compensation for such work.¹ A provision fixing the debt limit is said not to prevent a city from being liable for failure or omission to collect an assessment where the contractor has bound himself to look to the assessments for compensation, though such liability exceeds the debt limit.² If the contract for public improvements causes a personal liability against the city such contract is within the provision of the statute fixing the debt limit.³ If the debt limit has been exceeded, a contract of this sort made thereafter is invalid even if the city is to reimburse itself by assessment for the expenses thus incurred.⁴ However, it has been held that a limitation of the power of a city to borrow money for general purposes does not restrict its power to borrow money for the construction of sidewalks for which the

¹ *Oakland Paving Co. v. Tompkins*, 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801; (affirmed in *Thompson v. Ashworth*, 73 Cal. 73, 14 Pac. 615 [1887]); *Thomason v. Ruggles*, 69 Cal. 465, 11 Pac. 20 [1886]. The court had previously divided on this question, *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3 [1886].

² *The Jacksonville Railway Company v. City of Jacksonville*, 114 Ill. 562, 2 N. E. 478 [1886]; *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890]; *Grunewald v. City of Cedar Rapids*, 118 Ia. 222, 91 N. W. 1059 [1902]; *Swanson v. City of Ottumwa*, 118 Iowa 161, 59 L. R. A. 620, 91 N. W. 1048 [1902]; *Ft. Dodge Electric Light & Power Company v. City of Ft. Dodge*, 115 Ia. 568, 89 N. W. 7 [1902]; *City of Clinton v. Walliker*,

98 Ia. 655, 68 N. W. 431 [1896]; *Tuttle v. Polk & Hubbel*, 92 Ia. 433, 60 N. W. 733 [1894]; *State of Kansas on the Relation of Young v. City of Neodesha*, 3 Kans. App. 319, 45 Pac. 122 [1896]; *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629 [1898]; *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600 [1896]; *Little v. City of Portland*, 26 Ore. 235, 37 Pac. 911 [1894]; *City of Galveston v. Loonie*, 54 Tex. 517 [1881]; *Smith v. City of Seattle*, 25 Wash. 300, 65 Pac. 612 [1901].

³ *Addyston Pipe & Steel Company v. City of Corry*, 197 Pa. St. 41, 80 Am. St. Rep. 812, 46 Atl. 1035 [1900]; See § 1508 *et seq.*

⁴ *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898].

⁵ *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898].

city was ultimately to be reimbursed by assessment.⁵ If the contract is entered into after the city has exceeded its debt limit, and such contract imposes a personal liability upon the city, it has been held that the property owner is not entitled to any relief if he is not assessed more than his proportionate share of the cost of improvement and the assessment does not exceed the benefits to his property. The fact that the city cannot be held liable has been said not to invalidate the assessment as to the share of the property owners.⁶ Such assessment is invalid as to the share of the city if the debt limit has been exceeded.⁷ The property owner, however, cannot defend against liability on the ground that the city is not liable for its share as long as no attempt is made to impose the share of the city upon the property owner.⁸ It has been said that a general tax payer may sue to restrain the public corporation from paying its share of the assessment if the debt limit has been reached.⁹ The question of the power of the city to make such contracts and incur such liability is said not arise until the city seeks to borrow money or to incur an indebtedness of some sort under such contract.¹⁰ The mere making of the contract does not seem to be regarded as the incurring of such debt.¹¹ If bonds are to be issued they count as a debt only from the time that they are actually issued.¹² A statutory provision for a re-assessment precludes the property owner from objecting that the contract was originally invalid as exceeding the debt limit.¹³

⁵ *City of Galveston v. Heard*, 54 Tex. 420 [1881].

⁶ *City of Galveston v. Loonie*, 54 Tex. 517 [1881]; *Beaser v. Barber Asphalt Paving Company*, 120 Wis. 599, 98 N. W. 525 [1904].

⁷ *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768 [1899]; *Ft. Dodge Electric Light & Power Company v. City of Ft. Dodge*, 115 Ia. 568, 89 N. W. 7 [1902]; *O'Malley v. Olyphant Borough*, 198 Pa. St. 525, 48 Atl. 483 [1901].

⁸ *People ex rel. Mammen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895]; *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768 [1899]; *Hughes v. Parker*, 148 Ind. 692, 48 N. E. 243 [1897]; *Ft. Dodge Electric Light & Power Company v. City of Ft. Dodge*, 115 Ia. 568, 89 N. W. 7 [1902].

⁹ *O'Malley v. Olyphant Borough*, 198 Pa. St. 525, 48 Atl. 483 [1901].

¹⁰ *The Jacksonville Railway Company v. City of Jacksonville*, 114 Ill. 562, 2 N. E. 478 [1886]; *Osborn v. Sutton*, 108 Ind. 443, 9 N. E. 410 [1886]; *Redding v. Esplen Borough*, 207 Pa. St. 248, 56 Atl. 431 [1903].

¹¹ *The Jacksonville Railway Company v. City of Jacksonville*, 114 Ill. 562, 2 N. E. 478 [1886]; *Osborn v. Sutton*, 108 Ind. 443, 9 N. E. 410 [1886]; *Redding v. Esplen Borough*, 207 Pa. St. 248, 56 Atl. 431 [1903].

¹² *Redding v. Esplen Borough*, 207 Pa. St. 348, 56 Atl. 431 [1903].

¹³ *State v. District Court of Blue Earth County*, 102 Minn. 482, 113 N. W. 697, 114 N. W. 654 [1907].

§ 508. Other restrictions on indebtedness.

A constitutional provision to the effect that whenever any county or city is authorized to contract an indebtedness it shall be required at the same time to provide for the collection of an annual tax therefor, does not apply to cities empowered prior to such constitution to contract indebtedness, until the legislature has passed statutes putting such constitutional provision into operation as to such cities.¹ Hence, under prior statutes which remain in force, cities may incur debts for such public improvements as streets and sewers, though they thereby exceed the debt limit.² A statute which restricts the tax rate to a certain prescribed percentage applies *prima facie* to general taxation and not to special assessments.³ Authority to a city to anticipate the collection of a street paving tax by borrowing money and pledging such tax authorizes a loan for which it may be necessary to pledge such tax to be levied for several successive years.⁴ A city may, by statute, be forbidden to spend more than its annual revenue.⁵ Such a statute, if made applicable to cities and police juries does not apply to levee districts.⁶

§ 509. Necessity of contractor's giving bond or security.

Occasionally statutes prescribe that a contractor must give bond for the faithful performance of the work. In some jurisdictions failure to give bond invalidates further proceedings.¹ In other jurisdictions under such statutes, failure to give bond is said not to invalidate subsequent proceedings.² In other jurisdictions failure to give bond is at least admissible in evidence as tending to show that no contract has in fact been let.³ If a bond has

¹ City of Lexington on Appeal, 96 Ky. 258, 28 S. W. 665 [1894]; Holzhauser v. City of Newport, 94 Ky. 396, 22 S. W. 752 [1893].

² Holzhauser v. City of Newport, 94 Ky. 396, 22 S. W. 752 [1893].

³ Dyer v. City of Newport (Ky.), 26 Ky. L. 204, 80 S. W. 1127 [1904]; Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860 [1898].

⁴ Coggeshall v. City of Des Moines, 78 Ia. 235, 41 N. W. 617, 42 N. W. 650 [1889].

⁵ State ex rel. Woulfe v. St. Paul, Judge, 107 La. 777, 32 So. 88 [1901].

1902]. See also, Jones v. City of Cincinnati, 18 Ohio 318.

⁶ Hughes v. Board of Commissioners of Caddo Levee District, 108 La. 146, 32 So. 218 [1901-1902].

¹ Bowditch v. Superintendent of Streets of Boston, 168 Mass. 239, 46 N. E. 1046 [1897]; (In this case there was also a failure to advertise for bids.)

² Larned v. Maloney, 19 Ind. App. 199, 49 N. E. 278 [1898]; Thurston v. City of Elmira, 10 Abb. Pr. N. S. (N. Y.) 119 [1868].

³ Manning v. Den, 90 Cal. 610, 27 Pac. 435 [1891].

in fact been given, but it is irregular, such irregularities, if not taken advantage of at the time, are ordinarily regarded as waived.⁴ Thus the fact that the preliminary bond binding the contractor to enter into the contract if his bid should be accepted is a few dollars less than ten per cent. of the aggregate amount of the proposal,⁵ or that such preliminary bond is not filed,⁶ or the fact that the contractor has not filed his bond as provided by statute,⁷ or the fact that the superintendent of streets has not approved the bond of the contractor⁸ or the fact that under a statute requiring one bond to be given when the bid is made which is to cover not only the execution of the contract but its performance, council has required two bonds, one to accompany the bid binding the contractor to enter into the contract, and the other executed on the award of the contract and conditioned for its performance,⁹ none of them invalidate the assessment. Under a municipal ordinance requiring bonds to be given by the contractors for the building of certain water works in the amount of the contract price without stating when such bond was to be given, it was held that a bond given on the completion of the contract and when the first installment of the contract price was due was given in sufficient time.¹⁰ Under an ordinance requiring the city engineer to specify the amount of security to be given, it is sufficient if in accordance with the custom of the engineer's office, the amount of security, based on the amount of the bid, is inserted in the specifications.¹¹ By con-

⁴ *Greenwood v. Morrison*, 128 Cal. 350, 60 Pac. 971 [1900]; *Conde v. City of Schenectady*, 164 N. Y. 258, 58 N. E. 130 [1900]; The sureties cannot avoid liability by showing that the city authorities did not approve the bond: *People v. Carroll*, — Mich. —, 115 N. W. 42 [1908].

⁵ *Greenwood v. Morrison*, 128 Cal. 350, 60 Pac. 971 [1900].

⁶ *Cady v. City of San Bernardino*, — Cal. —, 94 Pac. 242 [1908].

⁷ *Larned v. Maloney*, 19 Ind. App. 199, 49 N. E. 278 [1898].

⁸ *Miller v. Mayo*, 88 Cal. 568, 26 Pac. 364 [1891].

⁹ *Conde v. City of Schenectady*, 164 N. Y. 258, 58 N. E. 130 [1900]; (In this case, however, another sec-

tion of the charter made valid every assessment for the purpose authorized by the charter "notwithstanding any irregularity, omission or error in any of the proceedings relating to the same.")

¹⁰ *Hallock v. City of Lebanon*, 215 Pa. St. 1, 64 Atl. 362 [1906]. For the construction of a bond conditioned to pay "any and all persons, any and all sums of money which may be due for labor and material supplied or performed in and about such work," see *City of Philadelphia to Use v. H. C. Nichols Company*, 214 Pa. St. 265, 63 Atl. 886 [1906].

¹¹ *Gilsonite Construction Co. v. Arkansas McAlester Coal Co.*, 205 Mo. 49, 103 S. W. 93 [1907].

tract, the city may be authorized to retain enough of the contract price to indemnify the city against all suits against it due to the defective construction of the improvement or to the negligence of the contractor.¹² A bond given by a contractor to indemnify persons damaged by reason of the contractor's failure to perform his contract through injuries arising in the process of construction does not enure to the benefit of the owners of property assessed.¹³ By statute it may be provided that the bidder for the construction of a public improvement must advance to the superintendent of streets or some designated public official the cost of the publication of notices, resolutions, orders and other specified expenses.¹⁴ Such statute is intended for the protection and benefit of those to whom such expenses are to be paid and for the protection of the city and the official to whom such payment is to be made. It is not intended for the benefit of the abutting property owners and if the persons entitled to the payment of such expenses file a written waiver of their right to have such expenses collected from the contractor in advance and such expenses are accordingly not so collected, such omission does not invalidate the assessment.¹⁵ In the absence of special statutory provisions, it has been held that a provision that all damage arising from the nature of the work should be borne by the contractor and that he should indemnify the city against all suits brought on account of damages from the action of the contractor, imposes conditions which tend to increase the cost of the work and to add to the burden of the property owners, and is therefore void.¹⁶

§ 510. Contract must conform to resolution or ordinance.

If a public improvement is constructed by a city a resolution or ordinance is usually made necessary by statute and forms the basis of subsequent proceedings.¹ Such resolution or ordinance is the sole authority which the officers of the city have for entering into such contract and constructing such improvement. Furthermore, under statutes which require a contract to be let

¹² Sweeten v. City of Millville, — N. J. —, 66 Atl. 923 [1907].

¹³ Grams v. Murphy, — Minn. —, 114 N. W. 753 [1908].

¹⁴ Fletcher v. Prather, 102 Cal. 413, 36 Pac. 658 [1894].

¹⁵ Fletcher v. Prather, 102 Cal. 413 36 Pac. 658 [1894].

¹⁶ Wollacott v. Meekin, 151 Cal. 701, 91 Pac. 612 [1907].

¹ See § 830 *et seq.*; § 837 *et seq.*; § 840.

to the lowest bidder it is, as has been said elsewhere,² essential that the terms of the contract into which the bidders are invited to enter should be set forth in order that the bidders may know what liability they are about to assume, and in order that the city officials may be able to determine who is in fact the lowest bidder. From these considerations it follows that the contract which is entered into must conform substantially to the requirements of the resolution or ordinance. If it does not so conform there is on the one hand no authority for entering into such contract and on the other hand it is impossible to tell who is the lowest bidder to whom the contract should have been awarded. Accordingly, if the contract does not conform substantially to the resolution or ordinance, it is invalid and cannot be the basis of a valid assessment, and if the contract is let for a gross sum and is not separable, its invalidity defeats the entire assessment.³ Thus, if in the contract, work is required in addition to that which is provided in the ordinance or resolution and the entire contract is let at a gross price, the contract and assessment based thereon are both invalid.⁴ Thus under a resolution to improve a street in a

² See § 495 *et seq.*

³ *Piedmont Paving Company v. Allman*, 136 Cal. 88, 68 Pac. 493 [1902]; *Bay Rock Company v. Bell*, 133 Cal. 150, 65 Pac. 299 [1901]; *Kutchin v. Engelbret*, 129 Cal. 635, 62 Pac. 214 [1900]; *Fay v. Reed*, 128 Cal. 357, 60 Pac. 927 [1900]; *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082 [1893]; *Broek v. Luning*, 89 Cal. 316, 26 Pac. 972 [1891]; *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891]; *Dyer v. Chase*, 52 Cal. 449 [1877]; *Himmelmamm v. Satterlee*, 50 Cal. 68 [1875]; *City of Stockton v. Whitmore*, 50 Cal. 554 [1875]; *City of Stockton v. Creanor*, 45 Cal. 643 [1873]; *Dougherty v. Hitchcock*, 35 Cal. 512, [1868]; *Beaudry v. Valdez*, 32 Cal. 269 [1867]; *People ex rel. Price v. Bridgeman*, 218 Ill. 568, 75 N. E. 1057 [1905]; *People ex rel. Price v. Lyon*, 218 Ill. 577, 75 N. E. 1017 [1905]; *Town of Cicero v. Green*, 211 Ill. 241, 71 N. E. 884 [1904]; *Young v. People ex rel. Raymond*, 196 Ill. 603, 63 N. E. 1075

[1902]; *McPike v. City of Alton*, 187 Ill. 62, 58 N. E. 301 [1900]; *Pells v. People ex rel. Holmgren*, 159 Ill. 580, 42 N. E. 784 [1896]; *Peck v. City of Grand Rapids*, 125 Mich. 416, 84 N. W. 61 [1900]; *City of Boonville ex rel. Cosgrove v. Stephens*, — Mo. App. —, 95 S. W. 314 [1906]; *Turner v. City of Springfield*, 117 Mo. App. 418, 93 S. W. 867 [1906]; *Barton v. Kansas City*, 110 Mo. App. 31, 83 S. W. 1093 [1904]; *City of Louisiana v. Shaffner*, 104 Mo. App. 101, 78 S. W. 287 [1903]; *City of Trenton ex rel. Gardner v. Collier*, 68 Mo. App. 483 [1896]; *Folmsbee v. City of Amsterdam*, 142 N. Y. 118, 36 N. E. 821 [1894]; *Cahn v. Metz*, 101 N. Y. S. [1906]; *Lutes v. Briggs*, 5 Hun. (N. Y.) 67 [1875]; *Mason v. City of Sioux Falls*, 2 S. Dak. 640, 39 Am. St. Rep. 802, 52 N. W. 770 [1892]; *McAllister v. City of Tacoma*, 9 Wash. 272, 37 Pac. 447, 658 [1894].

⁴ *Piedmont Paving Company v. Allman*, 136 Cal. 88, 68 Pac. 493 [1902];

jurisdiction where the street is not regarded as including gutters, a contract which includes the construction of rock gutters and the assessment based thereon are both invalid.⁵ A resolution to macadamize the street does not give authority to enter into a contract for curbing the sidewalk.⁶ Under a resolution to curb and macadamize a street, the contract cannot include constructing sidewalks.⁷ An order to pave a fifty-four foot roadway with bituminous rock upon a six inch concrete foundation does not authorize a contract for the construction of sidewalks and curbing.⁸ A resolution to construct a street does not authorize a contract including the construction of a sewer for draining sewage from abutting property.⁹ A resolution to change the grade of a street, invalid because not based upon the petition of the property owners, does not authorize the construction of a sidewalk upon another street and an assessment therefor is invalid.¹⁰ A resolution for grading a street at a given grade does not authorize a contract which provides for a change of grade.¹¹ A resolution for grading a street does not authorize a contract including the curbing of such street.¹² Under an improvement ordinance providing for certain described sewers the construction of extra sewers and additional catch basins and the substitution of flush tanks for lamp posts is not authorized even if such items are beneficial and desirable.¹³ If the specifications are not referred to in the resolution so as to make them a part thereof, the specifications

Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082 [1893]; Donnelly v. Howard, 60 Cal. 291 [1882]; Dyer v. Chase, 52 Cal. 440 [1877]; Himmelmann v. Satterlee, 50 Cal. 68 [1875]; Beaudry v. Valdez, 32 Cal. 269 [1867]; Peek v. City of Grand Rapids, 125 Mich. 416, 84 N. W. 614 [1900]; Folmsbee v. City of Amsterdam, 142 N. Y. 118, 36 N. E. 821 [1894]; Lutes v. Briggs, 5 Ill. (N. Y.) 67 [1875]; People v. Van Nort, 65 Barb. (N. Y.) 331; Mason v. City of Sioux Falls, 2 S. Dak. 640, 39 Am. St. Rep. 802, 51 N. W. 770 [1892]; McAllister v. City of Tacoma, 9 Wash. 272, 37 Pac. 447, 658 [1894].

⁵ Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082 [1893].

⁶ Beaudry v. Valdez, 32 Cal. 269 [1867].

⁷ Dyer v. Chase, 52 Cal. 440 [1877].

⁸ McAllister v. City of Tacoma, 9 Wash. 272, 37 Pac. 447, 658 [1894].

⁹ Peek v. City of Grand Rapids, 125 Mich. 416, 84 N. W. 614 [1900].

¹⁰ Folmsbee v. City of Amsterdam, 142 N. Y. 118, 36 N. E. 821 [1894].

¹¹ Mason v. City of Sioux Falls, 2 S. Dak. 640, 39 Am. St. Rep. 802, 51 N. W. 770 [1892].

¹² Mason v. City of Sioux Falls, 2 S. Dak. 640, 39 Am. St. Rep. 302, 51 N. W. 770 [1892].

¹³ People ex rel. McCormack v. McWethy, 177 Ill. 334, 52 N. E. 479 [1898].

cannot be resorted to, to supplement, or add to, the terms of the resolution.¹⁴ A contract cannot provide for the purchase of additional material not fairly included within the description of the ordinance.¹⁵ Thus under an ordinance for buying cast iron water pipe, water hydrants cannot be purchased.¹⁶ Different material from that specified in the ordinance cannot be contracted for.¹⁷ Thus under an ordinance providing for covering a street with six inches of the best quality of broken limestone, the board of improvements cannot change such paving material to seven inches of rolling mill slag.¹⁸ Different work from that authorized by the ordinance cannot be contracted for even if it is as good as that provided for by the ordinance.¹⁹ Thus after a paving contract has been performed in an unsatisfactory manner a city comptroller whose power is to settle and adjust all claims in favor of or against the corporation cannot enter into a contract whereby the contractor is to lay a new pavement of a different nature in consideration of receiving the unpaid balance of the purchase price.²⁰ A contract which provides for a method of doing the work different from that specified in the ordinance or resolution is invalid.²¹ Thus a resolution required a course of brick in street paving to be rolled once with the street roller. Such resolution was held to mean the roller then used by the city. Subsequently and before the contract was entered into, the city purchased a smaller roller and the contract permitted such brick to be rolled with such small roller. Such contract was held to be invalid.²² Under an ordinance requiring bidders upon a grading contract to bid on each block separately, a bid and contract for grading the entire street at a certain sum per cubic yard is invalid and invalidates the assessment.²³ In some jurisdictions it is held that a contract

¹⁴ Bay Rock Company v. Bell, 133 Cal. 150, 65 Pac. 299 [1901]. Question raised but not decided for want of proper pleading in Fay v. Reed, 128 Cal. 357, 60 Pac. 927 [1900].

¹⁵ Town of Cicero v. Green, 211 Ill. 241, 71 N. E. 884 [1904].

¹⁶ Town of Cicero v. Green, 211 Ill. 241, 71 N. E. 884 [1904].

¹⁷ Young v. People ex rel. Raymond, 196 Ill. 603, 63 N. E. 1075 [1902].

¹⁸ Young v. People ex rel. Raymond, 196 Ill. 603, 63 N. E. 1075 [1902].

¹⁹ Cahn v. Metz, 101 N. Y. S. 392 [1906].

²⁰ Cahn v. Metz, 101 N. Y. S. 392 [1906].

²¹ City of Boonville ex rel. Cosgrove v. Stephens, — Mo. App. —, 95 S. W. 314 [1906].

²² City of Boonville ex rel. Cosgrove v. Stephens, — Mo. App. —, 95 S. W. 314 [1906].

²³ City of Stockton v. Creanor, 45 Cal. 643 [1873].

for less work than that which is specified in the resolution of intention or the ordinance is invalid.²⁴ This view is based upon the theory that the only authority to the city officials to enter into a contract or construct an improvement is that found in the resolution or ordinance, and that they have no power to contract for less work than that for which they were required to contract. Thus if a resolution provides for improving a certain part of a street, as from one cross street to another, a contract for the improvement of a part of such street less in length than that specified in the ordinance or resolution is invalid.²⁵ If an ordinance for paving a certain part of a street has been passed, a subsequent ordinance providing for paving a portion of one of such streets at the entire cost of a private corporation operates as a repeal of a former ordinance and invalidates an improvement made thereunder.²⁶ An ordinance which provides for the construction of a street sixty-one feet wide under which an assessment is levied and confirmed is repealed by a subsequent ordinance reducing the width of the street to fifty-five feet and such assessment is rendered invalid.²⁷ An ordinance authorizing the construction of a sewer for sanitary and drainage purposes does not authorize the construction of a sewer for drainage purposes only without any house connections.²⁸ If it is possible from the terms of the contract to separate the cost of the unauthorized part of the improvement from the cost of that which is authorized, the assessment will be valid as to the latter and invalid as to the former.²⁹ Thus where a sewer was constructed at a certain rate per foot and the plans and specifications required about eight feet more of sewer to be laid than was provided for by the reso-

²⁴ *Kutchin v. Engelbret*, 129 Cal. 635, 62 Pac. 214 [1900]; *City of Stockton v. Whitmore*, 50 Cal. 554 [1875]; *Dougherty v. Hitchcock*, 35 Cal. 512 [1868]; *McPike v. City of Alton*, 187 Ill. 62, 58 N. E. 301 [1900]; *Pells v. People ex rel. Holmgren*, 159 Ill. 580, 42 N. E. 784 [1896]; *Barton v. Kansas City*, 110 Mo. App. 31, 83 S. W. 1093 [1904]; *City of Trenton ex rel. Gardner v. Collier*, 68 Mo. App. 483 [1896]; *In re Scranton Sewer*, 213 Pa. St. 4, 62 Atl. 173 [1905].

²⁵ *City of Stockton v. Whitmore*, 50 Cal. 554 [1875]; *Dougherty v. Hitchcock*, 35 Cal. 512 [1868].

²⁶ *McPike v. City of Alton*, 187 Ill. 62, 58 N. E. 301 [1900].

²⁷ *Pells v. People ex rel. Homgrain*, 159 Ill. 580, 42 N. E. 784 [1896].

²⁸ *Barton v. Kansas City*, 110 Mo. App. 31, 83 S. W. 1093 [1904].

²⁹ *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891]; *Himmelmann v. Hoadley*, 44 Cal. 276 [1872]; *Beaudry v. Valdez*, 32 Cal. 269 [1867]; *Bennett v. City of Emmetsburg*, — Ia. —, 115 N. W. 582 [1908].

lution of intention, the assessment is valid as to all except such eight feet.³⁰ If the cost of grading can be ascertained separate from the cost of unauthorized curbing, the assessment may be enforced as to the cost of such grading.³¹ If the cost of the two kinds of work cannot be separated, the entire assessment is invalid.³² If the board of supervisors has awarded a contract to be performed in a certain time, and time is of the essence of such contract, the contract entered into by the superintendent of streets giving a longer time for performance is invalid and an assessment based thereon cannot be enforced.³³ If, by the contract an assessment district is formed differing from that laid out by the ordinance, such contract is invalid.³⁴ Hence under a resolution of intention to improve a certain described street the city cannot give permission to certain lot owners to construct that part of the improvement in front of their respective lots.³⁵ If the contract conforms substantially to the ordinance but in the performance of such contract additional work is done, the assessment for the improvement specified in the ordinance and contract is valid, although the items of extra work must be eliminated.³⁶ If the contract conforms to the ordinance and the objection to the assessment is that the contract has not been performed, a different question arises which is discussed elsewhere.³⁷

§ 511. Substantial compliance sufficient.

It is not necessary that the contract should conform literally to the resolution or ordinance authorizing the improvement. It is sufficient if there is a substantial conformity.¹ Thus, under an

³⁰ Frick v. Morford, 87 Cal. 576, 25 Pac. 764 [1891].

³¹ Mason v. City of Sioux Falls, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770 [1892].

³² Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082 [1893].

³³ Brock v. Luning, 89 Cal. 316, 26 Pac. 972 [1891].

³⁴ Kutchin v. Engelbret, 129 Cal. 635, 62 Pac. 214 [1900]; Haisch v. City of Seattle, 10 Wash. 435, 38 Pac. 1131 [1894].

³⁵ Kutchin v. Engelbret, 129 Cal. 635, 62 Pac. 214 [1900].

³⁶ McDonald v. Mezes, 107 Cal. 492, 40 Pac. 808 [1895].

³⁷ See § 527 *et seq.*

¹ Gage v. City of Chicago, 201 Ill. 93, 66 N. E. 374 [1903]; Hyman v. City of Chicago, 188 Ill. 462, 59 N. E. 10 [1900]; Martindale v. Palmer, 52 Ind. 411 [1875]; Lynch v. City of Kansas City, 44 Kan. 452, 24 Pac. 973 [1890]; Mayor and City Council of Baltimore v. Raymo, 68 Md. 569, 13 Atl. 383 [1888]; Cole v. Skrainka, 105 Mo. 303, 16 S. W. 491 [1891]; Dunn v. McNeely, 75 Mo. App. 217 [1898]; Eyermann v. Provenchere, 15 Mo. App. 256 [1884]; Voght v. Buffalo, 133 N. Y. 463, 31 N. E. 340 [1892]; City of Spokane v. Browne, 8 Wash. 317, 36 Pac. 26 [1894].

ordinance providing for a Nicholson or wooden block pavement, a contract for "what is known as wooden block pavement" is sufficient.² An ordinance which provides for grading certain streets authorizes a contract for "grading, grubbing, guttering and curbing" such streets.³ An ordinance for paving a street designated by its popular name authorizes a contract covering the same length of such street though the contract describes it by its official name, the street being known officially by another name after the bend therein.⁴ A resolution which refers to a street as forty-two feet wide to be improved according to plans and specifications, authorizes a contract for paving thirty-seven feet in width, where the plans and specifications show that a strip five feet wide in the center of the street is omitted as being a part of the street which the railway company is bound to pave.⁵ An ordinance for a fourteen foot sidewalk authorizes a contract for improving the sidewalk, although the space between the building and the curb is but thirteen feet on account of the fact that the property owner's building extends over the line.⁶ An ordinance for paving a street with vitrified brick authorizes a contract for paving it with "hard burned brick specially burned for paving."⁷ An ordinance for paving a street with granite blocks eight inches in depth authorizes a contract for paving such streets with granite blocks ranging from seven to eight inches in depth.⁸ An ordinance for paving a street by a specified patent process authorizes a contract which differs from the patent in permitting the street to be rammed as well as rolled, differs as to the angle at which the stones were to be laid and differs as to the material to be placed between the joints of the stone.⁹ If the contract does not conform to the ordinance owing to clerical errors, the assessment is nevertheless valid if performance is had according to the terms of the ordinance.¹⁰ In some jurisdictions it is held that a variance between the ordinance

² *Martindale v. Palmer*, 52 Ind. 411 [1875].

³ *City of Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26 [1894].

⁴ *Lynch v. City of Kansas City*, 44 Kan. 452, 24 Pac. 973 [1890].

⁵ *Voght v. Buffalo*, 133 N. Y. 463, 31 N. E. 340 [1892].

⁶ *Hyman v. City of Chicago*, 188 Ill. 462, 59 N. E. 10 [1900].

⁷ *Dunn v. McNeely*, 75 Mo. App. 217 [1898].

⁸ *Cole v. Skrainka*, 105 Mo. 303, 16 S. W. 491 [1891].

⁹ *Mayor and City Council of Baltimore v. Raymo*, 68 Md. 569, 13 Atl. 383 [1888].

¹⁰ *Eyeremann v. Provenchere*, 15 Mo. App. 256 [1884].

and the contract which is not prejudicial to the property owners does not invalidate the contract or the assessment therefor.¹¹ One reason given for this view is that if the city had the power in the first instance to make the contract which it did make, ratification of the contract by the proper officials is equivalent to a subsequent grant of authority and has the same legal effect.¹² Thus, under a resolution to pave a given length of a specified street a contract to pave a shorter portion of such street has been held to be valid if the burden of the property owners was not increased and property not benefited by the improvement actually constructed was not assessed.¹³ Under an ordinance for constructing a street and a sidewalk a contract for the construction of a street alone has been held to be valid and the assessment therefor has been upheld.¹⁴ So, under a resolution for laying cross-walks at intersecting streets, an assessment is valid though walks were laid only where the intersecting streets were paved with Belgian or concrete pavement as long as only the walks actually laid are charged for.¹⁵ If the original notice of intention to improve specifies a given material, property owners cannot complain if a different material which is both cheaper and more serviceable than that originally selected is in fact used.¹⁶ If the specifications require work not named in the ordinance but such work is not required by the contract and no charge is made therefor the contract and assessment therefor are valid.¹⁷ Improvements which are incidental to the improvements specified in the ordinance or resolution and which by construction may be regarded as a part thereof may be provided for in the

¹¹ *Oakland Paving Company v. Rier*, 52 Cal. 270 [1877]; *Field v. City of Chicago*, 198 Ill. 224, 64 N. E. 840 [1902]; *Heman Construction Company v. Loevy*, 179 Mo. 455, 78 S. W. 613 [1903]; (reversing *Heman Construction Company v. Loevy*, 64 Mo. App. 430 [1895]); In the Matter of Pinckney, 22 Hun. (N. Y.) 474 [1880]; *Barkley v. Oregon City*, 24 Ore. 515, 33 Pac. 978 [1893]; *City to Use of O'Rourke v. Hays*, 93 Pa. St. (12 Norris) 72 [1881]; *Hutchinson v. Pittsburg*, 72 Pa. St. (22 P. F. Smith) 320.

¹² *City to Use of O'Rourke v. Hays*,

93 Pa. St. (12 Norris) 72 [1881].

¹³ In the Matter of Pinckney, 22 Hun. (N. Y.) 474 [1880]; *Hutchinson v. Pittsburg*, 72 Pa. St. (22 P. F. Smith) 320 [1872].

¹⁴ *Heman Construction Company v. Loevy*, 171 Mo. 455, 78 S. W. 613 [1903]; (reversing *Heman Construction Company v. Loevy*, 64 Mo. App. 430 [1895]).

¹⁵ *Matter of Eager*, 12 Abb. Pr. N. S. (N. Y.) 151 [1871].

¹⁶ *Barkley v. Oregon City*, 24 Ore. 515, 33 Pac. 978 [1893].

¹⁷ *Oakland Paving Company v. Rier*, 52 Cal. 270 [1877].

contract, although not expressly named in the resolution.¹⁸ Under a resolution to construct a sewer, a contract may be made which provides that manholes and lampholes shall be constructed as a part thereof.¹⁹ Under a resolution for the construction of a sewer, a provision in the contract that the contractor should take up the old sewer pipe along the line of the contemplated improvement without additional expense to the city does not invalidate the contract where it appears that by reason of such provision a higher contract price was not necessarily in the bid.²⁰ Under an ordinance or resolution providing for several improvements, distinct contracts may be let to different persons for each improvement.²¹ However, under an ordinance to improve a street between two given points a city engineer has no power to let the work in sections and to compute the cost thereof accordingly.²² In some cases a much greater divergence between the contract and the ordinance is allowed than is indicated by the authorities already discussed. Thus it has been said that a difference between the contract and the ordinance as to the dimensions of the stone to be used in paving may permit the city to make such divergence a defense if sued on the contract, but cannot invalidate an assessment levied for the improvement.²³ The repair of a sewer extending sixty feet beyond the distance indicated by the ordinance has been held not to invalidate the assessment.²⁴ Under an ordinance and contract for building a street, the subsequent construction of a retaining wall which proved to be necessary by reason of the nature of the soil when the excavation was once made was held not to invalidate the contract or assessment.²⁵ In case of a conflict between two different ordinances with reference to street improvements, an ordinance for improving a specific street in a certain described manner prevails over a prior general ordinance which provides that

¹⁸ *Comstock v. Eagle Grove City*, 133 Ia. 589, 111 N. W. 51 [1907].

¹⁹ *Comstock v. Eagle Grove City*, 133 Iowa 589, 111 N. W. 51 [1907].

²⁰ *Comstock v. Eagle Grove City*, 133 Iowa 589, 111 N. W. 51 [1907].

²¹ *Bates v. Twist*, 138 Cal. 52, 70 Pac. 1023 [1902].

²² *Eyerman v. Hardy*, 8 Mo. App. 311 [1880].

²³ *Dashiell v. Mayor and City Council of Baltimore*, Use of Hax, 45 Md. 615 [1876].

²⁴ *Webber v. Common Council of the City of Lockport*, 43 Howard 368 [1872].

²⁵ *Longworth v. City of Cincinnati*, 34 O. S. 101 [1877]; (The cost of such wall was held to be a proper item of the assessment.)

subsequent street improvements should be made as therein specified.²⁶

§ 512. Effect of invalid terms.

The contract between the public corporation and the contractor who undertakes to construct a public improvement is controlled by the rules with reference to subject matter applicable to contracts in general. It is often sought to incorporate into such contracts, terms which in some form violate the policy of either the written or the unwritten law. Such provisions cannot be enforced. Their effect upon the rest of the contract turns on the question whether such terms are merely void or whether they are not merely void but illegal. If the terms are merely void their incorporation into the contract does not affect the valid terms of the contract if such valid terms are by themselves sufficient to constitute a contract.¹ However, in some jurisdictions this rule is not followed. If the void terms are made the basis of competitive bidding and the effect of incorporating them into the prospective contract is to restrict competition and to increase the contract price, it is held in some cases that an assessment levied for the contract price is invalid.² If the invalid terms are not merely void but illegal their effect upon the rest of the contract turns upon the question whether the contract is entire or severable. If the contract is entire the incorporation of an illegal term invalidates the entire contract. If the contract is severable the incorporation of an illegal term does not invalidate those terms of a contract which can be separated from the illegal part thereof. These questions, however, can best be discussed in connection with the specific types of void and illegal terms which have been considered by the courts. A provision in a contract for a street improvement which attempts to relieve the street superintendent and his sureties from liability for any delinquency upon his part is unauthorized by statute and is apparently void but the insertion of such clause does not invalidate the rest of the contract.³ A clause which requires the contractor to bear all loss or

²⁶ Holdom v. City of Chicago, 169 Ill. 109, 48 N. E. 164 [1897].

¹ McDonald v. Mezes, 107 Cal. 492, 40 Pac. 808 [1895]; Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337 [1895].

² See §§ 514, 515.

³ McDonald v. Mezes, 107 Cal. 492, 40 Pac. 808 [1895]; Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337 [1895].

damage resulting from the nature of the work imposes an extra burden on the property owner in excess of any benefits to him and renders the assessment void.⁴

§ 513. Terms fixed by law.

If the law fixes the liability of the parties as to certain matters, such terms will be implied in the contract although not expressed and accordingly a contract will not be invalid because such terms are not incorporated therein specifically.¹ Thus, where the law fixes the amount of the cost of paving which shall be borne by the abutting property owners and the city, where work is done upon a street in the center of which is a strip not used for ordinary street purposes, it is not necessary that said terms should be incorporated in the contract.² The incorporation into a contract in express terms of a provision which the law would imply in the absence of express terms cannot affect its validity.³ If a contract provides for the performance of all the work specified in the resolution of intention but furthermore contains a provision that the adjoining property should not be assessed for improving the part of the street occupied by a railway company, the contractor agreeing to look to the railway company for payment for such portion of the work, the insertion of such provision does not invalidate the contract.⁴

§ 514. Provisions with reference to labor.

Contracts for public improvements often contain provisions restricting the number of hours which shall constitute a day's work for those employed in the performance of such contract. Under modern statutes, eight hours is the number commonly selected as constituting a day's work. In some jurisdictions statutes restricting the number of hours which shall constitute a day's work are regarded as invalid. Where such view obtains

¹ Van Loenen v. Gillespie, — Cal. —, 96 Pac. 87 [1908]; Hatch v. Nevills, — Cal. —, 95 Pac. 43 [1907]; Blochman v. Spreckels, 135 Cal. 662, 57 L. R. A. 213, 67 Pac. 1061; Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612; Glassell v. O'Dea, — Cal. App. —, 95 Pac. 44 [1908].
Barber Asphalt Paving Company

v. Gogreve, 41 La. Ann. 251, 5 So. 848 [1889].

² Barber Asphalt Paving Company v. Gogreve, 41 La. Ann. 251, 5 So. 848 [1889].

³ Perine v. Forbush, 97 Cal. 305, 32 Pac. 226 [1893].

⁴ Perine v. Forbush, 97 Cal. 305, 32 Pac. 226 [1893].

it is said that if the specifications contain a provision restricting the number of hours which shall constitute a day's work and bids are made and the contract let upon such terms as a basis, the contract and the assessment therefor are invalid, since the cost to the property owner is improperly increased.¹ Where this view prevails, a property owner in resisting the assessment need not show that such provision actually increased the cost of the work.² It is sufficient if he shows that such provision forms the basis of the bidding and that its natural tendency was to increase the amount of the bids made.³ If, however, the provisions restricting the number of hours which shall constitute a day's work do not form the basis of the bidding or affect the amount of the bids, such provision does not invalidate the contract into which it is subsequently incorporated.⁴ Thus if such forms are not found in the specifications or the notice inviting proposals and the contractors do not base their bids thereon, such subsequent provisions do not render the contract invalid.⁵ Even if such provisions are found in the specifications, the advertisement and the bid as well as the contract, it has been said that the presumption will be that such terms entered into and formed the basis of the competitive bidding, but that such presumption may nevertheless be rebutted.⁶ If the provision restricting the number of hours in a day's work is incorporated into the contract and the men employed to perform such contract work a greater number of hours the property owner cannot resist the assessment upon such ground.⁷ In some jurisdictions statutes restricting the number of hours which shall constitute a day's labor to any reasonable number are regarded as valid. Where such provisions are held to be valid, a contract containing such provision and the assessment levied to pay the cost of such contract are both held to

¹ *Glover v. People ex rel. Raymond*, 201 Ill. 545, 66 N. E. 820 [1903]; *McChesney v. People ex rel. Raymond*, 200 Ill. 146, 65 N. E. 626 [1902]; *Bird ex rel. Hudson v. City of Detroit*, — Mich. —, 116 N. W. 1065 [1908].

² *Glover v. People ex rel. Raymond*, 201 Ill. 545, 66 N. E. 820 [1903].

³ *McChesney v. People ex rel. Raymond*, 200 Ill. 146, 65 N. E. 626 [1902].

⁴ *Flinn v. Peters*, 3 Cal. App. 235, 84 Pac. 995 [1906]; *Wells v. People ex rel. Raymond*, 201 Ill. 435, 66 N. E. 210 [1903]; *Treat v. People ex rel. Raymond*, 195 Ill. 196, 96 N. E. 891 [1902].

⁵ *Flinn v. Peters*, 3 Cal. App. 235, 84 Pac. 995 [1906].

⁶ *Gage v. People ex rel. Hanberg*, 207 Ill. 61, 69 N. E. 635 [1904].

⁷ *Williams v. Savings and Loan Society*, 97 Cal. 122, 31 Pac. 908 [1893].

be valid.⁸ By some city ordinances it is provided that bidders upon public improvements must employ union labor only. Where such provision is contained in a general ordinance, and not in the improvement ordinance, the specifications, or the bids, such provision is not regarded as entering into the terms of the bidding or affecting the amount of the bids.⁹ Under such circumstances, therefore, as the contract price is not increased by such general ordinance, the contract and the assessment levied therefor are valid.¹⁰ In some contracts which have been considered by the courts, have appeared clauses which forbade the employment of alien labor in the performance thereof. If such terms do not enter into the bidding and thus restrict competition and raise the price of the work they do not invalidate the contract.¹¹ If such clause is not found in the ordinance or the advertisement for bids, it is not regarded as affecting the bidding.¹² Even though such clause is inserted in the specifications but it is not required by the ordinance and is not found in the advertisement for bids, and it does not appear that any of the bidders knew that such clause would be inserted in the specifications, such clause does not invalidate the contract.¹³ On the other hand, if a provision against the employment of alien or convict labor is found in the specifications which form the basis of bids for a contract for street paving and such provision is known to the bidders and taken into consideration by them in making such bids, such provision is regarded as increasing the amount of the bid by restricting the field for the employment of labor.¹⁴ Accordingly such contract

⁸ *Curtice v. Schmidt*, 202 Mo. 703, 101 S. W. 61 [1907]; *St. Louis Quarry and Construction Company v. Frost*, 90 Mo. App. 677 [1901].

⁹ *Treat v. People ex rel. Raymond*, 195 Ill. 196, 62 N. E. 891 [1902]; *Gray v. People ex rel. Raymond*, 194 Ill. 486, 62 N. E. 894 [1902]; *Fiske v. People ex rel. Raymond*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985 [1901].

¹⁰ *Treat v. People ex rel. Raymond*, 195 Ill. 196, 62 N. E. 891 [1902]; *Gray v. People ex rel. Raymond*, 194 Ill. 486, 62 N. E. 894 [1902]; *Fiske v. People ex rel. Raymond*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985 [1900].

¹¹ *Treat v. People ex rel. Raymond*, 195 Ill. 196, 62 N. E. 891 [1902]; *Hamilton v. People ex rel. Raymond*, 194 Ill. 133, 62 N. E. 533 [1902]. (explained in *McChesney v. People ex rel. Raymond*, 200 Ill. 146, 65 N. E. 626 [1902]).

¹² *Givins v. People ex rel. Raymond*, 194 Ill. 150, 88 Am. St. Rep. 143, 62 N. E. 534 [1902].

¹³ *Gage v. People ex rel. Hanberg*, 207 Ill. 61, 69 N. E. 635 [1904]; *Hamilton v. People ex rel. Raymond*, 194 Ill. 133, 62 N. E. 533 [1902].

¹⁴ *Inge v. Board of Public Works of Mobile*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678 [1902].

is invalid as is the assessment based thereon.¹⁵ A statute prohibiting the employment of alien laborers if they are to be paid from funds raised from taxation has been held to be unconstitutional.¹⁶ Where this view prevails, the failure of the city and of the contractor to comply with the provisions of such statute does not invalidate the assessment proceedings.¹⁷ In some jurisdictions, clauses which prohibit the employment of alien or non-resident labor are regarded with more favor. A contract which required the contractor to employ laborers residing in the city was said to be valid after performance where there was no showing that the cost of the improvement was thereby increased.¹⁸ The Supreme Court of the United States has held that such a provision can be complained of as in violation of the Federal constitution only by a member of the excluded class and not by the property owner.¹⁹ A contract for a public improvement provided that the work of dressing stone should be done within the territorial limits of the state. There was some evidence to show that the effect of such provision was to restrict competitive bidding and to increase the cost of construction and the lower court found that such was the effect of this provision. It was held that under a statute requiring the letting of contracts on competitive bidding, such a contract was invalid and the assessment levied to pay the contract price could not be enforced.²⁰ On the other hand in the absence of any evidence tending to show that such clause restricted competition, it was held that such clause was valid.²¹ A provision fixing the minimum rate of wages does not invalidate the assessment if it is not shown to have been a term of the proposal or to have formed the basis of the bids.²²

¹⁵ *Inge v. Board of Public Works of Mobile*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678 [1902].

¹⁶ *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786 [1903].

¹⁷ *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786 [1903].

¹⁸ *Edwards & Walsh Construction Co. v. Jasper County*, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902]; (citing *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 52 L. R. A. 814, 59 N. E. 716).

¹⁹ *Chadwick v. Kelley*, 187 U. S.

540, 47 L. 293, 23 S. 175 [1903]; (affirming *Kelley v. Chadwick*, 104 La. 719, 29 So. 295 [1901]); (In this case the contract provided that the contractor should employ only *bona fide* residents of the city.)

²⁰ *St. Louis Quarry and Construction Company v. Von Versen*, 81 Mo. App. 519 [1899].

²¹ *St. Louis Quarry and Construction Company v. Frost*, 90 Mo. App. 677 [1901].

²² *Flinn v. Peters*, 3 Cal. App. 235, 84 Pac. 995 [1906].

Whether a provision in the proposals to the effect that preference would be given to a bidder who would agree to pay the full union schedule to his employes invalidates the assessment, was questioned but not decided in a recent Massachusetts case,²³ as in that case the expenses incurred for damage to realty exceeded the amount of the assessment, which could thus be sustained, irrespective of the validity of the contract.

§ 515. Patented or monopolized articles.

A patent is a legal monopoly and there can be no competition in a patented article unless the person owning the patent voluntarily offers it for sale in open market.¹ Under a statute which provides for competition and the letting of contracts to lowest bidders, the question has been presented in many cases whether a patented article can be required. Upon this question there has been a conflict of authority. In some jurisdictions it is said to be improper under such statutes to include patented articles in the specifications and invite bids thereon.² In some cases the question has been raised but not decided.³ In other jurisdictions it has been said to be proper to include patented articles.⁴ One of the theories given for this is, that persons may bid on such contract and may secure the consent of the owner of the patent to make use thereof.⁵ A special statute which provides specifically for the use of a patented article has been held to be valid.⁶ It has been held that if it is proper to make use of a patented article, the contract therefor should not be let on com-

²³ *Gardiner v. Street Commissioners of City of Boston*, 188 Mass. 223, 74 N. E. 341 [1905].

¹ *Barber Asphalt Paving Company v. Gogreve*, 41 La. Ann. 251, 5 So. 848 [1889]; *Burgess v. City of Jefferson*, 21 La. Ann. 143.

² *Nicholson Pavement Co. v. Painter*, 35 Cal. 699 [1868]; *Siegel v. City of Chicago*, 223 Ill. 428, 79 N. E. 280 [1906]; *Monaghan v. City of Indianapolis*, 37 Ind. App. 280, 76 N. E. 424, reversing on rehearing 75 N. E. 33 [1905]; *Lewis v. City of Elizabeth*, 25 N. J. Eq. (10 C. E. Gr.) 298 [1874]; *Dolan v. Mayor, etc., of New York*, 4 Abb. Pr. N. S. (N. Y.) 397 [1868].

³ *Yarnold v. City of Lawrence*, 15 Kan. 126 [1875].

⁴ *Motz v. City of Detroit*, 18 Mich. 494 [1869]; *Hobart v. City of Detroit*, 17 Mich. 246, 97 Am. Dec. 185; *Kansas City Transfer Company v. Huling*, 22 Mo. App. 654 [1886]; *Matter of McCormack*, 60 Barb. (N. Y.) 128 [1870]; *Matter of McCormack*, 10 Abb. Pr. N. S. (N. Y.) 234 [1870].

⁵ *Hobart v. City of Detroit*, 17 Mich. 246, 97 Am. Dec. 185.

⁶ *Dean v. Borchsenius*, 30 Wis. 236 [1872]; *Mills v. Charleton*, 29 Wis. 400, 9 Am. 578 [1872]; *Dean v. Charlton*, 27 Wis. 522 [1871].

petitive bidding, since there can be no competition thereon unless the consent of the owner of the patent has been secured in advance.⁷ The fact that a specific pavement was patented was held to be no objection to an assessment for an improvement in which such pavement is specified, if the city has, before the contracts were let, acquired the right to permit any successful bidder to make use of such patent on reasonable terms.⁸ If the use of a patented article is not stipulated for in the contract the fact that such article is in fact used does not invalidate the assessment.⁹ If the improvement as specified is to be constructed in part by the use of patented articles and in part by the use of articles which are not patented, it has been said that such kinds of work should be separated and separate proposals invited for the part which was not patented.¹⁰ Relief in equity has been refused on this ground, for the reason that the complainant had an adequate remedy at law.¹¹ Whether any patent exists has been left doubtful by the record in some cases.¹² Even where the record has disclosed the existence of a patent process, the contract has been held valid.¹³ Many of these cases involve paving with grades of asphalt of which at the time of the contract one corporation had a virtual monopoly.¹⁴ Where only one company could furnish asphalt of the grade required it was said to be proper to specify the brand of asphalt to be furnished, thus re-

⁷ *People ex rel. Trundy v. Van Nort*, 65 Barb. (N. Y.) 331 [1873].

⁸ *Lacoste v. City of New Orleans*, 119 La. 469, 44 So. 267 [1907]; *Hastings v. Columbus*, 42 O. S. 585 [1885].

⁹ *Dunne v. Altschul*, 57 Cal. 472 [1881]; (Furthermore while such articles were marked "patented" there was no evidence to show that they were in fact patented.) *Contra*: *Monaghan v. City of Indianapolis*, 37 Ind. App. 280, 76 N. E. 424, 75 N. E. 33 [1905].

¹⁰ *Lewis v. City of Elizabeth*, 25 N. J. Eq. (10 C. E. Gr.) 298 [1874]; *In the Matter of Eager*, 46 N. Y. 100 [1871]; *Matter of Eager*, 12 Abb. Pr. N. S. (N. Y.) 151 [1871]; *Matter of McCormack*, 10 Abb. Pr. N. S. (N. Y.) 234 [1870].

¹¹ *Lewis v. City of Elizabeth*, 25

N. J. Eq. (10 C. E. Gr.) 298 [1874].

¹² *Barber Asphalt Paving Company v. Gogreve*, 41 La. Ann. 251, 5 So. 848 [1889].

¹³ *N. P. Perine Contracting and Paving Company v. Quackenbush*, 104 Cal. 684, 38 Pac. 533 [1894]; *Swift v. City of St. Louis*, 180 Mo. 80, 79 S. W. 172 [1904].

¹⁴ *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 48 L. 1142, 24 S. 784 [1904]; (modifying, 117 Fed. 925 [1902]); *Swift v. City of St. Louis*, 180 Mo. 80, 79 S. W. 172 [1904]; *Verdin v. City of St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52 [1895]; *Barber Asphalt Paving Co. v. Hunt*, 100 Mo. 22, 18 Am. St. Rep. 530, 8 L. R. A. 110, 13 S. W. 98 [1890]; *Schoenberg v. Field*, 95 Mo. App. 241, 68 S. W. 945.

stricting the specifications formally as well as practically to the product of that company.¹⁵ So it has been held proper to select a given kind of cement in which one company has a monopoly where it is not shown that any other kind of cement would answer the purpose equally well.¹⁶ This view has not been acquiesced in in all jurisdictions, however. If the city by ordinance has limited the material to be used to one particular brand of asphalt which can be supplied by only one company, such ordinance has been held to be invalid.¹⁷ In such cases the proper form of specification is to require an asphalt equal to a certain prescribed standard. A different question arises where the material to be used is one which can be furnished by more than one dealer or manufacturer. In such cases the city has no right to fix upon the product of a certain manufacturer or dealer as that which is to be furnished in the performance of the contract.¹⁸ Thus, where several manufacturers each make suitable grades of brick for paving, the city under statutes which provide for competitive bidding, has no right to designate the product of one manufacturer as that which must be furnished in the performance of the contract.¹⁹ The city has the right to designate the product of one manufacturer as a standard to which the material furnished under the contract must conform. Further than this the city cannot go, in restricting the material furnished to the product of one manufacturer where several are able to furnish the same. The existence of a practical local monopoly in paving material does not seem to invalidate the assessment if the specifications do not unduly restrict the nature of the material to be furnished. On the other hand, if a street improvement contract requires the use of slag and one person has acquired a monopoly in slag and

¹⁵ *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 48 L. 1142, 24 S. 784 [1904]; (modifying, 117 Fed. 925 [1902]); *Barber Asphalt Paving Company v. Field*, 188 Mo. 182, 86 S. W. 860 [1905]; *Swift v. City of St. Louis*, 180 Mo. 80, 79 S. W. 172 [1904]; *Verdin v. City of St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52 [1895]; *Warren v. Barber Asphalt Paving Co.*, 115 Mo. 572, 22 S. W. 490; *Barber Asphalt Paving Co. v. Hunt*, 100 Mo. 22, 18 Am. St. Rep.

530, 8 L. R. A. 110, 13 S. W. 98 [1890].

¹⁶ *Swift v. City of St. Louis*, 180 Mo. 80, 79 S. W. 172 [1904].

¹⁷ *Fishburn v. City of Chicago*, 171 Ill. 338, 63 Am. St. Rep. 236, 39 L. R. A. 482, 49 N. E. 532.

¹⁸ *Curtice v. Schmidt*, 202 Mo. 703, 101 S. W. 61 [1907].

¹⁹ *Curtice v. Schmidt*, 202 Mo. 703, 101 S. W. 61 [1907]; *Taylor v. Schroeder*. — Mo. App. —, 110 S. W. 26 [1908].

controls its price, the fact that such person is the exclusive bidder at such street improvement contract and refuses to sell to other contractors unless they would agree not to oppose the use of slag upon streets, does not make a defense to the assessment unless it was shown that the price was in fact unreasonable.²⁰ Under a statute providing that except for repairs, "no patented pavement shall be laid and no patented articles advertised for, contracted for or purchased, except under such circumstances that there can be a fair and reasonable opportunity for competition, the conditions to secure which shall be prescribed by the board of estimate and apportionment," the city may specify patented articles if competition is secured, and it may secure competition by giving to the bidders a choice of material.²¹ In recent cases courts have passed upon contracts for specific types of paving material in which a practical monopoly existed, together with possibly a patent on the process of construction. Such contracts have ordinarily been held to be valid and assessments levied for such improvements have been upheld.²²

§ 516. Covenant for maintenance of improvement—Effect of specific statutory provisions.

Provisions are frequently found in street improvement contracts or in some cases in contracts for improvements of other types, by which the contractor agrees that the work shall be in good condition at the end of a certain time after the completion thereof. The validity of such provisions has frequently been attacked both upon constitutional and statutory grounds. In states in which it is held that the legislature cannot authorize the levy of an assessment for repairs, the legislature has no power to provide for assessments for repairs by including them in a contract

²⁰ *Givins v. People ex rel. Raymond*, 194 Ill. 150, 88 Am. St. Rep. 143, 62 N. E. 534 [1902].

²¹ *Warren Brothers Co. v. City of New York*, 190 N. Y. 297, 83 N. E. 59 [1907].

²² *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 48 L. 1142, 24 S. 784 [1904]; (*modifying*, 117 Fed. 925 [1902]); *N. P. Perine Contracting and Paving Company v. Quacken-*

bush, 104 Cal. 684, 38 Pac. 533 [1894]; *Barber Asphalt Paving Company v. Gogreve*, 41 La. Ann. 251, 5 So. 848 [1889]; *Barber Asphalt Paving Company v. Field*, 188 Mo. 182, 86 S. W. 860 [1905]; *Swift v. City of St. Louis*, 180 Mo. 80, 79 S. W. 172 [1904]; *Barber Asphalt Paving Co. v. Hunt*, 100 Mo. 22, 18 Am. St. Rep. 530, 8 L. R. A. 110, 13 S. W. 98 [1890].

for original construction, and if the legal effect of such contract is to provide for such repairs, it must in such jurisdictions either be invalid because not authorized by statute, or the statute authorizing it must be unconstitutional. In either case such provisions in a contract render it invalid.¹ Whether provisions of this sort will be upheld or not is said by the Supreme Court of the United States to be a question purely for the state courts, no federal question of any kind being involved.² In states in which the legislature has power to authorize assessments for repairs and there is a specific statute giving to a city power to require the contractor to keep the improvement in repair for such period of time as they see fit, a contract requiring the contractor to keep the improvement in good condition and repair for ten years is valid, even if such provision enhances the cost of such improvement and even if the terms of the contract extend beyond a guarantee of the original workmanship and material and bind a contractor to make repairs for injuries or deterioration due to other causes.³ A grant of authority to a city "to determine what work shall be done or improvements made," does not confer power on the city to include the cost of repairs, not arising from defective work or material, in an assessment for the original paving of a street.⁴ Accordingly a provision that the contractor would keep the work done in thorough repair from injury by traffic, decomposition and decay for five years is invalid, since in so far as it requires repairs not occasioned by mere defective work and material it imposes an additional burden on the property to be assessed for the improvement.⁵

§ 517. Covenant for maintenance construed as guaranty.

In states in which assessments for repairs may be levied without violating the constitution, but in which there are no specific statutes authorizing provisions for maintenance and repairs as a part of the contract for original construction, we find a sharp conflict of authority upon the question of the validity of such provisions. In many jurisdictions, contracts for maintenance and repair

¹ See § 373 *et seq.*

² *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. 879, 21 S. 625 [1901].

³ *La Veine v. City of Kansas City*, 67 Kan. 239, 72 Pac. 774 [1903].

⁴ *Young v. City of Tacoma*, 31 Wash. 153, 71 Pac. 742 [1903].

⁵ *Young v. City of Tacoma*, 31 Wash. 153, 71 Pac. 742 [1903].

are construed as in effect guarantees of the workmanship and material of the original construction, and hence as valid.¹ If this theory is correct, the contention of these courts that such provision does not enhance the cost of the improvement, since it is equivalent to a guaranty that the contractor will perform his contract according to the terms thereof, is correct.² This view has been entertained both where the city has authority to levy assessments for repairs,³ and where by statute it is provided that the cost of repairs must be paid out of the general treasury.⁴ Where a contract is thus construed the contractor is held liable for deterioration or injury to the property due to defective

¹ *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901]; *Graham v. City of Chicago*, 187 Ill. 411, 58 N. E. 393 [1900]; *Latham v. Village of Wilmette*, 168 Ill. 153, 48 N. E. 311 [1897]; *Cole v. People*, 161 Ill. 16, 43 N. E. 607 [1896]; *Shank v. Smith*, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932 [1901]; *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898]; *City of Kansas City v. Hanson*, 60 Kan. 833, 58 Pac. 474 [1899]; (reversing *City of Kansas City v. Hanson*, 8 Kans. App. 290, 55 Pac. 513 [1898]); *City of Covington v. Dressman*, 6 Bush. (69 Ky.) 210 [1869]; *City of Louisville v. Henderson*, 5 Bush. (68 Ky.) 515 [1869]; *Bacas v. Adler*, 112 La. 806, 36 So. 739 [1904]; *Barber Asphalt Paving Company v. French*, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]; *Barber Asphalt Paving Co. v. Hezel*, 155 Mo. 391, 48 L. R. A. 285, 56 S. W. 449 [1899]; *Seaboard National Bank of New York v. Woesten*, 147 Mo. 467, 48 L. R. A. 279, 48 S. W. 939 [1898]; *Morse v. City of West Port*, 110 Mo. 502, 19 S. W. 831 [1892]; *St. Louis Quarry and Construction Company v. Frost*, 90 Mo. App. 677 [1901]; *Barber Asphalt Paving Company v. Hezel*, 76 Mo. App. 135 [1898]; (affirmed, *Barber Asphalt Paving Co. v. Hezel*, 155 Mo. 391, 48 L. R. A. 285, 56 S. W. 449 [1899]); *Wilson v. Inhabitants of the City of Trenton*, 61 N. J. L.

(32 Vr.) 599, 68 Am. St. Rep. 714, 44 L. R. A. 540, 40 Atl. 575 [1898]; *City of Schenectady v. Trustees of Union College*, 66 Hun. (N. Y.) 179, 21 N. Y. Supp. 147 [1892]; *Hastings v. Columbus*, 42 O. S. 585 [1885]; *McGlynn v. City of Toledo*, 22 Ohio C. C. 34 [1901]; *Philadelphia to Use v. Pemberton*, 208 Pa. St. 214, 57 Atl. 516 [1904]; (affirming, *Philadelphia to Use v. Pemberton*, 25 Pa. Super. Ct. 323 [1904]). It has been said of such a provision: "It is regarded as simply a guaranty of the quality of the work contracted to be done and does not render the contract void, as increasing the burden of abutting owners by requiring them to pay for keeping the pavement in repair for the period of five years after its completion. It is an incident of the contract—not an independent undertaking." *Barber Asphalt Paving Co. v. Watt*, 51 La. Ann. 1345, 1352, 1353, 26 So. 70, (quoted in *Bacas v. Adler*, 112 La. 806, 815, 36 So. 739 [1904]).

² *Seaboard National Bank of New York v. Woesten*, 147 Mo. 467, 48 L. R. A. 279, 48 S. W. 939 [1898].

³ *Morse v. City of West Port*, 110 Mo. 502, 19 S. W. 831 [1892].

⁴ *Seaboard National Bank of New York v. Woesten*, 147 Mo. 467, 48 L. R. A. 279, 48 S. W. 939 [1898]; *St. Louis Quarry and Constructing Company v. Frost*, 90 Mo. App. 677 [1901].

work and material and not for injuries due to other causes.⁵ Thus, under such a contract it was held that the contractor was not liable to repair the streets if they were injured by the bursting of a water main with the construction and laying of which the contractor had had nothing to do.⁶ Accordingly, if the contractor did repair the streets under such circumstances, he was regarded as a mere volunteer and could not recover from the city even if the loss was due to the city's negligence.⁷

§ 518. Illustrations of covenants for maintenance construed as guaranties.

Whether a contract is one for the guaranty of materials and workmanship, or whether it is one for making repairs for deterioration due to any cause, depends upon the language used in the contract taken in connection with the nature of the improvement. The term of years for which the work is to be kept up, in connection with the nature of the improvement, may be material in determining the intention of the parties. The contract which is to be one of guaranty often suggests by its terms that it is really intended as a contract of guaranty. Thus, a contract which provided that the improvement should be so perfectly made that it would remain in good repair for seven years,¹ or one which provided that the contractor should make all repairs for a period of seven years that should become necessary as a result of unskillful construction or unsuitable material and that a certain per cent. of the contract price should be retained as a guaranty fund for such repairs,² or that the work should be done in so substantial a manner that no repairs should be required for five years after its completion and that in case repairs became necessary during that time the contractor would make them without charge,³ or that the contractor would guarantee the durability of the pavement for five years,⁴ or that the

⁵ *City of Kansas City v. Hanson*, 60 Kan. 833, 58 Pac. 474 [1899].

⁶ *Green River Asphalt Company v. City of St. Louis*, 188 Mo. 576, 87 S. W. 985 [1905].

⁷ *Green River Asphalt Company v. City of St. Louis*, 188 Mo. 576, 87 S. W. 985 [1905].

¹ *Hastings v. Columbus*, 42 O. S. 585 [1885].

² *Shank v. Smith*, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932 [1901].

³ *City of Schenectady v. Trustees of Union College*, 66 Hun. 179, 21 N. Y. Supp. 147 [1892].

⁴ *Wilson v. Inhabitants of the City of Trenton*, 61 N. J. L. (32 Vr.) 599, 68 Am. St. Rep. 714, 44 L. R. A. 540, 40 Atl. 575 [1898].

contractor would replace defective work at any time within two years and that if he failed to do so, the city might replace it and recover the expense from himself and his bondsmen,⁵ has in each case been held to be a contract guaranteeing materials and workmanship of the original construction. The meaning thus given to the foregoing contracts is probably in accordance with the actual intention of the parties to the contract. Contracts have, however, been construed as contracts guaranteeing materials and workmanship where the language used by the parties was suggestive rather of an intention to bind the contractor to repair in all cases. Thus, a guaranty for maintenance and repair,⁶ or a contract to maintain the pavement for ten years,⁷ it not appearing that the cost of the improvement was increased by such provision,⁸ or a contract to maintain the street for a period of nine years,⁹ or an agreement that the contractor will keep the pavement in repair for five years where it appears that the pavement, if laid in accordance with the specifications, would last five years without repairs,¹⁰ or a provision that the contractor should keep the street in repair for a period of five years after it was finished and that ten per cent. of the contract price should be withheld in order to enforce such completion and repair,¹¹ or a provision binding the contractor to maintain and repair the street for five years,¹² or a provision that the contractor shall keep the street in repair for two years free of charge,¹³ or a provision that the contractor shall "keep in good order and repair at his own proper cost and expense all the work herein specified for the space of one year,"¹⁴ or that the contractor

⁵ *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898].

⁶ *Graham v. City of Chicago*, 187 Ill. 411, 58 N. E. 393 [1900].

⁷ *Morse v. City of West Port*, 110 Mo. 502, 19 S. W. 831 [1892].

⁸ *Seaboard National Bank of New York v. Woesten*, 147 Mo. 467, 48 L. R. A. 279, 48 S. W. 939 [1898].

⁹ *Barber Asphalt Paving Company v. Hezel*, 76 Mo. App. 135 [1898]; (affirmed in *Barber Asphalt Paving Company v. Hezel*, 155 Mo. 391, 48 L. R. A. 285, 56 S. W. 449 [1900].

¹⁰ *Philadelphia to Use v. Pemberton*, 208 Pa. St. 214, 57 Atl. 516

[1904]; (affirming *Philadelphia to Use v. Pemberton*, 25 Pa. Super. Ct. 323 [1904]).

¹¹ *McGlynn v. City of Toledo*, 22 Ohio C. C. 34 [1901].

¹² *Barber Asphalt Paving Company v. French*, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900].

¹³ *Latham v. Village of Wilmette*, 168 Ill. 153, 48 N. E. 311 [1897]; (The cost of repairs not being considered by the commissioners in making the assessment.)

¹⁴ *City of Covington v. Dressman*, 6 Bush. (69 Ky.) 210 [1869].

shall keep his work in repair for one year,¹⁵ or a provision that the contractor shall keep the work in repair for six months,¹⁶ has each been regarded as in effect a contract guaranteeing the materials and workmanship of the original improvement, although the language used suggests rather a contract for making repairs due to any cause whatever. So a provision in a contract for a system of street lighting that the contractor should guarantee the cable system for five years and that it should stand a certain test at the end of that time was held to be valid and not to avoid the assessment therefor.¹⁷

§ 519. Covenant for maintenance construed as covenant to repair.

In other jurisdictions contracts which by their terms are much like contracts of the type already discussed are regarded as in effect contracts for making repairs in the future for deterioration due to any cause and are held to be invalid.¹ Such provisions have been held invalid even where the city has by statute power to make repairs and to levy assessments therefor.² In these jurisdictions power to make repairs is construed as power to make repairs which in the judgment of the city are then necessary and not power to collect in advance a fund to be used at some indefinite time in the future for the repair and maintenance of the improvement.³ Thus, a provision that the contractor shall give a bond with sureties conditioned "for keeping the

¹⁵ *St. Louis Quarry and Constructing Company v. Frost*, 90 Mo. App. 677 [1901].

¹⁶ *City of Louisville v. Henderson*, 5 Bush. (68 Ky.) 515 [1869].

¹⁷ *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901].

¹ *City Council of Montgomery v. Barnett*, — Ala. —, 43 So. 92 [1907]; *Alameda Macadamizing Co. v. Pringle*, 130 Cal. 226, 80 Am. St. Rep. 124, 52 L. R. A. 264, 62 Pac. 394 [1900]; *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701 [1893]; *Excelsior Paving Co. v. Leach* (Cal.) 34 Pac. 116; *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. Law Rep. 128, 63 S. W. 964 [1901]; *City of Louisville v. Selva*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899]; *Gosnell v. City of Louisville*, 104 Ky. 201,

20 Ky. Law Rep. 519, 46 S. W. 722 [1898]; *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125 [1896]; *State ex rel. Wheeler v. District Court of Ramsey County*, 80 Minn. 293, 83 N. W. 183 [1900]; *Portland v. Bituminous Paving Co.*, 33 Ore. 307, 72 Am. St. Rep. 713, 44 L. R. A. 527, 52 Pac. 28 [1898]; *Boyd v. City of Milwaukee*, 92 Wis. 456, 66 N. W. 603 [1896]; *Young v. City of Tacoma*, 31 Wash. 153, 71 Pac. 742 [1903]; *McAllister v. City of Tacoma*, 9 Wash. 272, 37 Pac. 658, 447 [1894].

² *Portland v. Bituminous Paving Co.*, 33 Ore. 307, 72 Am. St. Rep. 713, 44 L. R. A. 527, 52 Pac. 28 [1898].

³ *State ex rel. Wheeler v. District Court of Ramsey County*, 80 Minn. 293, 83 N. W. 183 [1900].

streets so improved in thorough repair for the term of five years from the completion of the contract,"⁴ or a guaranty that the contractor will keep the improvement in repair for five years and that it will deposit bonds equal to ten per cent. of the contract price as a guaranty of the performance of the same,⁵ or a provision that the contractor shall keep the improvement in good order and repair for five years after its completion and guarantee that during that period neither the city nor the property owners shall be at any expense for any repairs made necessary by defective workmanship or material or by any other reason except cutting through the pavement in order to lay pipes,⁶ or a provision that the contractor shall give bond guaranteeing the work for one year from injury by ordinary use,⁷ has in each case been regarded as a provision requiring the contractor to make ordinary repairs and hence is invalid. If the city has no authority to levy an assessment for repairs, provisions in a contract for original construction requiring the contractor to make ordinary repairs are, of course, invalid.⁸ Such a provision in a contract is said to increase the cost thereof and to cast an extra burden upon the owners of property which is assessed for the original construction.⁹ The same rule applies where repairs are to be assessed on property owners different from those on whom the original cost of construction is to be assessed.¹⁰ Where the increase in cost due to the unauthorized provision for future repairs can be separated from the cost of original construction, it is said that an assessment based upon such a contract may be upheld after deducting such increase.¹¹ Thus, where the contract provides for the deposit of bonds amounting to ten per cent. of the contract price as a guaranty for the performance of this

⁴ *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701 [1893].

⁵ *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125 [1896].

⁶ *Boyd v. City of Milwaukee*, 92 Wis. 456, 66 N. W. 603 [1896].

⁷ *Alameda Macadamizing Company v. Pringle*, 130 Cal. 226, 80 Am. St. Rep. 124, 52 L. R. A. 264, 62 Pac. 394 [1900].

⁸ *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125 [1896]; *Boyd v. City of Milwaukee*, 92 Wis. 456, 66 N. W. 603 [1896].

⁹ *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125 [1896].

¹⁰ *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701 [1893].

¹¹ *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964, 23 Ky. Law Rep. 128 [1901]; *City of Louisville v. Selvage*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899]; *Williamsport v. Hughes*, 21 Pa. Super. Ct. 443 [1902]; *Young v. City of Tacoma*, 31 Wash. 153, 71 Pac. 742 [1903].

provision,¹² or provides for withholding ten per cent. of the contract price as a guaranty for the performance of such provision, such amount may be deducted from the amount of the assessment and the rest of such assessment may be enforced.¹³ It has been held that the court may determine from the evidence the amount of increased cost of the improvement due to the covenant to repair, even if the contract is an entire contract for a gross sum.¹⁴ In Missouri the view was originally expressed that provisions of this sort amounted to a contract for repairs and were invalid.¹⁵ Subsequently, however, a different view has been entertained and contracts of this sort are construed as contracts for the guaranty of materials and workmanship. In Louisiana, while it has been conceded that the recent tendency of the courts is to regard contracts for maintenance as merely contracts for repairs and not contracts for guaranteeing workmanship and material, yet it was said that this view had developed since the contract in question was made and that the contract would be held valid in accordance with the view prevailing when it was entered into.¹⁶ In some jurisdictions the validity of a clause for maintenance cannot be attacked successfully after the improvement has been constructed.¹⁷ This holding, however, is based on the assumption that if the contract is entire, it is impossible to sever the part of the expense due to the contract for maintenance from that due to the contract for original construction. A different view prevails where such separation is regarded as possible.¹⁸ In a recent Alabama case the validity of a contract for maintenance was questioned but not finally passed upon. The advertisement called for a contract for construction and ten years' maintenance. The contract as let required construction and only two years maintenance. It was held that under such advertise-

¹² *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. Law Rep. 128, 63 S. W. 964 [1901].

¹³ *City of Louisville v. Selvage*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899].

¹⁴ *Fair Haven and Westville Railroad Company v. City of New Haven*, 77 Conn. 667, 60 Atl. 651 [1905].

¹⁵ *Verdin v. City of St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52 [1895]. For the present view see § 518.

¹⁶ *Bacas v. Adler*, 112 La. 806, 36 So. 739 [1904].

¹⁷ *Fisher v. Georgia Vitriified Brick and Clay Company*, 121 Ga. 621, 49 S. E. 679 [1905]; *Bacas v. Adler*, 112 La. 806, 36 So. 739 [1904]; *Barber Asphalt Paving Company v. Watt*, 51 La. Ann. 135, 26 So. 73 [1899].

¹⁸ *Fair Haven & Westville Railroad Company v. City of New Haven*, 77 Conn. 667, 60 Atl. 651 [1905]; *City of Louisville v. Selvage*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899].

ment such a contract could not be let, as it was impossible to determine who the lowest bidder was.¹⁹ If a method is provided by statute for objecting to such unlawful increase in cost, such statutory method must be taken advantage of, or it is held to be waived.²⁰ The fact that the cost of keeping a street in repair for five years from its completion is included in the assessment does not make it so void as to subject it to collateral attack.²¹ The fact that a provision requiring the original contractor to keep the improvement in repair for ten years is a part of the original contract, does not relieve the property owners who are by statute liable to assessment for repairs from liability for such assessment if the original contractor becomes insolvent and is unable to perform such contract.²² If a street railway company is bound to pave and keep in repair the part of the street on which its tracks are laid and a space of two feet on each side of the tracks, such railway company cannot be assessed for the increased cost of a street improvement due to a provision in the contract for keeping it in repair for ten years if the contract and bond are so drawn that the railroad company could not enforce such provision.²³

§ 520. . Restrictions on contract price.

There is no constitutional provision found in most state constitutions which requires the legislature to place a restriction upon the price to be paid by the city for a given public improvement.¹ If no limitation is imposed by statute the courts have no power to restrict the action of the city in determining the character of the improvement or the price to be paid as long as no fraud is shown to exist.² Accordingly, the fact that the public cor-

¹⁹ *City Council of Montgomery v. Barnett*, — Ala. —, 43 So. 92 [1907].

²⁰ *Alexander v. City of Tacoma*, 35 Wash. 366, 77 Pac. 686 [1904].

²¹ *Alexander v. City of Tacoma*, 35 Wash. 366, 77 Pac. 686 [1904].

²² *State ex rel. Woulfe v. St. Paul*, 107 La. 777, 32 So. 88 [1902].

²³ *Fair Haven & Westville Railroad Company v. City of New Haven*, 77 Conn. 667, 60 Atl. 651 [1905]; *Fair Haven & Westville Railroad Com-*

pany v. City of New Haven, 77 Conn. 219, 58 Atl. 703 [1904]. (The railway company remains liable on its original obligation to repair, the street and gets no benefit from this provision in the contract.)

¹ *Rogers v. City of St. Paul*, 22 Minn. 494 [1876].

Palmer v. City of Danville, 166 Ill. 42, 46 N. E. 629 [1897]; *Rogers v. City of St. Paul*, 22 Minn. 494 [1876]; *Hill v. Swingley*, 159 Mo. 45, 60 S. W. 114 [1900].

poration ordered the improvement to be made at a time of the year when it would cost more than at other seasons does not invalidate the assessment.³ If by statute a limit is placed upon the amount which may be expended for public improvement such statute must be obeyed.⁴ Under a statute fixing the limit of the amount which may be paid for a park the net amount of damages less benefits and not the gross amount of damages without deducting benefits is to be used in determining the amount paid.⁵ The contract price may be limited to the amount of the estimate prepared in advance.⁶ A contract for paving not performed within the time fixed by ordinance became voidable at the expiration of such time, and if revived by the city several years later with the consent of the contractor, is subject to an ordinance passed in the meantime restricting the cost of paving to a certain maximum price per square yard.⁷

§ 521. Option to property owners to do work or to select contractor or materials.

Statutes frequently provide that the property owners must be given an opportunity to do the work themselves before the city has power to provide for the construction of given improvements at the expense of the property owners. Such statutes are held to be valid, since the notice to the property owners and the opportunity to be heard as to the amount of the assessment constitute due process of law.¹ The prescribed notice to the property owners, and an opportunity to them to do the work must be given to make further proceedings valid.² Under a statute providing that the property owner may construct a sidewalk in front of his property and thereby relieve it from assessment, a notice requiring property owners to construct the sidewalks in front of their lots, and stating that if they construct such sidewalks their property will be relieved from all assessment except

³ Philadelphia to use v. Evans, 139 Pa. St. 483, 21 Atl. 200 [1891].

⁴ Andrews v. People ex rel. Rumsey, 84 Ill. 28 [1876]; Philadelphia to use v. Jewell, 135 Pa. St. 329, 19 Atl. 947 [1890].

⁵ Andrews v. People ex rel. Rumsey, 84 Ill. 28 [1876].

⁶ Ireland v. City of Rochester, 51 Barb. (N. Y.) 414 [1868].

⁷ Philadelphia to use v. Jewell, 135 Pa. St. 329, 19 Atl. 947 [1890].

¹ Heath v. Manson, 147 Cal. 694, 82 Pac. 331 [1905]; Dyer v. Woods, 166 Ind. 44, 76 N. E. 624 [1906]; Borough of Beltzhoover v. Maple, 139 Pa. St. 335, 18 Atl. 650 [1889].

² Rork v. Smith, 55 Wis. 67, 12 N. W. 408 [1882]; See § 52 *et seq.*, § 737.

their respective proportionate shares of the cost of intersections is not sufficient, since by reason of such construction the property is relieved from all assessment.³ If a short time is given to the property owner in which to repair a sidewalk and such owner begins such repair within the time limited and the work is prosecuted in good faith, the fact that it is not entirely completed at the expiration of the time limit does not empower the city to have such work done again at the cost of the property owner.⁴ On the other hand the fact that the property owner has begun the work does not relieve him from assessment unless it is shown that he has substantially complied with the requirements of the ordinance.⁵ If a short time is given to the property owner in which to do the work and the city has required such amount of work to be done in a short time and the available working force in that locality is insufficient to do the work within the time limited, and the property owner is accordingly unable to do the work within the time limited, it has been held to be fraudulent for the city to let contracts for such work.⁶ Where a contract is let within the time in which the owner may do the work himself, it has been held that such contract and the assessment based thereon are nevertheless valid where the contractor does not begin performance until after the time limit has expired and the owner has made no effort to construct the improvement within such time limit.⁷ Under such statute it is not necessary for the property owners to aver that the city surveyor gave to them the certificate of the completion of their work required by law.⁸ Under other statutes it is provided that after the improvement is determined upon, a certain number of the property owners, usually either a majority or three-fourths of them, may elect to do the work themselves.⁹ Under such statutes it is held that

³ *City of Chicago v. Burkhardt*, 223 Ill. 297, 79 N. E. 82 [1906].

⁴ *Heman v. St. Louis Merchants' Land Improvement Company*, 75 Mo. App. 372 [1898].

⁵ *Shrum v. Town of Salem*, 13 Ind. App. 115, 39 N. E. 1050 [1895].

⁶ *Foote v. City of Milwaukee*, 18 Wis. 270 [1864]. (Additional and possible controlling facts in this case were that the work was let at an exorbitant price, and that while a short time was fixed in the contract

for the performance, such time was subsequently extended for almost a year.)

⁷ *City of Galveston v. Heard*, 54 Tex. 420 [1881].

⁸ *Barber v. Board of Supervisors of the City and County of San Francisco*, 42 Cal. 631 [1872].

⁹ *German Savings & Loan Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902]; *California Improvement Company v. Quinchard*, 119 Cal. 87, 51 Pac. 24 [1897]; Ca-

public officers have no power to let a contract for such improvement within the time thus limited.¹⁰ A contract let within such time is void and cannot be the basis of a valid assessment.¹¹ This holding is based on the theory that the city officials have no jurisdiction to let the contract until the time thus limited has expired.¹² Such a statute is not repealed by a subsequent statute declaring a contract between the city and an officer thereof void.¹³ The court in this case expressed a doubt whether there was any inconsistency between the two statutes and held that if there was any inconsistency the second statute repealed the first only if a city official was one of the majority of the property owners who elected to do the work.¹⁴ Where a small street terminates in an open street and by statute the owners of such street are held to be assessed in part for the improvement of the principal street, the term "majority of the owners" has been held to mean the owners of the greater part of the frontage on the principal street.¹⁵ Under such statutes a contract between three-fourths of the property owners who waive their right to take the contract and agree with the contractor for a reduced rate for the work to be done and for a corresponding credit upon their assessment is held not to be fraudulent, at least if the other property owners have the privilege of entering into such arrangement.¹⁶ By statute the property owners may have the right to select the material to be used in the improvement.¹⁷ If the statute requires notice to be given to the property owners in order to enable them to make such selection, such notice must be given.¹⁸

pron v. Hitchcock, 98 Cal. 427, 33 Pac. 431 [1893]; *Manning v. Den*, 90 Cal. 610, 27 Pac. 435 [1891]; *Burke v. Turney*, 54 Cal. 486 [1880]; *Betts v. City of Naperville*, 214 Ill. 380, 73 N. E. 752 [1905].

¹⁰ *California Improvement Co. v. Quinchard*, 119 Cal. 87, 51 Pac. 24 [1897]; *Manning v. Den*, 90 Cal. 610, 27 Pac. 435 [1891].

¹¹ *California Improvement Co. v. Quinchard*, 119 Cal. 87, 51 Pac. 24 [1897]; *Manning v. Den*, 90 Cal. 610, 27 Pac. 435 [1891]; *Burke v. Turney*, 54 Cal. 486 [1880].

¹² *Burke v. Turney*, 54 Cal. 486 [1880].

¹³ *Capron v. Hitchcock*, 98 Cal. 427, 33 Pac. 431 [1893].

¹⁴ *Capron v. Hitchcock*, 98 Cal. 427, 33 Pac. 431 [1893].

¹⁵ *Cochran v. Collins*, 29 Cal. 130 [1865].

¹⁶ *German Savings & Loan Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902].

¹⁷ *Eddy v. City of Omaha*, 72 Neb. 550, 101 N. W. 25 [1904]; modified on rehearing, 102 N. W. 70, 103 N. W. 692 [1905].

¹⁸ *Eddy v. City of Omaha*, 72 Neb. 550, 101 N. W. 25 [1904]; modified on rehearing, 102 N. W. 70; 103 N. W. 692 [1905].

If the notice is waived by the property owners the facts constituting a waiver must be shown.¹⁹ If the statute does not provide for notice to the property owners to enable them to select the material, it is said that the property owners should take the initiative within a reasonable time and should communicate their choice to the proper city official.²⁰ In case of failure so to communicate their choice of material the city officials are justified in assuming that the property owners waive their right to make such choice.²¹ Under a statute which provides that the property owners shall make a selection from not less than two kinds of material to be designated by the board of public works, the board may designate a certain specified kind of asphalt which can be furnished by one company only as one of the two kinds of material.²² The designation by the board, of macadam, brick or asphalt is sufficient. It is not necessary that the board select two kinds of each of such materials.²³ Under a statute giving to the petitioners for an improvement the right to select the material, the board of public works may reject the material as unsuitable, but has no further discretion.²⁴ Under some statutes or ordinances it is provided that a certain proportion, usually a majority of the property owners to be assessed may select the person to do the work for which the assessment is to be levied.²⁵ Under such statutes no recovery can be had upon the assessment if the work is done by some one who has not been selected by the property owners.²⁶ The property owners who have selected a person to do the work may withdraw their assent to such selection at any time before the contract has been awarded by the city.²⁷ A contract-

¹⁹ *Eddy v. City of Omaha*, 72 Neb. 550, 101 N. W. 25 [1904]; modified on rehearing, 102 N. W. 70, 103 N. W. 692 [1905].

²⁰ *Moale v. Mayor and City Council of Baltimore*, 61 Md. 224 [1883].

²¹ *Moale v. Mayor and City Council of Baltimore*, 61 Md. 224 [1883].

²² *Barber Asphalt Paving Company v. Field*, 188 Mo. 182, 86 S. W. 860 [1905].

²³ *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107.

²⁴ *Rhodes v. Board of Public Works*, 10 Colo. App. 99; 49 Pac. 430 [1897].

²⁵ *Reilly v. City of Philadelphia*, 60 Pa. St. (10 P. F. Smith) 467 [1869].

²⁶ *City of Philadelphia to use of O'Rourke v. Philadelphia and Reading Railroad Company*, 88 Pa. St. (7 Norris) 314 [1879]; *Dickerson v. Peters*, 71 Pa. St. (21 P. F. Smith) 53 [1872]; *Reilly v. City of Philadelphia*, 60 Pa. St. (10 P. F. Smith) 467 [1869].

²⁷ *City of Philadelphia to use of O'Rourke v. Philadelphia and Reading Railroad Co.*, 88 Pa. St. (7 Norris) 314 [1879]; *Dickerson v. Peters*, 71 Pa. St. (21 P. F. Smith) 353

or so selected by the property owners may recover for the work done under his agreement with the owners although the contract with the city called for paving a greater extent of the street.²⁸ The fact that the property owners select the person to do the work and enter into a contract with him before the ordinance authorizing them so to do is passed, does not invalidate the assessment.²⁹

§ 522. Time of performance.

In the absence of special statute it is not necessary that the public corporation should fix a time within which the contract must be performed.¹ In the absence of such provision it will be implied that the contract is to be performed within a reasonable time.² Under some statutes it is provided that the time within which the contract is to be performed must be fixed. Such statutes are valid and must be complied with substantially, at least.³ If the time within which the contract is to be performed has been fixed by the proper board, the officer who is authorized to make the contract cannot change the time so fixed.⁴ If he attempts to enter into a contract by the terms of which any other time is fixed, such contract is not that which he was authorized to make and is therefore invalid.⁵ It is provided by some statutes that some specified officer must fix the time at which performance is to begin and at which performance is to be completed. Such provisions are mandatory and a contract entered into without complying with such provisions is invalid.⁶ It is not necessary, however, that a specific date be fixed upon which performance is to begin.⁷

[1872]. Apparently *contra*, Long v. O'Rourke, 10 Phil. 129, where it was held that a second appointment did not revoke the first.

²⁸ Fell v. Philadelphia to the use of Cunningham, 81 Pa. St. (31 P. F. Smith) 58 [1876]. (In this case that part of the street contracted for by the city but not agreed upon by the property owners was forbidden to be opened by an act of the legislature and no paving was there done.)

²⁹ Fell v. Philadelphia to the use of Cunningham, 81 Pa. St. (P. F. Smith) 58 [1876].

¹ Carlin v. Cavender, 56 Mo. 286 [1874]; Strassheim v. Jerman, 56 Mo. 104 [1874].

² Allen v. La Force, 95 Mo. App.

324, 66 S. W. 1057 [1902]; Ayers v. Sehmohl, 86 Mo. App. 349 [1900]. (In this case the ordinance did not fix any time limit but the contract fixed a limit of sixty days.)

³ Brock v. Luning, 89 Cal. 316, 26 Pac. 972 [1891].

⁴ Brock v. Luning, 89 Cal. 316, 26 Pac. 972 [1891].

⁵ Brock v. Luning, 89 Cal. 316, 26 Pac. 972 [1891].

⁶ Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081 [1894]; Libbey v. Elsworth, 97 Cal. 316, 32 Pac. 228 [1893]; Washburn v. Lyons, 97 Cal. 314, 32 Pac. 310 [1893].

⁷ Williams v. Bergin, 127 Cal. 578, 60 Pac. 164 [1900].

It is sufficient if the proper officer fixes the time for commencing performance within a certain number of days from the time of entering into the contract not exceeding the number permitted by statute.⁸ A contract which provides that the work is to be commenced within ten days from the date of the contract and to be completed within two hundred and forty days thereafter shows with sufficient accuracy when the performance is to begin and when it is to be completed.⁹ It has been held that while the time at which the work is to be completed should be fixed by the advertisement inviting proposals and not after the contract has been let, yet such complaint comes too late after the contract has been performed.¹⁰ If in a contract for street paving the time within which the contract is to be performed is left blank, the provisions of a general ordinance requiring all contracts for street paving to be performed within two years are regarded as incorporated in such contract.¹¹

§ 523. Separation and combination of contracts.

The city may let one contract for two or more distinct improvements,¹ as long as no injustice is done thereby.² If, however, the plan of letting a contract in which two or more distinct improvements are combined, results in assessing for the cost of one improvement, property which is benefited solely by the other improvement, such assessment is invalid.³ In the absence of statute it is not necessary that the different items of work should be let in separate contracts.⁴ On the other hand, in the absence of specific statutory provision to the contrary, separate contracts may be let for work which is covered by one ordinance or resolu-

⁸ *Williams v. Bergin*, 127 Cal. 578, 60 Pac. 164 [1900]; *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920 [1899]; *White v. Harris*, 103 Cal. 528, 37 Pac. 502 [1894].

⁹ *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920 [1899].

¹⁰ *Richardson v. Mehler*, 111 Ky. 408, 63 S. W. 957, 23 Ky. Law Rep. 917 [1901].

¹¹ *Philadelphia to use v. Jewell*, 135 Pa. St. 329, 19 Atl. 947 [1890].

¹ *Alameda Macadamizing Company v. Williams*, 70 Cal. 534, 12 Pac. 530

[1886]; *Bye, Pros. v. Atlantic City*, 73 N. J. L. 402, 64 Atl. 1056 [1906]; *Wilmington Avenue*, 213 Pa. St. 238, 62 Atl. 848 [1906].

² *State, Provident Institution for Savings in Jersey City, Pros. v. Mayor, etc., of Jersey City*, 52 N. J. L. (23 Vr.) 490, 19 Atl. 1096 [1890].

³ *Kansas City Grading Company v. Holden*, 32 Mo. App. 490 [1888]. See § 568 *et seq.*

⁴ *Eyer mann v. Blakesley*, 9 Mo. App. 231 [1880].

tion.⁵ Under statutes which require improvements exceeding a certain amount in cost, to be ordered with certain additional formalities, there is an occasional tendency to evade complying with such formalities by subdividing such improvement into sections, no one of which will in cost exceed the prescribed amount. In such case the question for the court to determine is whether such an improvement is divided into sections in good faith by reason of the necessities of the case or whether it is so divided merely to evade complying with such statutory requirements.⁶ The public corporation cannot divide what is actually one entire improvement into subdivisions so as to avoid the necessity of advertising for bids.⁷ Thus, if contracts for an amount exceeding five hundred dollars must be let on competition, the city cannot evade this requirement by letting the contract for a walk in front of each lot, as a separate improvement, each to the same contractor.⁸ Thus, where no adequate cause appears for dividing a street into sections, but it is so divided by ordinances which are presented and adopted at the same time, it is assumed that such division is merely to evade complying with such formalities.⁹ On the other hand, if the ordinances are passed at different dates extending over a period of two years, it will not be assumed that such division of the improvement into sections was made for the purpose of evading such statute.¹⁰

§ 524. Effect of provision for liquidated damages.

Provisions are sometimes found in contracts to the effect that the contractor must pay a certain sum per day as liquidated damages in case of failure to perform within the time limited. In some jurisdictions it is held that such penalties are intended for the benefit of the property owner and that delay in perform-

⁵ *Bates v. Twist*, 138 Cal. 52, 70 Pac. 1023 [1902]; *Ede v. Cogswell*, 79 Cal. 278, 21 Pac. 767 [1889]; *Eyermann v. Blakesley*, 13 Mo. App. 407 [1883]; *People ex rel. Thompson v. Mayor, etc., of the City of Syracuse*, 6 Hun. (N. Y.) 652 [1876].

⁶ *Nelson v. City of Chicago*, 196 Ill. 390, 63 N. E. 738 [1902]; *Kerfoot v. City of Chicago*, 195 Ill. 229, 63 N. E. 101 [1902].

⁷ *People ex rel. Whitlock v. Lamon*,

232 Ill. 587, 83 N. E. 1070 [1908].

⁸ *People ex rel. Whitlock v. Lamon*, 232 Ill. 587, 83 N. E. 1070 [1908].

⁹ *Nelson v. City of Chicago*, 196 Ill. 390, 63 N. E. 738 [1902]. See to the same effect *Kerfoot v. City of Chicago*, 195 Ill. 229, 63 N. E. 101 [1902].

¹⁰ *Ton v. City of Chicago*, 216 Ill. 331, 74 N. E. 1044 [1905]. For other questions presented by the division of an improvement see § 574.

ance gives to the property owner the right to have a proportionate amount of such penalty deducted from his assessment.¹ Such amount cannot be deducted if no delay in completing the improvement is shown.² In other jurisdictions it is held that such penalty is not intended for the benefit of the property owner and has no relation to the assessment,³ and that the city may enforce such penalty or not in its discretion.⁴ If the city elects not to enforce such penalty it is held that the property owner cannot insist on having a proportionate part thereof deducted from his assessment.⁵ Under either theory the property owner must be able to show that such provision for deducting a stipulated amount in case of non-performance could have been enforced and ought to have been enforced or he cannot have a proportionate amount thereof deducted from his assessment.⁶

§ 525. Necessity of completion of improvement.

Whether the improvement for which the assessment is levied must be completed before the assessment is levied or whether the assessment may be levied before the improvement is completed is a matter which rests with the discretion of the legislature. Each method of procedure has its advantages. If the improvement is completed before the assessment is levied, it is then possible to determine, not as a matter of speculation but as a matter of fact, what benefits are conferred by the improvement in question and to what extent each separate tract of land is benefited. On the other hand the amount of benefits may then prove to be so small in comparison with the cost of improvement, that the city would not have undertaken such improvement if it had known how small a proportion of the cost could be exacted from the property owners. It is therefore more satisfactory, although less exact, to know before the improvement is constructed and the expense incurred therefor, what proportion of the cost of the im-

¹ *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163 [1902].

² *Heman Construction Company v. Loevy*, 179 Mo. 455, 78 S. W. 613 [1904].

³ *Cass Farm Co. v. City of Detroit*, 124 Mich. 433, 83 N. W. 108 [1900].

⁴ *Gulick v. Connely*, 42 Ind. 134 [1873]; *Lindsey v. Brawner*. — Ky. —, 97 S. W. 1, 29 Ky. L. Rep. 1236

[1906]; *Cass Farm Co. v. City of Detroit*, 124 Mich. 433, 83 N. W. 108 [1900].

⁵ *Gulick v. Connely*, 42 Ind. 134 [1873]; *Lindsey v. Brawner*. — Ky. —, 97 S. W. 1, 29 Ky. L. Rep. 1236 [1906].

⁶ *State, Kohler, Pros. v. Town of Guttenberg*, 38 N. J. L. (9 Vr.) 419 [1876].

provement is to be borne by the city and what by the property owners. The legislature has full power to determine which course of procedure it will adopt. It is often provided by statute that the assessment is to be levied when the improvement is constructed.¹ It is generally held in the absence of specific statutory provision to the contrary that a public corporation may do the work before the assessment is levied.² This power exists even if the public corporation is authorized to levy an assessment before the performance of the contract for which the assessment is levied.³ It is especially necessary to defer the levy of the assessment until the construction of the improvement where the assessment is to be levied for the cost of the improvement and no means is provided for estimating the cost in advance as a basis for the levy of the assessment.⁴ Thus, if under a street sprinkling contract the amount of work to be done and the amount to be paid therefor cannot be determined definitely until the end of the season, an assessment need not be levied monthly to pay for the work done up to such periods of time but may be levied at the end of the season for the entire cost of the work.⁵ In many jurisdictions it is held that a public corporation has no power to levy an assessment until the completion of the improvement for which the assessment is levied.⁶ Such intention of the legislature may

¹ *Alberger v. Mayor and City Council of Baltimore*, 64 Md. 1, 20 Atl. 988 [1885]; *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66 [1906].

² *Smith v. Duck Pond Ditching Association*, 54 Ind. 235 [1876]; *Keigher v. City of St. Paul*, 69 Minn. 78, 72 N. W. 54 [1897] *Webber v. Common Council of the City of Lockport*, 43 Howard (N. Y.) 368 [1872]; *Elwood v. City of Rochester*, 43 Hun. (N. Y.) 102 [1887]; *Wetmore v. Campbell*, 4 N. Y. Supp. Ct. 341 [1849].

³ *Smith v. Duck Pond Ditching Association*, 54 Ind. 235 [1876].

⁴ *Keigher v. City of St. Paul*, 69 Minn. 78, 72 N. W. 54 [1897].

⁵ *Keigher v. City of St. Paul*, 69 Minn. 78, 72 N. W. 54 [1897].

⁶ *Sargent and Company v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. 1028 [1895]; *City of Chicago v.*

Richardson, 213 Ill. 96, 72 N. E. 791 [1904]; (supplemental assessment); *People ex rel. Raymond v. Grover*, 203 Ill. 24, 67 N. E. 165 [1903]; *People ex rel. Raymond v. Latham*, 203 Ill. 9, 67 N. E. 403 [1903]; *Craig v. People ex rel. Ganaway*, 193 Ill. 199, 61 N. E. 1072 [1901]; *Mix v. People ex rel. Shaw*, 106 Ill. 425 [1883]; *Sanborn v. City of Mason City*, 114 Ia. 189, 86 N. W. 286 [1901] *State of Kansas, on the Relation of Young v. Neodesha*, 3 Kan. App. 319, 45 Pac. 122 [1896]; *City of Henderson v. Lambert*, 77 Ky. (14 Bush.) 24 [1878]; *Moody and Co. v. Chadwick*, 52 La. Ann. 1888, 28 So. 361 [1900]; *New England Hospital for Women and Children v. Street Commissioners of the City of Boston*, 188 Mass. 88, 74 N. E. 294 [1905]; *Jones v. Metropolitan Park Commissioners*, 181 Mass. 494,

be expressed in a statutory provision which provides that the assessment shall not be levied until the improvement is completed.⁷ It may be inferentially provided by statute that the assessment must be levied before the work is begun.⁸ Thus, where a statute provided that land owners might pay their proportional part of the cost of building a road in labor, but that the expense of building the road was to be met by assessing upon the lands, the value of which was increased by the improvement, a sum sufficient to build a road, the omission to levy such assessment as a part of the original proceedings in laying out the road was said to invalidate them.⁹ Such intention may also be found where the statute provides for levying the assessment for the cost of the improvement and provides no way for estimating such cost in advance as a basis of the assessment.¹⁰ In such cases the cost of the improvement can ordinarily be determined only after the improvement has been constructed.¹¹ Even where the statute authorizes an assessment to be levied before the work

64 N. E. 76 [1902]; *In re Kingman*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778 [1891]; *Prince v. City of Boston*, 111 Mass. 226 [1872]; *Sherwood v. Ryneerson*, 141 Mich. 92, 104 N. W. 392 [1905]; *City of Sedalia to Use of Sedalia National Bank v. Donohue*, 190 Mo. 407, 89 S. W. 386 [1905]; *City to use of McGrath v. Clemens*, 49 Mo. 552 [1872]; *Heman Construction Company v. Loevy*, 64 Mo. App. 430 [1895]; *Bellevue Improvement Company v. Village of Bellevue*, 39 Neb. 876, 58 N. W. 446 [1894]; *Hoagland v. Wurts*, 41 N. J. L. (12 Vr.) 175 [1879]; *In the Matter of Wood*, 51 Barb. (N. Y.) 275 [1868]; *Beckman's Petition*, 19 Abb. Prac. 244 [1865]; *City of Cincinnati for use of Wirth v. Cincinnati & Spring Grove Avenue Company*, 26 O. S. 345 [1875]; *Taylor v. Wapakoneta*, 26 Ohio Cir. Ct. R. 283 [1904].

⁷ *Sargent and Company v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. 1028 [1895]; *Sanborn v. City of Mason City*, 114 Ia. 189, 86 N. W. 286 [1901]; *Jones v. Metropolitan Park Commissioners*, 181 Mass. 494,

64 N. E. 76 [1902]; *City of Sedalia to Use of Sedalia National Bank v. Donohue*, 190 Mo. 407, 89 S. W. 386 [1905].

⁸ *Pierce v. County Commissioners of Franklin County*, 63 Me. 252 [1872].

⁹ *Pierce v. County Commissioners of Franklin County*, 63 Me. 252 [1872].

¹⁰ *State of Kansas on the Relation of Young v. City of Neodesha*, 3 Kan. App. 319, 45 Pac. 122 [1896]; *Moody and Co. v. Chadwick*, 52 La. Ann. 1888, 28 So. 361 [1900]; *New England Hospital for Women and Children v. Street Commissioners of the City of Boston*, 188 Mass. 88, 74 N. E. 294 [1905]; *Prince v. City of Boston*, 111 Mass. 226 [1872]; *City of Sedalia to use of Sedalia National Bank v. Donohue*, 190 Mo. 407, 89 S. W. 386 [1905]; *Hoagland v. Wurts*, 41 N. J. L. (12 Vr.) 175 [1879].

¹¹ "It is manifest that the ordinance authorizing the work to be done, which is required to be based only upon an estimate of the cost, could not levy and assess the special

is begun, a supplementary assessment for the excess of the cost of the improvement over the amount of the original assessment cannot be levied until the improvement is completed.¹² Thus, if an assessment for a sidewalk is to be based upon cost bills showing the actual cost of building the walk apportioned according to frontage, the improvement must be constructed before such cost bill can be made out.¹³ Under other statutes a public corporation is authorized to levy an assessment for an improvement before such improvement has been constructed.¹⁴ Where it is

tax for the doing of the work, for the council would not at that time know what the cost of the work would be, and, therefore, could not apportion it by the original ordinance. Until the contract for the doing of the work was let, no one could know what the cost of the improvement would be. The statute clearly contemplates, therefore, that the city council shall authorize the doing of the work, shall enter into the contract therefor, and shall afterwards levy the cost as a special tax." *City of Sedalia to use of Sedalia National Bank v. Donohue*, 190 Mo. 407, 422, 423, 89 S. W. 386 [1905].

"An assessment of this kind is necessarily subsequent to the widening. From the nature of the case it cannot be made until the completion of the work. One element in the apportionment, the net expense of grading the whole widened street, cannot be sooner ascertained." *Whiting v. Mayor and Aldermen of the City of Boston*, 106 Mass. 89, 95 [1870]; quoted in *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870], and in *Prince v. City of Boston*, 111 Mass. 226 [1872].

Of an assessment levied before the improvement was constructed, the court said that being "a judgment of valuers founded on speculation in place of an assessment founded on facts or by a fixed standard, it seems to me that such a procedure is a substantial departure from ancient usage and on that account cannot be sanctioned." *Hoagland v.*

Wurts, 41 N. J. L. (12 Vr.) 175, 181 [1879]; (affirming *Matter of Commissioners to drain Great Meadows*, 39 N. J. L. (10 Vr.) 433 [1877].

¹² *Sheriffs v. City of Chicago*, 213 Ill. 620, 73 N. E. 367 [1905]; *City of Chicago v. Richardson*, 213 Ill. 96, 72 N. E. 791 [1904].

¹³ *People ex rel. Raymond v. Grover*, 203 Ill. 24, 67 N. E. 165 [1903]; *People ex rel. Raymond v. Latham*, 203 Ill. 9, 67 N. E. 403 [1903]; *Craig v. People ex rel. Gannaway*, 193 Ill. 199, 61 N. E. 1072 [1901].

¹⁴ *Lawrence v. People ex rel. Foote*, 188 Ill. 407, 58 N. E. 991 [1900]; *Craft v. Kochersperger*, 173 Ill. 617, 50 N. E. 1061 [1898]; *Hammond v. People for use, etc.*, 169 Ill. 545, 48 N. E. 573 [1897]; *Racer v. State for use of Rhine*, 131 Ind. 393, 31 N. E. 81 [1891]; *Eel River Draining Association v. Topp*, 16 Ind. 242 [1861]; *Ross v. Board of Supervisors of Wright County, Iowa*, 128 Iowa 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506 [1905]; *Henderson v. Mayor and City Council of Baltimore, Use of Eschbach*, 8 Md. 352 [1855]; *Foster v. Park Commissioners*, 133 Mass. 321; *Germania Bank v. City of St. Paul*, 79 Minn. 29, 81 N. W. 542 [1900]; *McConville v. City of St. Paul*, 75 Minn. 383, 74 Am. St. Rep. 508, 43 L. R. A. 584, 77 N. W. 993 [1899]; *Strickland v. City of Stillwater*, 63 Minn. 43, 65 N. W. 131 [1895]; *Astoria Heights Land Company v. City of New York*, 179 N. Y. 579, 72 N. E. 1139 [1904]; (*af-*

sought to levy an assessment before the improvement has been constructed, an estimate of the probable cost of the improvement must be made and the assessment must be levied for the amount of this estimate.¹⁵ Under an ordinance providing that the granite pavement then laid upon the street should be sold and the proceeds thereof applied upon the cost of the improvement, such sale need not be made before the assessment for the improvement is levied.¹⁶ The fact that a contract for the construction of a ditch provides that no part of the work was to be accepted until all of the ditch down stream therefrom should have been completed, does not prevent the levy of an assessment before the work is so completed.¹⁷ In the same state some statutes may provide for levying assessments only after the improvement is completed, or at least contracted for; while other statutes passed at different times or with reference to different improvements, may authorize assessments before the improvement is completed or contracted for. Thus, while in Massachusetts under most of the assessment statutes, the improvement must be completed before the assessment is levied¹⁸ the statute authorizing an assessment for the laying out of a park authorizes such assessment without reference to the completion of such improvement.¹⁹ So in Michigan it was originally provided that the assessment should be levied before a contract was let,²⁰ but this rule was subsequently modified by statute.²¹ An assessment cannot be levied for work no part of which has been or is to be done.²² To resist an assessment on the ground that the work has not been done it is necessary to show unequivocally that the work has not been done.²³

firming, 89 App. Div. 512, 86 N. Y. S. 651 [1903]); In the Matter of the Application of Beekman, 31 Howard (N. Y.) 16 [1865]; Britton v. City of Philadelphia, 32 Pa. St. 387 [1859]; Espy Estate Company v. Pacific County, 40 Wash. 67, 82 Pac. 129 [1905]; Felker v. City of New Whatcom, 16 Wash. 178, 47 Pac. 505 [1896].

¹⁵ Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771 [1890]; City of Chicago v. Singer, 116 Ill. App. 559 [1904]; Doughty v. Hope, 3 Denio (N. Y.) 249 [1846]; Beekman's Petition, 1 Abb. Pr. 449 [1865].

¹⁶ Aldis v. South Park Commissioners, 171 Ill. 424, 49 N. E. 565 [1898].

¹⁷ Racer v. State for Use of Rhine, 131 Ind. 393, 31 N. E. 81 [1891].

¹⁸ See *ante*, this section, n. 11.

¹⁹ Foster v. Park Commissioners, 133 Mass. 321.

²⁰ Lefevre v. Mayor, etc., of Detroit, 2 Mich. 586 [1853].

²¹ Butler v. Detroit, 43 Mich. 552, 5 N. W. 1078.

²² In the Matter of Eager, 58 Barb. (N. Y.) 557 [1871]. See §§ 417, 418.

²³ Masonic Building Association v. Brownell, 164 Mass. 306, 41 N. E. 306 [1895].

Accordingly, if the pleadings and the agreed facts leave it doubtful whether the work has been performed or not it will be presumed that the work has been performed if this fact is necessary to the validity of the assessment.²⁴ If the improvement has been substantially completed an assessment may be levied or tax bills issued, although something yet remains to be done under the contract,²⁵ at least if the work is completed before the suit is brought.²⁶ If an improvement is constructed in sections an assessment may be levied when one of such sections is completed without awaiting completion of the entire improvement if the statute authorizes such assessment.²⁷ Under an ordinance and contract for improving a designated part of a street, an assessment cannot be levied for improving a part thereof only, even if such assessment is restricted to the property in front of which such work is done.²⁸ If one block of an entire street improvement has been rejected by a board, they have no authority to certify that the entire work has been performed, although they take a bond from the contractor to complete the work and withhold a part of his compensation.²⁹ An assessment may be levied upon the completion of the work for which an assessment is to be levied though other work to be paid for in another way has not yet been completed.³⁰ Thus, where a street car company was to pay the cost of paving between its rails, an assessment may be levied upon the abutting property owners when the street, except that part between the rails of the street car track, has been paved.³¹ So if sidewalks are to be constructed at the expense of the city, an assessment for a street improvement may be levied when such improvement is completed, all except the sidewalks.³²

²⁴ *Masonic Building Association v. Brownell*, 164 Mass. 306, 41 N. E. 306 [1895].

²⁵ *Weber v. Schergens*, 59 Mo. 389 [1875].

²⁶ *Filey v. Cranor*, 51 Mo. 541 [1873].

²⁷ *Tuttle v. Polk & Hubbel*, 92 Ia. 433, 60 N. W. 733 [1894].

²⁸ *Filey v. Cranor*, 51 Mo. 541 [1873]; *City to Use of McGrath v. Clemens*, 49 Mo. 552 [1872]; (*overruling City of St. Louis to Use of McGrath v. Clemens*, 36 Mo. 467 [1865]; and *City of St. Louis to Use*

of *Rotchford v. De Nove*, 44 Mo. 136 [1869]); which held that an assessment could be levied if the work was done in front of the property assessed); *Fowler v. City of St. Joseph*, 37 Mo. 228 [1866].

²⁹ In the *Matter of the Petition of Wood*, 51 Barb. (N. Y.) 275 [1868].

³⁰ *Stifel v. MacManus*, 74 Mo. App. 558 [1898].

³¹ *Stifel v. MacManus*, 74 Mo. App. 558 [1898].

³² *Whiting v. Mayor and Aldermen of the City of Boston*, 106 Mass. 89 [1870].

§ 526. Assessment upon basis of estimated cost.

Where a preliminary estimate is provided for by statute to be made before the improvement is undertaken, the effect of such estimate upon the amount for which the assessment may be levied depends entirely upon the provisions of the statute. Since an assessment may be levied before the improvement is made,¹ or even before the contract is let,² the amount of the estimate may be taken as a basis for assessment.³ In some jurisdictions this amount cannot be exceeded in levying the assessment.⁴ Under the practice in some states the question whether the estimate is for the correct amount must be raised by appeal or it is regarded as waived.⁵ If the preliminary estimate is merely required as a basis for bids, the assessment is not restricted by the amount of such preliminary estimate but may be for the actual cost even if larger than the estimate in the absence of fraud.⁶ A change in the plans of the improvement may, in such case, be made after the estimate but before the contract.⁷ Under a statute which authorizes a municipality to which new territory has been annexed, to proceed with assessment proceedings already begun except where they have been carried to a finality, if an assessment has been confirmed and collected more than nine years before the annexation and the improvement has been completed for about the same time, such proceeding has been carried to a finality and a further assessment cannot be levied even if the original assessment was for too small a sum.⁸ Under a statutory proceeding authorizing the levy of an assessment for "the probable amount of expense" of public improvements, the city is not restricted to an assessment before the work is done upon a basis of preliminary estimates only.⁹ If the statute provides for a hearing upon the estimate and provides that the price fixed in the estimate shall not be increased, an estimate which is ascertained to be too small in amount to complete the work may be abandoned and an increased estimate may be filed, if notice and hearing

¹ See §§ 417, 418, 522.

² See § 522.

³ *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1885]. See § 813 *et seq.*

⁴ *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1885].

⁵ *Balfe v. Lammers*, 109 Ind. 347, 10 N. E. 92 [1886].

⁶ *State, Kohler, Pros. v. Town of*

Guttenberg, 38 N. J. L. (9 Vr.) 419 [1876].

⁷ *Fuller v. City of Grand Rapids*, 105 Mich. 529, 63 N. W. 530 [1895].

⁸ *Town of Cicero v. Hill*, 193 Ill. 226, 61 N. E. 1020 [1901].

⁹ *City of Meriden v. Camp*, 46 Conn. 284 [1878].

are given upon such new estimate.¹⁰ In jurisdictions where the statute does not require that the improvement should be completed before the assessments are collected, the fact that the estimate for such improvement has been exceeded and that the improvement has never been completed does not enable the property owners to resist such assessments.¹¹ On application for a judgment of sale for a delinquent special assessment the court cannot reduce the assessment to an amount equal to a proportionate part of the cost of the improvement already completed and the estimated amount necessary to finish the work.¹² If an assessment is levied and collected before the improvement is constructed and such improvement is subsequently abandoned, those who paid such assessments may recover them in an action for money had and received on the theory of failure of consideration.¹³ The amount which can be recovered is the amount of the assessment paid in, less the amount of benefits received by the property of the party seeking recovery.¹⁴ Furthermore, if the city has expended in a legal and honest manner the money raised by the assessment, upon the improvement for which assessment was levied, the assessment cannot be recovered even though the property of the party seeking recovery was not benefited by such expenditure.¹⁵ However, it has been held that when a street was to be opened, widened and graded, and an assessment was levied and the amount raised expended on grading, the owner of property not benefited thereby may recover the amount paid in when the improvement is abandoned.¹⁶ It may be provided by statute that partial estimates may be made of the amount due on the work while such work progresses and that assessments may be levied based upon such partial estimates.¹⁷ The validity of such

¹⁰ *City of Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122 [1904]; 80 Pac. 467 [1905].

¹¹ *Felker v. City of New Whatecom*, 16 Wash. 178, 47 Pac. 505 [1896].

¹² *Connecticut Mutual Life Insurance Co. v. People ex rel. Kochersperger*, 172 Ill. 31, 49 N. E. 989 [1898].

¹³ *Germania Bank v. City of St. Paul*, 79 Minn. 29, 81 N. W. 542 [1900]; *McConville v. City of St. Paul*, 75 Minn. 383, 74 Am. St. Rep. 508, 43 L. R. A. 584, 77 N. W. 993

[1899]; *Strickland v. City of Stillwater*, 63 Minn. 43, 65 N. W. 131 [1895].

¹⁴ *Strickland v. City of Stillwater*, 63 Minn. 43, 65 N. W. 131 [1895].

¹⁵ *Germania Bank v. City of St. Paul*, 79 Minn. 29, 81 N. W. 542 [1900].

¹⁶ *McConville v. City of St. Paul*, 75 Minn. 383, 74 Am. St. Rep. 508, 43 L. R. A. 584, 77 N. W. 993 [1899].

¹⁷ *City of Indianapolis v. Imberry*, 17 Ind. 175 [1861]; *Fralich v. Barlow*, 25 Ind. App. 383, 58 N. E. 271

an assessment is not affected by the fact that the city engineer, in signing an estimate, placed an improper title after his name.¹⁸ The objection that the estimate is not for the proper amount is one which must under the procedure in some states be raised on appeal and not by injunction.¹⁹ Such preliminary estimate is generally mandatory where an assessment is levied after the work is begun and before it is completed.²⁰ Such estimate is not necessary where the cost of the entire work has been definitely ascertained.²¹ Whether council can revise an estimate once made is a question which has been raised but not decided.²² Confirmation of an assessment cannot be resisted on the ground that the contract price is less than the estimate.²³ If an assessment may be levied upon the basis of the preliminary estimate before the improvement is constructed and the actual cost of the improvement is less than the amount of the assessment, such amount must be repaid to the owner or credited upon his assessment.²⁴ If the property owner demands it, such rebate should be made upon his assessment before he is obliged to pay the same in.²⁵ The statute providing that such rebate is to be made at once, means immediately upon ascertaining the amount of the surplus and not upon the issuing of vouchers.²⁶ Accordingly, an agreement between the city and a property owner that the property owner shall allow the assessment to be confirmed, and that if the contract price of the improvement is less than the estimate, the judgment of confirmation shall be vacated and a judgment for the exact amount of the assessment shall be entered, does not invalidate the assessment, since such provision is substantially that which the law

[1900]; *State of Minnesota ex rel. City of Duluth v. District Court of St. Louis County*, 61 Minn. 542, 64 N. W. 190 [1895].

¹⁸ *Heiple v. City of Washington*, 219 Ill. 604, 76 N. E. 854 [1906].

¹⁹ *Balfe v. Lammers*, 109 Ind. 347, 10 N. E. 92 [1886].

²⁰ *Lammers v. Balfe*, 41 Ind. 218 [1872]; *Jones v. Schulmeyer*, 39 Ind. 119 [1872]; *Landsdale v. Nicklaus*, 38 Ind. 289 [1871]; *City of Indianapolis v. Imberry*, 17 Ind. 175 [1861]; *In the Matter of Beekman*, 31 Howard (N. Y.) 16 [1865].

²¹ *In the Matter of Beekman*, 31 Howard (N. Y.) 16 [1865].

²² *City of Indianapolis v. Patterson*, 33 Ind. 157 [1870].

²³ *Danforth v. Village of Hinsdale*, 177 Ill. 579, 52 N. E. 478 [1899].

²⁴ *Davies v. City of Los Angeles*, 86 Cal. 37 [1890]; 24 Pac. 771 [1890]; *Gage v. People ex rel. Hanberg*, 219 Ill. 634, 76 N. E. 834 [1906]; *Thaler v. West Chicago Park Commissioners*, 174 Ill. 211, 52 N. E. 116 [1898].

²⁵ *Gage v. People ex rel. Hanberg*, 219 Ill. 634, 76 N. E. 834 [1906]; *Groesbeck v. Cincinnati*, 51 O. S. 365, 37 N. E. 707 [1894].

²⁶ *People ex rel. Keeney v. City of Chicago*, 152 Ill. 546, 38 N. E. 744 [1894].

would imply.²⁷ The amount of the surplus of the estimate over the assessment should be credited upon the assessment, and when enough has been collected upon the assessment to equal the actual cost of the work, no further collection should be allowed.²⁸ Under some statutes the entire amount of the assessment must be paid in and the excess subsequently repaid to the property owners.²⁹ If the property owner has paid in an amount upon the assessment in excess of the actual cost of the work he may maintain assumpsit to recover such payment from the city.³⁰ After denying the right of the property owner to such surplus, the city cannot be allowed to raise the question that the property owner should not have sued in assumpsit but should have sued in mandamus to compel the council to apportion and pay over such excess.³¹ Upon the same principle, if the improvement is abandoned in whole or in part the owner may recover a proportionate share of the amount paid in by him.³² The surplus cannot be applied to other uses even if they are purposes for which general taxes or local assessments might have been levied.³³ Such surplus cannot be transferred to the general funds,³⁴ nor can it be applied to meet deficiencies in funds raised by assessment for other improvements undertaken at the same time.³⁵ An assessment for benefits for the construction of a drainage ditch in excess of the cost thereof cannot be applied to new work.³⁶ If the amount of the assessment is less than the amount of the benefits conferred and the cost of the improvement exceeds the amount of the assessment, it is ordi-

²⁷ *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731 [1897].

²⁸ *People ex rel. Hanberg v. McMahon*, 224 Ill. 284, 79 N. E. 645 [1906]; *Betts v. City of Naperville*, 214 Ill. 380, 73 N. E. 752 [1905]; *People ex rel. McCornack v. McWethy*, 177 Ill. 334, 52 N. E. 479 [1898]; *Thaler v. West Chicago Park Commissioners*, 174 Ill. 211, 52 N. E. 116 [1898]; *People ex rel. McCornack v. McWethy*, 165 Ill. 222, 46 N. E. 187 [1897].

²⁹ *Fisher v. City of Rochester*, 6 Lansing (N. Y.) 225 [1872].

³⁰ *City of Chicago v. McCormick*, 124 Ill. App. 639 [1906]; *City of Chicago v. Fisk*, 123 Ill. App. 404 [1905]; *City of Chicago v. Singer*,

116 Ill. App. 559 [1904]; *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 228 [1890]; *Cleveland v. Tripp*, 13 R. I. 50 [1880]. See § 1490.

³¹ *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 228 [1890].

³² *Germania Bank v. City of St. Paul*, 79 Minn. 29, 81 N. W. 542 [1900].

³³ *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 228 [1890].

³⁴ *Reamer v. Hogg*, 142 Ind. 138, 41 N. E. 353 [1895].

³⁵ *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 228 [1890].

³⁶ *Reamer v. Hogg*, 142 Ind. 138, 41 N. E. 353 [1895].

narily provided by statute that supplemental assessments may be levied to pay the excess of the cost of the improvements over the assessment already levied.³⁷ Under a statute, however, authorizing a city to proceed with public improvements in territory annexed to such city where the proceedings have not been carried to a finality, a supplemental assessment cannot be levied where the improvement has been completed, and the original assessment collected several years before the annexation.³⁸

§ 527. Necessity and nature of substantial performance.

If the contract for the construction of the public improvement for which the assessment in question is levied is performed fully, no question can, of course, arise as to the validity of the assessment on that ground.¹ Serious questions, however, arise if such contract is not performed fully. The effect which non-performance shall have is to a very large extent in the discretion of the legislature. Since the legislature has power to determine the nature and character of the improvement and since it may delegate this power to the public corporation by which such improvement is to be constructed, it follows that the legislature may provide what shall constitute performance or may delegate this power to the public corporation by which such improvement is to be constructed. Under many statutes there can be no recovery upon a local assessment unless the contract is performed in at least a substantial manner.² In some cases it is said that the contract

³⁷ See § 952 *et seq.*

³⁸ *Town of Cicero v. Hill*, 193 Ill. 226, 61 N. E. 1020 [1901].

¹ *Fell v. Philadelphia, to Use of Cunningham*, 81 Pa. St. (31 P. F. Smith) 58 [1876].

² *Santa Cruz Rock Pavement Company v. Bowie*, 104 Cal. 286, 37 Pac. 934 [1894]; *McVerry v. Kidwell*, 63 Cal. 246 [1883]; *Crawford v. Mason*, 123 Ia. 301, 98 N. W. 795 [1904]; *Mason v. City of Des Moines*, 108 Ia. 658, 79 N. W. 389 [1899]; *Wingert v. Snouffer & Ford*, 134 Ia. 97, 108 N. W. 1035 [1906]; *City of Lexington v. Walby*, — Ky. —, 109 S. W. 299 [1908]; *City of Henderson v. Lambert*, 77 Ky. (14 W. P. D. Bush.) 24 [1878]; *Preston v.*

Roberts, 75 Ky. (12 Bush.) 570 [1877]; *Germania Bank v. City of St. Paul*, 79 Minn. 29, 81 N. W. 542 [1900]; *City of St. Joseph v. Anthony*, 30 Mo. 537 [1860]; *Heman v. Gerardi*, 96 Mo. App. 231, 69 S. W. 1069 [1902]; *Shoenberg v. Heyer*, 91 Mo. App. 389 [1902]; *Brady v. Rogers*, 63 Mo. App. 222 [1895]; *The King Hill Brick Manufacturing Company v. Hamilton*, 51 Mo. App. 120 [1892]; *Guinotte v. Ridge*, 46 Mo. App. 254 [1891]; *Kansas City ex rel. Neill v. Askew*, 105 Mo. App. 84, 79 S. W. 483 [1904]; *Meyer v. Wright*, 19 Mo. App. 283 [1885]; *State, Central Railroad Company, Pros. v. City of Bayonne*, 35 N. J. L. (6 Vr.) 332 [1872]; *Calm v.*

must be performed strictly.³ This rule is, however, more favorable to the property owner than that in force in the great majority of jurisdictions. It is generally said that it is sufficient if the contract has been complied with in a substantial manner even if literal performance is wanting.⁴ If by statute a specific method is provided for raising the question of defective performance,⁵ as by filing an affidavit stating the defects in performance,⁶ failure to raise such questions in the manner prescribed operates as a waiver thereof. What amounts to substantial performance is a question upon which there is some diversity of opinion. The principles applicable in the ordinary law of contracts are not always recognized in assessment cases, since it is suggested that the existence of benefit to the property owner by reason of the improvement should be the test of substantial performance. If the improvement does substantially the same work as that contracted for and confers substantially the same benefit upon the property owner, it is said that the contract is performed substantially.⁷ What constitutes substantial performance is a ques-

Metz, 101 N. Y. S. 392 [1906]; *Stone v. Viele*, 38 O. S. 314 [1882]; *City of Cincinnati for Use of Wirth v. Cincinnati and Spring Grove Avenue Company*, 26 O. S. 345 [1875]; *Taylor v. Wapakoneta*, 26 Ohio Cir. Ct. R. 285 [1904]; *Harrisburg v. Baptist*, 156 Pa. St. 526, 27 Atl. 8 [1893]; *City of Philadelphia to Use v. Ball*, 147 Pa. St. 243, 23 Atl. 564 [1892]; *Erie City for Use v. Butler*, 120 Pa. St. 374, 14 Atl. 153 [1888]; *City of Philadelphia to Use of Johnson v. Rule*, 93 Pa. St. (12 Norris) 15 [1880]; *Philadelphia to Use of Dyer v. Brooke*, 81 Pa. St. (31 P. F. Smith) 23 [1876]; *Findley v. City of Pittsburg (Pa.)*, 11 Atl. 678; *Berwind v. Galveston and Houston Investment Company*, 20 Tex. Civ. App. 426, 50 S. W. 413 [1899].

³ *Heman v. Gerardi*, 96 Mo. App. 231, 69 S. W. 1069 [1902].

⁴ *Reclamation District No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676 [1884]; *Sarber v. Rankin*, 154 Ind. 236, 56 N. E. 225 [1899]; *People ex rel. Raymond v. Church*, 192 Ill. 302, 61 N. E. 496 [1901]; *Inhabi-*

tants of Leominster v. Conant, 139 Mass. 384, 2 N. E. 690 [1885]; *Mayor and City Council of Baltimore v. Raymo*, 68 Md. 569, 13 Atl. 383 [1888]; *Dashiell v. Mayor and City Council of Baltimore, Use of Hax*, 45 Md. 615 [1876]; *Angell v. Cortright*, 111 Mich. 223, 69 N. W. 486 [1896]; *Ristey v. City of St. Louis*, 34 Mo. 404 [1864]; *Saxton National Bank v. Haywood*, 62 Mo. App. 550 [1895]; *Meyer v. Wright*, 19 Mo. App. 283 [1885]; *Eyermann v. Provenchere*, 15 Mo. App. 256 [1884]; *Voght v. City of Buffalo*, 133 N. Y. 463, 31 N. E. 340 [1892]; *Philadelphia, to Use v. Jewell*, 135 Pa. St. 329, 19 Atl. 947 [1890]; *Philadelphia to Use v. Jewell*, 140 Pa. St. 9, 21 Atl. 239 [1891].

⁵ *In the Matter of Bridgeford*, 65 Hun. (N. Y.) 227, 20 N. Y. Supp. 281 [1892].

⁶ *In the Matter of Bridgeford*, 65 Hun. (N. Y.) 227, 20 N. Y. Supp. 281 [1892].

⁷ *Church v. People ex rel. Kochersperger*, 179 Ill. 205, 53 N. E. 554 [1899]; *Rossiter v. City of Lake*

tion which can be determined better from specific illustrations than from a statement of abstract principles. Thus, a slight change in the location of the improvement which does not affect the benefit conferred upon the property by such an improvement does not prevent the contract from being performed substantially.⁸ So the construction of a system of sewers from which were omitted two lateral sewers which were to drain only the streets in which they were laid, was held to be a substantial performance authorizing an assessment upon the property drained by the system as constructed.⁹ If the improvement constructed is in an entirely different location from that contracted for so that it cannot perform the same functions or benefit the same property as if it were performed under the contract, such performance invalidates the assessment, as it is not a substantial performance.¹⁰ Thus, if an entirely different street is improved from that contracted for the assessment is invalid.¹¹ A slight change in the size of the improvement does not prevent the performance from being substantial.¹² Thus the existence of slight inequalities in the width of a sidewalk,¹³ or the fact that a street as paved is slightly wider than its original limits,¹⁴ or the fact that in the performance of a contract to clean out a ditch it is made somewhat wider than it was originally,¹⁵ or the fact that the sewer as laid out varies two inches in diameter from that shown upon the plan,¹⁶ are all of them variances so slight as to amount to substantial performance. Under a contract for constructing a street

Forest, 151 Ill. 489, 38 N. E. 359 [1894]; Sarber v. Rankin, 154 Ind. 236, 56 N. E. 225 [1900]; Rislev v. City of St. Louis, 34 Mo. 404 [1864]; City of St. Joseph v. Anthony, 30 Mo. 537 [1860]; Wewell v. City of Cincinnati, 45 O. S. 407, 15 N. E. 196 [1887].

⁸ Church v. People ex rel. Koehersperger, 179 Ill. 205, 53 N. E. 554 [1899]; Rossiter v. City of Lake Forest, 151 Ill. 489, 38 N. E. 359 [1894].

⁹ Wewell v. City of Cincinnati, 45 O. S. 407, 15 N. E. 196 [1887].

¹⁰ Windsor v. District of Columbia, 7 Mackey (D. C.) 96 [1889]; Schneider v. District of Columbia, 7 Mackey (D. C.) 252 [1889].

¹¹ Windsor v. District of Columbia, 7 Mackey (D. C.) 96 [1889].

¹² Watson v. City of Philadelphia, to Use of Adams, 93 Pa. St. 111 [1880]; Inhabitants of Leominster v. Conant, 139 Mass. 384, 2 N. E. 699 [1885]; Angell v. Cortright, 111 Mich. 223, 69 N. W. 486 [1896].

¹³ Watson v. City of Philadelphia, to Use of Adams, 93 Pa. St. 111 [1880].

¹⁴ Dugger v. Hicks, 11 Ind. App. 374, 36 N. E. 1085 [1894].

¹⁵ Angell v. Cortright, 111 Mich. 223, 69 N. W. 486 [1896].

¹⁶ Inhabitants of Leominster v. Conant, 139 Mass. 384, 2 N. E. 699 [1885].

at a certain grade the construction of a street at a substantially different grade is not substantial performance.¹⁷ An assessment for the construction of such street is invalid even if the contractor in working to such grade has acquiesced in the action of the city after the contract was let in reducing such grade.¹⁸ Performance according to the ordinance and according to the true intention of the parties is sufficient, although by clerical mistake the contract does not express such intention correctly.¹⁹ Failure to construct an incidental part of an improvement which is not properly covered by the contract does not invalidate the contract or the assessment.²⁰ Thus, if the erection of a railing and barriers is not a part of a public highway contracted for, the failure to construct such railing and barriers does not invalidate the assessment.²¹ So if curbing and guttering is not regarded as a part of grading and macadamizing a street, the omission of such curbing and guttering under a contract to grade and macadamize does not invalidate the assessment.²² If the part of a street covered entirely by railway tracks cannot be paved at the cost of the owners of lots abutting on other parts of such street, the omission to pave such part does not invalidate the assessment.²³ If the ordinance and contract required paving the street with asphalt "from curb to curb," the fact that subsequently a street railway company whose tracks were located therein was required to pave that portion of the street between its tracks with stone, was held not to render the assessment invalid.²⁴ This is true, especially if the street railway is not to be laid upon the portion of the street which is required to be improved.²⁵ If only a part of the improvement has been constructed and default is then made in the contract, such performance is not substantial if the part of the improvement as constructed does not perform substantially the same functions as would have been performed by the improvement con-

¹⁷ *Brady v. Rogers*, 63 Mo. App. 222 [1895].

¹⁸ *Brady v. Rogers*, 63 Mo. App. 222 [1895].

¹⁹ *Eyermann v. Provenchere*, 15 Mo. 256 [1884].

²⁰ *Fox v. Middlesborough Town Company*, 96 Ky. 262, 28 S. W. 776 [1894]; *Chase v. Board of Aldermen of Springfield*, 119 Mass. 556 [1876].

²¹ *Chase v. Board of Aldermen of Springfield*, 119 Mass. 556 [1876].

²² *Fox v. Middlesborough Town Company*, 96 Ky. 262, 28 S. W. 776 [1894].

²³ *Saxton National Bank v. Haywood*, 62 Mo. App. 550 [1895].

²⁴ *City of Erie v. Moody*, 171 Pa. St. 610, 33 Atl. 378.

²⁵ *Thompson v. People ex rel. Foote*, 184 Ill. 17, 56 N. E. 383.

structed in accordance with the terms of the contract. The fact that an improvement, such as a street, has been completed in front of certain property does not show that such property has received all the benefit that it would have received had the improvement been completed.²⁶ In many types of improvement, construction of that part in front of the given tract of property can be of no benefit unless the entire improvement is constructed. Accordingly, if only a part of a street contracted for is constructed, an assessment cannot, in the absence of statute, be levied therefor.²⁷ By statute in some states it is provided that if a certain proportion of a street has been constructed, a proportionate assessment may be levied for the work done.²⁸ The benefit accruing from the construction of a sidewalk depends upon the continuity thereof. Accordingly, if under a contract to construct a sidewalk, the contractor omits the sidewalks in front of property used by the owners thereof as homesteads, this does not amount to substantial performance.²⁹ If a part of the improvement which cannot in any way affect the property assessed, has been omitted in performing the contract, such omission does not invalidate the assessment.³⁰ Thus, in the construction of a general plan of sewers, sewers were omitted on two streets which were not graded to the established grade. These sewers were to be laterals draining only the streets in which they are laid. Such omission was held not to invalidate the assess-

²⁶ *City. to Use of McGrath v. Clemens*, 49 Mo. 552 [1872]; *Fowler v. City of St. Joseph*, 37 Mo. 228 [1866].

²⁷ *City of Cincinnati for Use of Wirth v. The Cincinnati and Spring Grove Avenue Company*, 26 O. S. 345 [1875]; *St. John v. City of East St. Louis*, 136 Ill. 207, 27 N. E. 543 [1892]; *City of Henderson v. Lambert*, 77 Ky. (14 W. P. D. Bush.) 24 [1878]; *State, Central Railroad Company, Pros. v. City of Bayonne*, 35 N. J. L. (6 Vr.) 332 [1872]; "A special assessment cannot be levied to pay for part of the improvement required by an ordinance nor can a special assessment be levied to pay for the whole after a part has been abandoned." *St.*

John v. City of East St. Louis, 136 Ill. 207, 214, 27 N. E. 543 [1891]; (citing *Dougherty v. Hitecock*, 35 Cal. 512 [1868]; *Holmes v. Village of Hyde Park*, 121 Ill. 128, 13 N. E. 540 [1889]; *Dorathy v. City of Chicago*, 53 Ill. 79 [1869]; *City of Henderson v. Lambert*, 77 Ky. (14 Bush) 24; *Murray v. Tucker*, 73 Ky. (10 Bush) 240 [1874]; *Pepper v. City of Philadelphia to Use of Horter*, 114 Pa. St. 96, 6 Atl. 899 [1886]).

²⁸ See Chapter XVI.

²⁹ *Berwind v. Galveston and Houston Investment Company*, 20 Tex. Civ. App. 426, 50 S. W. 413 [1899].

³⁰ In the matter of *McCormack*, 60 Barb. 128 [1870].

ment as to the property drained by the sewers as constructed.³¹ The use of material in the performance of a contract which is substantially different from that contracted for does not amount to substantial performance especially if the material as used does not perform the same functions as that contracted for.³² Under a contract for grading and paving streets, a provision for crushed river gravel is not performed substantially by the use of gravel which was not crushed where it was shown that crushing was important because crushed gravel would bind into a solid body while uncrushed gravel would not.³³ Under a provision for constructing a layer of brick laid flat, the use of broken rock, three inches shallower than the prescribed depth, is not a substantial performance.³⁴ Under an ordinance and contract requiring pavement in part of brick and in part of crushed granite, the construction of a pavement entirely of brick is not substantial performance.³⁵ If a property owner is required to construct a brick sidewalk in front of his property and he is subsequently by another ordinance given the right to construct it of granitoid if he prefers, and he does not construct any sidewalk, he cannot complain if the city constructs a sidewalk of granitoid.³⁶ The use of a smaller amount of cement than that required by the contract which makes the curbing constructed therefrom inferior to that contracted for is not substantial performance.³⁷ If the improvement as constructed can be made to comply with the contract by making repairs, it has been held that this amounts to substantial performance so that the contract price, less the cost of repairs, may be recovered.³⁸ If the material used under the contract performs the same functions as that contracted for, but is substantially different therefrom, it is held in some jurisdictions that this amounts to substantial performance.³⁹ Thus, under a contract

³¹ *Wewell v. City of Cincinnati*, 45 O. S. 407, 15 N. E. 196 [1887].

³² *Mason v. City of Des Moines*, 108 Ia. 658, 79 N. W. 389 [1899]; *Kansas City ex rel. Neill v. Askew*, 105 Mo. App. 84, 79 S. W. 483 [1904]; *King Hill Brick Manufacturing Company v. Hamilton*, 51 Mo. App. 120 [1892].

³³ *Kansas City ex rel. Neill v. Askew*, 105 Mo. App. 84, 79 S. W. 483 [1904].

³⁴ *The King Hill Brick Manufac-*

turing Company v. Hamilton, 51 Mo. App. 120 [1892].

³⁵ *City of Lexington v. Walby* — Ky. —, 109 S. W. 299 [1908].

³⁶ *Neill v. Power*, — Ky. —, 107 S. W. 694 [1908].

³⁷ *Mason v. City of Des Moines*, 108 Ia. 658, 79 N. W. 389 [1899].

³⁸ *Hastings v. Columbus*, 42 O. S. 585 [1885].

³⁹ *Richards v. City of Cincinnati*, 31 O. S. 506 [1877].

for filling with pure earth, sand, gravel or rock, it was held that the use of bricks and mortar in such filling was a substantial performance, where this material was shown to be equal in durability to that specified.⁴⁰ In other jurisdictions the use of a material substantially different from that specified is not substantial performance even if the material used is equal to or better than that specified. Thus, under a contract to lay an asphalt block pavement the construction of a better pavement of sheet asphalt was held not to be substantial performance.⁴¹ If the council has passed invalid "orders" after the enactment of the improvement ordinance, which are without effect as amendments thereof, and which change the requirements of the ordinance as to the material used, it will not be presumed, in the absence of evidence, that such orders were followed and the ordinance ignored.⁴² The contractor should be allowed to show the character and kind of material used by him if it is claimed that inferior material has been used.⁴³ If more work has been performed than was provided for by the contract an assessment cannot be levied for such extra work,⁴⁴ but such additional performance does not invalidate the assessment if the cost thereof can be separated from the cost of the work done under the contract.⁴⁵ In some jurisdictions it is said that a defect in performance must, in order to affect an assessment, inflict a special injury upon the owner of the property assessed.⁴⁶ Under this theory damages should not be pro-rated by deducting the total damages from the total amount of the assessment, but the damages specially suffered by each owner must be deducted from his assessment.⁴⁷

§ 528. Excuses for failure to perform.

A property owner who has acquiesced in the performance of the contract has been held to be estopped from resisting the enforce-

⁴⁰ *Richards v. City of Cincinnati*, 31 O. S. 506 [1877].

⁴¹ *Cahn v. Metz*, 101 N. Y. 392 [1906].

⁴² *Galt v. City of Chicago*, 174 Ill. 605, 51 N. E. 653.

⁴³ *City of Philadelphia to Use of Johnson v. Rule*, 93 Pa. St. 15 [1880].

⁴⁴ *McDonald v. Mezes*, 107 Cal. 492, 40 Pac. 808 [1895]; *Shannon v. Village of Hinsdale*, 180 Ill. 202, 54

N. E. 181 [1899]; *People ex rel. McCornack v. McWethy*, 177 Ill. 334, 52 N. E. 479 [1898].

⁴⁵ *McDonald v. Mezes*, 107 Cal. 492, 40 Pac. 808 [1895]; *Shannon v. Village of Hinsdale*, 180 Ill. 202, 54 N. E. 181 [1899].

⁴⁶ *City of Pittsburg v. MacConnell*, 130 Pa. St. 463, 18 Atl. 645.

⁴⁷ *Creamer v. Bates*, 49 Mo. 523 [1872]; *Meyer v. Wright*, 19 Mo. App. 283 [1885].

ment of the assessment under such performance.¹ This is true, especially if the property owner has requested changes to be made in the improvements which have been made in accordance with such request,² and the rule applies with especial force where the change in material, which constitutes the defect in performance, was made at the request of the property owner who now objects to the assessment on the ground of such change.³ In some jurisdictions, however, it is held that property owners are not obliged to watch the performance of the work or to protest because of failure to perform the contract.⁴ If an abutting owner voluntarily makes performance of certain terms of the contract impossible, he cannot take advantage of such non-performance in order to defeat the assessment.⁵ Thus, failure to make a pavement as wide as ordered in the notice to property owners does not invalidate the assessment where due to the unlawful act of the owner in extending his fence into the street beyond his line.⁶ Failure to perform provisions in a contract, the performance of which the law forbids, does not invalidate the contract.⁷ Thus, under a con-

¹ *Petaluma Paving Co. v. Singley*, 136 Cal. 616, 69 Pac. 426 [1902]; *Lux & Talbott Stone Co. v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903]; *Shank v. Smith*, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932 [1901]; *Prezinger v. Harness*, 114 Ind. 491 [1887]; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501 [1887]; *City of Evansville v. Pfisterer*, 34 Ind. 36, 7 Am. Rep. 214 [1870]; *Cluggish v. Foons*, 15 Ind. App. 599, 43 N. E. 158; *Arnold v. City of Fort Dodge, Iowa*, 111 Ia. 152, 82 N. W. 495 [1900]; *Mudge v. Walker*, — (Ky.) —, 90 S. W. 1046, 28 Ky. Law Rep. 996 [1906]; *Brick & Terra Cotta Company v. Hull*, 49 Mo. App. 433 [1892]; *Dusenbury v. Mayor and Common Council of the City of Newark*, 25 N. J. Eq. (10 C. E. Gr.) 295 [1874]; *Sandford v. Mayor, etc., of the City of New York*, 33 Barb. (N. Y.) 147 [1860].

² *Lux and Talbott Stone Company v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903]; *Prezinger v. Harness*, 114 Ind. 491, 16 N. E. 495 [1887]; *Ross v. Stackhouse*, 114 Ind. 200, 16

N. E. 501 [1887]; *City of Evansville v. Pfisterer*, 34 Ind. 36, 7 Am. Rep. 214 [1870]; *Cluggish v. Koons*, 15 Ind. App. 599, 43 N. E. 158; *Arnold v. City of Fort Dodge, Iowa*, 111 Ia. 152, 82 N. W. 495 [1900]; *Brick & Terra Cotta Company v. Hull*, 49 Mo. App. 433 [1892]; *Dusenbury v. Mayor and Common Council of the City of Newark*, 25 N. J. Eq. (10 C. E. Gr.) 295 [1874].

³ Thus where the change from artificial to natural stone was made at the request of the defendant, he is estopped from setting up such changes as a ground for invalidating the assessment. *Brick & Terra Cotta Company v. Hull*, 49 Mo. App. 433 [1892].

⁴ *Wingert v. Snouffer*, 134 Ia. 97, 108 N. W. 1035 [1906].

⁵ *Hood v. Trustees of Town of Lebanon*, 12 Ky. L. Rep. 813, 15 S. W. 516 [1891].

⁶ *Hood v. Trustees of Town of Lebanon*, 12 Ky. L. Rep. 813, 15 S. W. 516 [1891].

⁷ *Steffen v. Fox*, 56 Mo. App. 9 [1893]; *Fell v. Philadelphia to the*

tract to pave a certain portion of a street, failure to pave a part thereof which was by statute forbidden to be opened was held not to invalidate the assessment.⁸ A contract for paving a sidewalk was made under an ordinance regulating the slant of the sidewalk and making a failure thereof a misdemeanor. The sidewalk contracted for was constructed at the intersection of two streets having different grades. It was held that compliance with the ordinance being impossible, the construction of a sidewalk which conferred the same benefit upon the property assessed and was equally convenient for public use as that specified in the ordinance, amounted to substantial performance.⁹

§ 529. Amount of recovery in case of substantial performance.

If the contract has been performed substantially but not literally the contractor is ordinarily allowed to recover the contract price, subject to deductions for defective performance.¹ It is sometimes suggested that the measure of his recovery is the value of the work done.² This rule, however, ignores the contract entirely, allows recovery in quasi contract and deprives both the contractor and the public corporation of any benefit which may have been obtained by either of them under the terms of the contract. Accordingly, the rule generally adopted is that the contract price may be recovered less a proper reduction for defective work, and not the value of the work as done.³ The amount of this deduction has been said to be the cost of repairs and work necessary to make the improvement what it would have been had the contract been performed.⁴ Another form of stating the rule

Use of Cunningham, 81 Pa. St. (31 P. F. Smith) 58 [1876]; See also § 514.

⁸ Fell v. Philadelphia to the Use of Cunningham & McNichol, 81 Pa. St. (31 P. F. Smith) 58 [1876].

⁹ Coffen v. Fox, 56 Mo. App. 9, [1893].

¹ Kelly v. Chadwick, 104 La. 719, 29 So. 295; (affirmed in Chadwick v. Kelly, 187 U. S. 540, 47 L. 293, 23 S. 175 [1903]); Barber Asphalt Paving Company v. Ullman, 137 Mo. 543, 38 S. W. 548 [1896. 1897]; Creamer v. Bates, 49 Mo. 523 [1872]; Meyer v. Wright, 19 Mo.

App. 283 [1885]; State, Watson, Pros. v. City of Elizabeth, 42 N. J. L. (13 Vr.) 508 [1880]; Hastings v. Columbus, 42 O. S. 585 [1885]; Corry v. Campbell, 25 O. S. 134 [1874]; Pepper v. City of Philadelphia to Use of Horter, 114 Pa. St. 96, 6 Atl. 899 [1886].

² Barber Asphalt Paving Company v. Ullman, 137 Mo. 543, 38 S. W. 458 [1896].

³ Corry v. Campbell, 25 O. S. 134 [1874].

⁴ Hastings v. Columbus, 42 O. S. 585 [1885].

for the proper amount of deduction is that it should be the difference between the cost of the work and materials, if furnished in accordance with the terms of the contract and the cost of the work and materials as actually furnished.⁵ Another method of stating the amount of recovery is that the contractor should recover such portion of the contract price, as the value of the work done bears to the value which it would have had, had it been done according to contract.⁶

§ 530. Quasi contractual rights in case of defective performance.

If the contract has not been performed in at least a substantial manner, the contractor cannot recover the reasonable value of the work done by him, ignoring the contract price, and have an assessment levied for such compensation, in the absence of some statute specifically authorizing such recovery.¹ Thus, if the original contractor A performs in part and then makes default and B is employed to finish the work, A cannot, by mandamus, compel the city to levy an assessment to raise the difference between the contract price for which A agreed to do the work and the price that was paid to B.² Since the legislature may give such effect as it pleases to breach of contract on the part of the contractor, it may be provided by statute that in case of non-performance the contractor may recover reasonable compensation for the work done by him,³ not exceeding the contract price.⁴ The mere fact that the property owner has made use of an improvement such as a street,⁵ which is situated upon property the fee of which belongs to such abutting owner and which the owner cannot keep

⁵ *Bond v. Mayor and Common Council of Newark*, 19 N. J. Eq. (4 C. E. Green) 376 [1869]; (A suit by the property owner to enjoin the city from paying the contractor.)

⁶ *Creamer v. Bates*, 49 Mo. 523 [1872].

¹ *City and County of Denver v. Hindry*, — Colo. —, 90 Pac. 1028 [1907]; *City of Auburn v. State ex rel. First National Bank*, — Ind. —, 83 N. E. 997 [1908]; *Neill v. Trans-Atlantic Mortgage Trust Company*, 89 Mo. App. 644 [1901]; *Traders' Bank v. Payne*, 31 Mo. App.

512; *Gallbreath v. Newton*, 30 Mo. App. 381 [1887].

² *City of Auburn v. State ex rel. First National Bank*, — Ind. —, 83 N. E. 997 [1908]; (The contract contained a provision that the city might annul the contract if progress by the contractor was unsatisfactory.)

³ *City of Davenport v. Allen*, 120 Fed. 172 [1903]; *Quest v. Johnson*, 58 Mo. App. 54.

⁴ *Quest v. Johnson*, 58 Mo. 54.

⁵ *Neill v. Trans-Atlantic Mortgage Trust Company*, 89 Mo. App. 644 [1901].

from using except by abandoning his property,⁶ does not render such owner liable on the theory of quasi contract. If the contractor alleges performance and sues to enforce the assessment upon the theory of performance he cannot recover in that action for a reasonable compensation for labor and material.⁷ Under a statute allowing recovery for only the actual value of the work done, if performance is not had in accordance with the terms of the contract, it has been held that if the contract is wholly ignored and such contract is itself valid and enforceable, no recovery can be had either on the contract or in quasi contract.⁸ Thus, if time is of the essence of the contract and the contract has not been performed within the time limited, it has been held that no recovery for work done can be had in an action for work, labor and materials.⁹

§ 531. Acceptance by public corporation conclusive.

Under many statutes the public corporation or some designated officer or set of officers thereof is made the sole judge to determine questions arising as to the construction of public improvements including questions concerning the performance of contracts for such construction.¹ The city council is often, by statute, made the sole judge to determine questions of performance.² Under such statutes, if the public corporation or the proper officer thereof accepts the work done as a full and complete performance of the contract, such acceptance is final and conclusive in the absence of fraud and the property owner cannot show in order to resist an assessment, that the work has not been performed in a proper manner.³ Thus, it may be provided by statute that the

⁶ Neill v. Trans-Atlantic Mortgage Trust Company, 89 Mo. App. 644 [1901].

⁷ Heman v. Larkin, 108 Mo. App. 392, 83 S. W. 1019 [1904].

⁸ McQuiddy v. Brannock, 70 Mo. App. 535 [1897].

⁹ McQuiddy v. Brannock, 70 Mo. App. 535 [1897].

¹ City of Henderson v. Lambert, 77 Ky. (14 Bush.) 24 [1878]; Harper v. City of Grand Rapids, 105 Mich. 551, 63 N. W. 517 [1895]; Hale v. City of Alton, 152 Ill. 113, 38 N. E. 750 [1894].

² Murray v. Tucker, 73 Ky. (10 Bush.) 240 [1874]; Harper v. City of Grand Rapids, 105 Mich. 551, 63 N. W. 517 [1895]; Weston v. City of Syracuse, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899].

³ Fitzgerald v. Walker, 55 Ark. 148, 17 S. W. 702 [1891]; Lambert v. Bates, 137 Cal. 676, 70 Pac. 777 [1902]; City of Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786 [1903]; Downey v. People ex rel. Raymond, 205 Ill. 230, 68 N. E. 807 [1903]; Gage v. People ex rel. Raymond, 200

property owner may appeal to a designated board for the determination of the question whether the contractor has performed the contract in a proper manner or not; and the determination of such board may be made final.⁴ Such appeal may be made informally, as by filing a written instrument protesting against the acceptance of the work for the reason that it is not performed in accordance with the contract,⁵ or remonstrating against the acceptance of the contract on the grounds that the "contract has not been done according to specifications on file in the office of the

Ill. 432, 65 N. E. 1084 [1903]; People ex rel. Raymond v. Whidden, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133 [1901]; Shannon v. Village of Hinsdale, 180 Ill. 202, 54 N. E. 181 [1899]; Craft v. Kochersperger, 173 Ill. 617, 50 N. E. 1061 [1898]; Callister v. Kochersperger, 168 Ill. 334, 48 N. E. 156 [1897]; Haley v. City of Alton, 152 Ill. 113, 38 N. E. 750 [1894]; People ex rel. Mannen v. Green, 158 Ill. 594, 42 N. E. 163 [1895]; Fisher v. People ex rel. Kern, 157 Ill. 85, 41 N. E. 615 [1895]; Ricketts v. Village of Hyde Park, 85 Ill. 110 [1877]; Lux and Talbott Stone Company v. Donaldson, 162 Ind. 481, 68 N. E. 1014 [1903]; Leakman v. Pritchard, 166 Ind. 24, 66 N. E. 153 [1902]; Studabaker v. Studabaker, 152 Ind. 89, 51 N. E. 933 [1898]; Montgomery v. Wasem, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184 [1888]; Simonton v. Hays, 88 Ind. 70 [1882]; Holloran v. Morman, 27 Ind. App. 309, 59 N. E. 869 [1901]; Darnell v. Keller, 18 Ind. App. 103, 45 N. E. 676 [1897]; Patterson v. Baumer, 43 Ia. 477 [1876]; Ferguson v. City of Coffeyville, — Kan. —, 94 Pac. 1010 [1908]; City of Henderson v. Lambert, 77 Ky. (14 W. P. D. Bush.) 24 [1878]; Murray v. Tucker, 73 Ky. (10 Bush.) 241 [1874]; Whitefield v. Hipple, 12 S. W. Rep. (Ky.) 150, 11 Ky. L. Rep. 386 [1889]; Harper v. City of Grand Rapids, 105 Mich. 551, 63 N. W. 517 [1895]; City of

Henderson v. Lambert, 77 Ky. (14 W. P. D. Bush.) 24 [1878]; Dixon v. City of Detroit, 86 Mich. 516, 49 N. W. 628 [1891]; Motz v. City of Detroit, 18 Mich. 494 [1869]; Liebstain v. Mayor and Common Council of the City of Newark, 24 N. J. Eq. (9 C. E. Gr.) 200 [1873]; Haven v. Mayor, Aldermen and Commonalty of the City of New York, 173 N. Y. 611, 66 N. E. 1110 [1903]; (affirming Havens v. Mayor, Aldermen and Commonalty of the City of New York, 67 App. Div. 90, 73 N. Y. S. 678 [1901]); Weston v. City of Syracuse, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899]; Ridenour v. Saffin, 1 Handy (Ohio) 464 [1855]; Duniway v. Portland, 47 Or. 103, 81 Pac. 945 [1905]; Chance v. City of Portland, 26 Ore. 286, 38 Pac. 68 [1894]; City of Philadelphia to Use of Mack, v. Gorgas, 180 Pa. St. 296, 36 Atl. 868 [1897]; Philadelphia to Use v. Jewell, 140 Pa. St. 9, 21 Atl. 239 [1891]; McKnight v. City of Pittsburg, 91 Pa. St. (10 Norris) 273 [1879]; City of Philadelphia v. Wistar, 35 Pa. St. (11 Casey) 427 [1860]; Town of Elma v. Carney, 9 Wash. 466, 37 Pac. 707 [1894].

⁴ Girvin v. Simon, 127 Cal. 491, 59 Pac. 945 [1900]; Creed v. McCombs, 146 Cal. 449, 80 Pac. 679 [1905]; Lambert v. Bates, 148 Cal. 146, 82 Pac. 767 [1905].

⁵ Creed v. McCombs, 146 Cal. 449, 80 Pac. 679 [1905].

street superintendent.”⁶ Where the public corporation has power to determine questions of performance conclusively, the act of such corporation in determining that work done by a property owner in front of his property under an ordinance requiring him to do so was properly constructed, was held to be conclusive and not subject to be questioned by other property owners.⁷ On the other hand, it has been held that the fact that the officers of a public corporation act in good faith, does not prevent the property owners from bringing a suit to prevent the city from accepting the work, paying the city’s proportion of the costs and issuing certificates for the proportion due from the property owners where the contractors are acting in bad faith.⁸ In a proceeding in which pure questions of law are presented, such as certiorari, questions as to the performance of the contract, being questions of fact, cannot be raised.⁹ Whether the decision of the city officials upon questions of the performance of the contract are administrative or judicial is a question upon which there is some conflict of authority which turns in part upon the wording of the different statutes. Under some statutes the city officials in passing upon such questions are said to act judicially.¹⁰ Under other statutes the city officials are said to act in an administrative capacity and not in a judicial capacity.¹¹

§ 532. Effect on rights of property owners of acceptance by public corporation.

In accordance with the theory already given as to the effect of the acceptance of work by the city or other public corporation, it has been said that if the public corporation has accepted the work as being in proper performance of the contract under which the improvement has been constructed, the question of actual performance as a matter of fact is immaterial,¹ if it cannot be shown

⁶ *Girvin v. Simon*, 127 Cal. 491, 59 Pac. 945 [1900].

⁷ *Whitefield v. Hipple*, 12 S. W. Rep. (Ky.) 150, 11 Ky. L. Rep. 386 [1889].

⁸ *Pleasant v. City of Shreveport*, 110 La. 1046, 35 So. 283 [1903].

⁹ *State, Wilson, Pros. v. Mayor and Common Council of the City of Hudson*, 32 N. J. L. (3 Vr.) 365 [1867].

¹⁰ *Lambert v. Bates*, 137 Cal. 676, 70 Pac. 777 [1902].

¹¹ *Town of Greenwood v. State ex rel. Lawson*, 159 Ind. 267, 64 N. E. 849 [1902]; *Eyermann v. Provenchere*, 15 Mo. App. 256 [1884].

¹ *Emery v. Bradford*, 29 Cal. 75; *People ex rel. Raymond v. Whidden*, 191 Ill. 374, 56 L. R. A. 995, 61 N. E. 133 [1901]; *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895]; *Sarber v. Rankin*, 154 Ind. 236, 56 N. E. 225 [1899]; *Studabaker v. Studabaker*,

that in accepting the work the public officials were guilty of fraud or bad faith.² The suggestion that fraud may invalidate the action of the city officials in accepting the performance of the contract is ordinarily made in cases where defective performance is claimed, but there is no showing of fraud or bad faith.³

§ 533. Acceptance by public corporation final unless different improvement is constructed.

It is held in some jurisdictions that if an improvement has been constructed to the satisfaction of the public authorities and has been accepted by them, defects in performance are no defense to the assessment unless the improvement is a different one from that which has been contracted for.¹ If the improvement contracted

152 Ind. 89, 51 N. E. 933 [1898]; *Racer v. State for Use of Rhine*, 131 Ind. 393, 31 N. E. 81 [1891]; *Mayor and City Council of Baltimore v. Raymo*, 68 Md. 569, 13 Atl. 383 [1888]; *Dashiell v. Mayor and City Council of Baltimore, Use of Hax*, 45 Md. 615 [1876]; *Whiting v. Mayor and Aldermen of the City of Boston*, 106 Mass. 89 [1870]; *Dixon v. City of Detroit*, 86 Mich. 516, 49 N. W. 628 [1891]; *Columbia Bottom Levee Company v. Meier*, 39 Mo. 53 [1866]; *State, Vanderbeck, Pros. v. Mayor and Common Council of Jersey City*, 29 N. J. L. (5 Dutch.) 441 [1861]; *In the Matter of Lewis*, 35 Howard (N. Y.) 162 [1868]; *City of Philadelphia to Use of Mack v. Gorgas*, 180 Pa. St. 296, 36 Atl. 868 [1897]; *Schenley v. Commonwealth for use of City of Allegheny*, 36 Pa. St. (12 Casey) 64 [1859].

² *Holleran v. Morman*, 27 Ind. App. 309, 59 N. E. 869 [1901]; *Darnell v. Keller*, 18 Ind. App. 103, 45 N. E. 676 [1897]; *Patterson v. Baumer*, 43 Ia. 477 [1876]; *Whitefield v. Hipple*, (Ky.), 12 S. W. Rep. 150, 11 Ky. L. Rep. 386 [1889]; *Dixon v. City of Detroit*, 86 Mich. 516, 49 N. W. 628 [1891]; *Motz v. City of Detroit*, 18 Mich. 494 [1869]; *In the Matter of Lewis*, 35 Howard 162 [1868]; *McGlynn v. City of Toledo*,

22 Ohio C. C. 34 [1901]; *Chance v. City of Portland*, 26 Ore. 286, 38 Pac. 68 [1894].

³ *Holleran v. Morman*, 27 Ind. App. 309, 59 N. E. 869 [1901]; *Darnell v. Keller*, 18 Ind. App. 103, 45 N. E. 676 [1897]; *Patterson v. Baumer*, 43 Ia. 477 [1876]; *Dixon v. City of Detroit*, 86 Mich. 516, 49 N. W. 628 [1891]; *Motz v. City of Detroit*, 18 Mich. 494 [1869]; *In the Matter of Lewis*, 35 Howard 162 [1868]; *McGlynn v. City of Toledo*, 22 Ohio C. C. 34 [1901]; *Chance v. City of Portland*, 26 Ore. 286, 38 Pac. 68 [1894].

¹ *Marshall v. People ex rel. Smith*, 219 Ill. 99, 76 N. E. 70 [1905]; *People ex rel. Price v. Bridgeman*, 218 Ill. 568, 75 N. E. 1057 [1905]; *Phillips v. People ex rel. Goedtner*, 218 Ill. 450, 75 N. E. 1016 [1905]; *Eustace v. People ex rel. Hanberg*, 213 Ill. 424, 72 N. E. 1089 [1905]; *City of Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 396 [1904]; *City of Chicago v. Ayers*, 212 Ill. 59, 72 N. E. 32 [1904]; *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786 [1903]; *Downey v. People ex rel. Raymond*, 205 Ill. 230, 68 N. E. 807 [1903]; *Wells v. People ex rel. Raymond*, 201 Ill. 435, 66 N. E. 210 [1903]; *Gage v. People ex rel. Raymond*, 200 Ill. 422, 65 N. E. 1084

for has been constructed, but the performance is defective, the assessment is under this theory not rendered invalid by reason of such defect.² Thus, if a sewer is laid on a line different from that prescribed, in order to avoid interfering with water pipes; and the improvement as constructed is as beneficial to the property owners as if it had been laid on the line prescribed, such deviation does not invalidate the assessment.³ Where a sewer is not constructed on the line indicated by the ordinance, in the absence of proof that the improvement as constructed was as beneficial as it would have been if constructed in accordance with the contract and ordinance, the improvement should be regarded as a different one from that contracted for and the assessment should be held as invalid.⁴ Under a provision that cobble stones used should be uniform in quality, and broken so as to pass through a ring four inches internal diameter, a slight deviation as to the size of such cobble stones does not make the improvement a different one.⁵ The fact that the curb and gutter are five inches thick instead of six inches thick and that the crushed stone which by the ordinance was to pass through a ring of an internal diameter of three inches, was some of it a little larger than such size, does not render the improvement a different one.⁶ So the

[1903]; *Gage v. People ex rel. Raymond*, 193 Ill. 316, 56 L. R. A. 916, 61 N. E. 1045 [1901]; *People ex rel. Raymond v. Church*, 192 Ill. 302, 61 N. E. 496 [1901]; *People ex rel. Raymond v. Whidden*, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133 [1901]; *McManus v. People ex rel. Raymond*, 183 Ill. 391, 55 N. E. 886 [1899]; *Church v. People ex rel. Kochersperger*, 174 Ill. 366, 51 N. E. 747 [1898]; *Craft v. Kochersperger*, 173 Ill. 617, 50 N. E. 1061 [1898]; *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171 [1898]; *Callister v. Kochersperger*, 168 Ill. 334, 48 N. E. 156 [1897]; *Ferris v. City of Chicago*, 162 Ill. 111, 44 N. E. 436 [1896]; *Pells v. People ex rel. Holmgren*, 159 Ill. 580, 42 N. E. 784 [1896]; *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895].

² *Marshall v. People ex rel. Smith*

219 Ill. 99, 76 N. E. 70 [1905]; *People ex rel. Price v. Bridgeman*, 218 Ill. 568, 75 N. E. 1057 [1905]; *City of Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 396 [1904]; *Wells v. People ex rel. Raymond*, 201 Ill. 435, 66 N. E. 210 [1903]; *People ex rel. Raymond v. Church*, 192 Ill. 302, 61 N. E. 496 [1901]; *People ex rel. Raymond v. Whidden*, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133 [1901]; *Church v. People ex rel. Kochersperger*, 174 Ill. 366, 51 N. E. 747 [1898].

³ *People ex rel. Raymond v. Church*, 192 Ill. 302, 61 N. E. 496 [1901].

⁴ *Church v. People ex rel. Kochersperger*, 174 Ill. 366, 51 N. E. 747 [1898].

⁵ *People ex rel. Price v. Bridgeman*, 218 Ill. 568, 75 N. E. 1057 [1905].

⁶ *City of Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 396 [1904].

use of less cement than that specified in the contract; the failure to use Portland cement; the use of lime screenings in place of sand; and failure to plaster the curb walls down far enough, do not make the improvement a different one.⁷ So an improvement is the same as that specified, although the cement is inferior in quality to that provided for⁸ or the sidewalk is two or three inches shorter than that provided for and of a softer stone.⁹ Under this theory, acceptance by the city of an improvement which is in effect a different one from that provided for, does not render the assessment for such improvement valid.¹⁰ Thus, if a different street is improved from that provided for,¹¹ or the width is increased,¹² as from fifty to sixty-four feet,¹³ or if it is reduced from sixty-one feet to fifty-three feet,¹⁴ the improvement has been held to be in legal effect a different one from that contracted for. Under a contract for macadamizing a road, the construction of a road out of a mixture of clay, gravel, limestone and slag, which amounts to nothing more than a dirt road, is in effect the construction of a different improvement.¹⁵ So if in a street improvement the grade is changed several feet and the cost is thereby materially increased, such improvement is regarded as in effect a different one.¹⁶

⁷ *People ex rel. Raymond v. Whidden*, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133 [1901].

⁸ *Wells v. People ex rel. Raymond*, 201 Ill. 435, 66 N. E. 210 [1903].

⁹ *Marshall v. People ex rel. Smith*, 219 Ill. 99, 76 N. E. 70 [1905].

¹⁰ *Phillips v. People ex rel. Goedtner*, 218 Ill. 450, 75 N. E. 1016 [1905]; *Eustace v. People ex rel. Hanberg*, 213 Ill. 424, 72 N. E. 1089 [1905]; *City of Chicago v. Ayers*, 212 Ill. 59, 72 N. E. 32 [1904]; *Gage v. People ex rel. Raymond*, 200 Ill. 432, 65 N. E. 1084 [1903]; *Young v. People ex rel. Raymond*, 196 Ill. 603, 63 N. E. 1075; *Gage v. People ex rel. Raymond*, 193 Ill. 316, 56 L. R. A. 916, 61 N. E. 1045 [1901]; *Church v. People ex rel. Koehersperger*, 174 Ill. 366, 51 N. E. 747 [1898]; *Ferris v. City of Chi-*

cago, 162 Ill. 111, 44 N. E. 436 [1896]; *Pells v. People ex rel. Holm-grain*, 159 Ill. 580, 42 N. E. 784 [1896].

¹¹ *Ferris v. City of Chicago*, 162 Ill. 111, 44 N. E. 436 [1896].

¹² *City of Chicago v. Ayers*, 212 Ill. 59, 72 N. E. 32 [1904].

¹³ *City of Chicago v. Ayers*, 212 Ill. 59, 72 N. E. 32 [1904].

¹⁴ *Pells v. People ex rel. Holm-grain*, 159 Ill. 580, 42 N. E. 784 [1896].

¹⁵ *Gage v. People ex rel. Raymond*, 200 Ill. 432, 65 N. E. 1084 [1903]; *Gage v. People ex rel. Raymond*, 193 Ill. 316, 56 L. R. A. 916, 61 N. E. 1045 [1901].

¹⁶ *Eustace v. People ex rel. Hanberg*, 213 Ill. 424, 72 N. E. 1089 [1905].

§ 534. Acceptance induced by fraud or mistake.

It has also been suggested that either bad faith or probable mistake might invalidate the action of the officers of a public corporation in determining that the contract has been performed but that in the absence of either bad faith or probable mistake, such determination is final.¹ What constitutes fraud is a question upon which there is some conflict of authority. If it can be shown that the public officials who accepted the performance of the contract were acting in collusion with the contractor by whom the improvement was constructed, fraud exists.² If the evidence falls short of establishing this state of facts, it is difficult in some jurisdictions to make it a case of fraud. Thus a fraudulent combination between the engineer and the committee of the council who were influential members of such body to keep the facts from the council and thus to procure the acceptance of the improvement by the council has been held not to amount to fraud, although the contractor was a party to such combination.³ So the combination of the contractors and the city engineer to make fraudulent representations to the board of public works with reference to the performance of the contract, which representations were believed by the board and upon which the board acted in good faith in accepting performance was held not to amount to fraud.⁴ In other jurisdictions a false certificate by a street commissioner with reference to the rate at which the work is done under a contract has been held to amount to fraud so as to invalidate the assessment.⁵ The acceptance by the public corporation of performance which is clearly and grossly defective is held in some jurisdictions to amount to fraud so that an assessment for such work is invalid.⁶ Thus, under a contract for covering a road with an even surface of broken stone to a depth of six inches so as to preserve an even surface, putting on stone varying from six inches to a foot in diameter each, and laid so roughly that teams could not pass over

¹ *Town of Elma v. Carney*, 9 Wash. 466, 37 Pac. 707 [1894].

² *Board of Commissioners of LaPorte County v. Wolff*. — Ind. —, 72 N. E. 860 [1904].

³ *Lux and Talbott Stone Company v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903].

⁴ *Duniway v. Portland*, 47 Or. 103, 81 Pac. 945 [1905].

⁵ *In the Matter of the Petition of Beekman*, 18 Howard (N. Y.) 460 [1859].

⁶ *McCain v. City of Des Moines*, 128 Iowa 331, 103 N. W. 979 [1905]; *Liebstein v. Mayor and Common Council of the City of Newark*, 24 N. J. Eq. (9 C. E. Gr.) 200 [1873]; *Haisch v. City of Seattle*, 10 Wash. 435, 38 Pac. 1131 [1894].

it, was held to be so gross a breach that acceptance thereof was fraudulent.⁷ However, acceptance of a gutter three feet wide instead of one four feet wide as required by contract has been said to be conclusive.⁸

§ 535. Acceptance by public corporation not final.

In some jurisdictions the acceptance of an improvement by a public corporation is not conclusive.¹ Under other statutes the acceptance of work by the city is only *prima facie* evidence that the work has been performed substantially in accordance with the terms of the contract.²

§ 536. Acceptance or rejection of work as affecting contractor.

The granting of power to the city to accept work,¹ also authorizes it to protect the property owners by rejecting the work in a proper case.² By statute the contractor cannot recover unless the county court finds that the improvement has been completed in substantial compliance with the terms of the ordinance.³ A city cannot refuse to accept an improvement for immaterial defects in performance.⁴

§ 537. Official certificate of performance.

Under some statutes provision is made for a certificate of the performance of the contract to be issued by some specific public officer when he finds that the contract has in fact been performed.¹ The purpose and effect of such certificate differs under different

⁷ Schumm v. Seymour, 24 N. J. Eq. (9 C. E. Gr.) 143 [1873].

⁸ Whitefield v. Hipple, 12 S. W. Rep. (Ky.) 150, 11 Ky. L. Rep. 386 [1889].

¹ City of St. Joseph v. Anthony, 30 Mo. 537 [1860]; Toledo for Use v. Grasser, 7 Ohio N. P. 396 [1883]; Pepper v. City of Philadelphia to Use of Horter, 114 Pa. St. 96, 6 Atl. 899 [1886]; Berwind v. Galveston and Houston Investment Company, 20 Tex. Civ. App. 426, 50 S. W. 413 [1899]; Haisch v. City of Seattle, 10 Wash. 435, 38 Pac. 1131 [1894].

² Gulick v. Connely, 42 Ind. 134 [1873].

³ Liebstein v. Mayor and Common Council of the City of Newark, 24 N. J. Eq. (9 C. E. Gr.) 200 [1873].

² Schumm v. Seymour, 24 N. J. Eq. (9 C. E. Gr.) 143 [1873].

³ Case v. City of Sullivan, 222 Ill. 56, 78 N. E. 37 [1906]; (affirming. Case v. City of Sullivan, 123 Ill. App. 671.)

⁴ Whitworth v. Webb City, 204 Mo. 579, 103 S. W. 86 [1907].

¹ Scherm v. Short, 77 S. W. 357, 25 Ky. Law Rep. 1108 [1903]; Dixon v. Labry, 25 Ky. Law Rep. 1679, 78 S. W. 430 [1904].

statutes. Under some statutes such certificate is necessary as a condition precedent to the validity of the assessment,² or to the issuing of bonds which are to be paid out of the fund raised by assessment.³ Under such statutes, the certificate, to be valid, must show substantially that the proper officer has determined as a fact that the work as performed is substantially that provided for by the contract.⁴ Thus a certificate of an engineer which states that in his office there is a record of another certificate which shows that the work of grading in question was examined and found to be practically right for official line and grade is insufficient.⁵ A certificate showing that a contract as modified has been performed is sufficient, if such modification is valid.⁶ Under some statutes it is provided that such certificate must be recorded.⁷ Where such requirement exists, a diagram on the back of the certificate which is necessary to an understanding of the work performed and of that unperformed, must be recorded and its omission is fatal.⁸ If the statute requires the certificate to be recorded with the assessment, recording it in a small book in which no assessments were recorded, without any reference thereto in the assessment records, is insufficient.⁹ On the other hand, immaterial omissions in recording the assessment are inoperative. Thus, omitting the words "depth being O. K." is immaterial where the depth is shown in the recorded certificate.¹⁰ Where the certificate of record shows by reference to the page of the record that all the proper documents including the engineer's certificate have been recorded, the fact that in enumerating the documents recorded the engineer's certificate is omitted does not invalidate the assessment.¹¹ Only the officer authorized by statute may sign such certificate.¹² Thus, a certi-

² *Obermeyer v. Patterson*, 130 Cal. 531, 62 Pac. 926 [1900]; *Frenna v. Sunny-side Land Company*, 124 Cal. 437, 57 Pac. 302 [1899]; *Case v. City of Sullivan*, 222 Ill. 56, 78 N. E. 37 [1906].

³ *Case v. City of Sullivan*, 222 Ill. 56, 78 N. E. 37 [1906].

⁴ *Obermeyer v. Patterson*, 130 Cal. 531, 62 Pac. 926 [1900].

⁵ *Obermeyer v. Patterson*, 130 Cal. 531, 62 Pac. 926 [1900].

⁶ *Weston v. City of Syracuse*, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899].

⁷ *Buckman v. Cuneo*, 103 Cal. 62, 36 Pac. 1025 [1894].

⁸ *Buckman v. Cuneo*, 103 Cal. 62, 36 Pac. 1025 [1894].

⁹ *Rauer v. Lowe*, 107 Cal. 229, 40 Pac. 337 [1895].

¹⁰ *Moffit v. Jordan*, 127 Cal. 622, 60 Pac. 173 [1900].

¹¹ *Greenwood v. Chandon*, 130 Cal. 467, 62 Pac. 736 [1900].

¹² *Rauer v. Lowe*, 107 Cal. 229, 40 Pac. 337 [1895]; *Frenna v. Sunny-side Land Company*, 124 Cal. 437, 57 Pac. 302 [1899].

ficate signed not by the officer nor by a deputy, but by a mere clerk in the office,¹³ or by an employe who did the surveying and measuring certified to,¹⁴ is insufficient. A certificate signed by all the members of the board of public works has been held to be sufficient, although the president and secretary also have authority to sign such certificate.¹⁵ If by statute the deputy or deputies of the board are authorized to receive and reject work, and the board in electing the chief engineer, authorized him to accept or reject work, the assistant engineer appointed by the board may, while acting in place of the chief engineer, accept such work.¹⁶ On the other hand, if the proper officials arbitrarily refuse a certificate the contractor may recover without waiting to obtain same.¹⁷ Thus, where out of a board of three, one examined the work and accepted it, while the other two refused to examine it, it was held that the contractor might enforce the assessment therefor, if the work was in fact properly performed.¹⁸ A certificate of full performance is not necessary, however, unless required by statute.¹⁹ If the statute does not make such certificate a condition precedent to the validity of the assessment, the approval of the proper officer is sufficient without a formal certificate of performance.²⁰ Under some statutes certificates are to be filed by certain officers for the benefit of other officers to enable the latter to determine whether the contract has been performed or not. Such statutes are purely directory and not mandatory. If the

¹³ *Rauer v. Lowe*, 107 Cal. 229, 40 Pac. 337 [1895].

¹⁴ *Frenna v. Sunnyside Land Company*, 124 Cal. 437, 57 Pac. 302 [1899].

¹⁵ *Menefee v. Bell*, 62 Mo. App. 659 [1895].

¹⁶ *Richardson v. Mehler*, 111 Ky. 408, 63 S. W. 957, 23 Ky. Law Rep. 917 [1901]; (If his power is doubtful the subsequent action of the board in approving his report operates as a ratification.)

¹⁷ *Neenan v. Donoghue*, 50 Mo. 493 [1872]; "If he has performed his contract he is entitled to pay, and whether there has been a performance is a question of fact to be determined upon by (*sic*) the evidence. It is true that if a party makes a contract he must abide by it before

he can recover on it; and if an approval by an outside party is made a condition precedent, such an approval must be obtained in a suit upon the contract. But here the action is not founded upon the contract. The contract is merely used as an instrument of proof, and if the plaintiff shows that he has done the work under the agreement, he should be permitted to recover whatever he may show himself justly entitled to." *Neenan v. Donoghue*, 50 Mo. 493, 495 [1872].

¹⁸ *Neenan v. Donoghue*, 50 Mo. 493 [1872].

¹⁹ *Gray v. Lucas*, 115 Cal. 430, 47 Pac. 354 [1896].

²⁰ *Fell v. Philadelphia to the Use of Cunningham*, 81 Pa. St. (31 P. J. Smith) 58 [1872].

officer, for whose benefit the certificate in question was to be filed, does not refuse to act on account of the failure to file such certificate the property owner cannot object to such failure.²¹ A statute requiring an entry of the due performance of a contract for street work upon the record of the superintendent of streets, is regarded as being for the benefit of other public officials and as directory merely.²² Accordingly, omission to make such entry does not invalidate the assessment.²³ Under some statutes the certificate of performance is merely *prima facie* evidence of the proper performance of the contract.²⁴ Under such statutes the amount of the assessment may be reduced by the court, below that fixed in the certificates, if the latter amount is too large.²⁵ Under some statutes such certificates have been held not to be binding upon the city as conclusive, and if the city ignores such certificate and decides that the contract has not been performed, such decision is not binding upon the contractor.²⁶ Under some statutes, however, such certificate is conclusive unless it can be shown that it was given in fraud and collusion.²⁷ Even under such statutes the existence of fraud or collusion or bad faith invalidates the certificate.²⁸ Thus, where the proper board rejected a part of the work, withheld part of the compensation, took a bond from the contractor to perform the rest of such contract and then gave him a certificate of performance, such certificate was held to be invalid.²⁹ By statute in some jurisdictions the certificate of some specific officers, such as the superintendent of streets,³⁰ is made

²¹ *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904]; *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262 [1901].

²² *Brady v. Bartlett*, 56 Cal. 350 [1880].

²³ *Brady v. Bartlett*, 56 Cal. 350 [1880].

²⁴ *Jenkins v. Stetler*, 118 Ind. 275, 20 N. E. 788 [1888]; *Barber Asphalt Paving Company v. Gogreve*, 41 La. Ann. 251, 5 So. 848 [1889].

²⁵ *S. D. Moody & Co. v. Sewerage and Water Board*, 117 La. 360, 41 So. 649 [1906].

²⁶ *Reilly v. City of Albany*, 40 Hun. 405 [1886].

²⁷ *Case v. City of Sullivan*, 222 Ill. 56, 78 N. E. 37 [1906]; *In the Matter of the Petition of Lewis v.*

Mayor, etc., of the City of New York, 35 Howard (N. Y.) 162 [1868]; *Ridenour v. Saffin*, 1 Handy (Ohio) 464 [1855]; *People of the State of New York ex rel. Ready v. Mayor and Common Council of the City of Syracuse*, 65 Hun. (N. Y.) 321, 20 N. Y. Supp. 236 [1892].

²⁸ *In the Matter of the Petition of Wood*, 51 Barb. (N. Y.) 275 [1868].

²⁹ *In the Matter of the Petition of Wood*, 51 Barb. (N. Y.) 275 [1868].

³⁰ *Williams v. Berwin*, 116 Cal. 56, 47 Pac. 877 [1897]; *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283 [1895]; *Warren v. Riddell*, 106 Cal. 352, 39 Pac. 781 [1895]; *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893]; *Frick v. Morford*, 87 Cal.

conclusive upon questions of performance as against the property owners in the absence of fraud. If the property owner is dissatisfied with such certificate, his only remedy is to appeal to the body designated by statute. The determination of such question upon appeal is final and if appeal is not taken the certificate is regarded as correct.³¹ As long as the contract is one which the city had power to make and the question is merely one of performance, appeal is necessary.³² Thus, the fact that under a contract to grade a street the wrong grade is assumed as the official grade, does not defeat the assessment if the work is approved by the street superintendent and no appeal is taken.³³ The determination of the city council on appeal that the work has been performed is final.³⁴ In case of fraud, however, acceptance by the superintendent is not controlling.³⁵ Thus, where under specifications requiring the use of one barrel of cement to each barrel of sand, fifteen per cent. more sand was used than the specifications called for, acceptance by the superintendent was not conclusive if fraud on his part was shown.³⁶ The acceptance of work by an officer under such a statute is said not to be a judicial act.³⁷ Accordingly, he may subsequently correct an erroneous decision with reference to such work which he has made in consequence of a clerical error.³⁸ A certificate which shows that the work has been accepted is not avoided by a detailed statement of the reasons therefor.³⁹ Thus, a street superintendent accepted

576, 25 Pac. 764 [1891]; *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127 [1889]; *Dunne v. Altshul*, 57 Cal. 472 [1881]; *Cochran v. Collins*, 29 Cal. 130 [1865]; *Emery v. Bradford*, 29 Cal. 75 [1865].

³¹ *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283 [1895]; *Warren v. Riddell*, 106 Cal. 352, 39 Pac. 781 [1895]; *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893]; *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891]; *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127 [1889]; *Shepard v. McNeill*, 38 Cal. 73 [1869]; *Cochran v. Collins*, 29 Cal. 130 [1865]; *Emery v. Bradford*, 29 Cal. 75 [1865].

³² *Warren v. Riddell*, 106 Cal. 352, 39 Pac. 781 [1895]; *Perine v. For-*

bush, 97 Cal. 305, 32 Pac. 226 [1893]; *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891]; *Emery v. Bradford*, 29 Cal. 75 [1865].

³³ *Warren v. Riddell*, 106 Cal. 352, 39 Pac. 781 [1895].

³⁴ *Lambert v. Bates*, 137 Cal. 676, 70 Pac. 777.

³⁵ *McVerry v. Kidwell*, 63 Cal. 246 [1883].

³⁶ *McVerry v. Kidwell*, 63 Cal. 246 [1883]; (Furthermore, seven per cent. of the bricks were of inferior quality.)

³⁷ *Eyer mann v. Provenchere*, 15 Mo. App. 256 [1884].

³⁸ *Eyer mann v. Provenchere*, 15 Mo. App. 256 [1884].

³⁹ *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500 [1900].

certain work. On appeal, the city council vacated such assessment and ordered the contractor to complete the work required by the contract under the direction of the city council and ordered the superintendent to accept the same when completed. When the completed work was accepted by council the superintendent gave a formal written acceptance of the work, but endorsed upon the assessment the statement that the work was performed under the supervision of the council and accepted by the council; that it was not done under his control or supervision and was not accepted by him; that he had no responsibility therefor. It was held that such endorsement could not qualify the effect of the formal acceptance.⁴⁰ In the absence of some specific statutory provision the mere lapse of time between the acceptance of the work and the issuing of the assessment does not invalidate the assessment.⁴¹ Under some statutes such certificates are binding only as between the city and the contractor and have no effect with reference to the property owner to be assessed.⁴² The fact that in a suit between the city and the contractor the city has alleged that the certificate of expense of the improvement is false, does not conclusively establish the invalidity of such certificate as between the city and the property owners.⁴³ The action of a public officer in accepting an improvement is final only as to the matters which he has, by statute, power to determine. To constitute an accepted street, the street must be accepted to the full width thereof, when approved under regulations adopted by the council specifying the character of work to be done. Acceptance of work done on a street is not sufficient to make the street an accepted street within the meaning of the statute requiring the city to improve streets after they are accepted.⁴⁴

§ 538. Necessity of performance within time limited.

Whether failure to perform a contract within the time specified by the contract or the ordinance authorizing the improvement

⁴⁰ *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500 [1900].

⁴¹ *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877 [1897].

⁴² In the Matter of the Petition of Burmeister, 56 Howard (N. Y.) 416 [1879].

⁴³ *Haven v. Mayor, Aldermen and Commonalty of the City of New York*, 173 N. Y. 611, 66 N. E. 1110 [1903]; (affirming, *Havens v. City of New York*, 73 N. Y. S. 678, 67 App. Div. 90 [1901]).

⁴⁴ *Oakland Paving Company v. Rier*, 52 Cal. 270 [1877].

defeats the right of the contractor to recover, and invalidates an assessment levied for such improvement, is a question which depends upon the terms of the statute authorizing the improvement and the assessment, and upon the terms of the specific contract. Under some statutes time is made the essence of the contract, the city is bound upon entering into a contract to fix the time within which such contract must be performed; and failure to perform within which such time discharges the contract, prevents the contractor from recovering, and invalidates an assessment levied for the cost of such improvement.¹ Failure to perform in six months² and in ninety days³ from the time fixed for performance, has been held to be so material as to invalidate the assessment. Some of these statutes are so sweeping in their scope that the city has no power to ratify the contract after breach by failure to perform within the time limit. An attempt by the city to render such contract valid by recognizing it as in force and levying an assessment or issuing tax bills therefor, is a nullity and does not make the assessment valid.⁴ Under such statutes the city cannot, after

¹ *John Kelso Co. v. Gillette*, 136 Cal. 603, 69 Pac. 296 [1902]; *Kelso v. Cole*, 121 Cal. 121, 53 Pac. 353 [1898]; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52 [1891]; *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885 [1891]; *Dougherty v. Nevada Bank*, 81 Cal. 162, 22 Pac. 513 [1889]; *Dougherty v. Coffin*, 69 Cal. 545, 10 Pac. 672 [1886]; *Fanning v. Schammel*, 68 Cal. 428, 9 Pac. 427 [1886]; *Mappa v. City Council of the City of Los Angeles*, 61 Cal. 309 [1882]; *Schibel v. Merrill*, 185 Mo. 534, 83 S. W. 1069 [1904]; *Merrill v. Schibel*, 185 Mo. 551, 83 S. W. 1133 [1904]; *Barber Asphalt Paving Company v. Ridge*, 169 Mo. 376, 68 S. W. 1043 [1902]; *Smith v. City of Westport*, 105 Mo. App. 221, 79 S. W. 725 [1904]; *Hilgert v. Barber Asphalt Paving Company*, 107 Mo. App. 385, 81 S. W. 496 [1904]; *Heman v. Gerardi*, 96 Mo. App. 231, 69 S. W. 1069 [1902]; *City of Springfield ex rel. Gilsonite Construction Co. v. Schmook*, 120 Mo. App. 41, 96 S. W. 257 [1906]; *Shoenberg v. Hever*, 91 Mo. App. 389 [1902]; *Winfrey v.*

Linger, 89 Mo. App. 159 [1901]; *Ayers v. Schmohl*, 86 Mo. App. 349 [1900]; *Richter v. Merrill*, 84 Mo. App. 150 [1900]; *New England Safe Deposit and Trust Company of Missouri v. James*, 77 Mo. App. 616 [1898]; *McQuiddy v. Brannock*, 70 Mo. App. 535 [1897]; *Rose v. Trestail*, 62 Mo. App. 352 [1895]; *Philadelphia to Use v. Jewell*, 135 Pa. St. 329, 19 Atl. 947 [1890].

² *McQuiddy v. Brannock*, 70 Mo. App. 535 [1897].

³ *Shoenberg v. Hever*, 91 Mo. App. 389 [1902].

⁴ *Barber Asphalt Paving Company v. Ridge*, 169 Mo. 376, 68 S. W. 1043 [1902]; *Smith v. City of Westport*, 105 Mo. App. 221, 79 S. W. 725 [1904]; *Hilgert v. Barber Asphalt Paving Company*, 107 Mo. App. 385, 81 S. W. 496 [1904]; *Heman v. Gerardi*, 96 Mo. App. 231, 69 S. W. 1069 [1902]; *City of Springfield ex rel. Gilsonite Const. Co. v. Schmook*, 120 Mo. App. 31, 96 S. W. 257 [1906]; *Ayers v. Schmohl*, 86 Mo. App. 349 [1900]; *Richter v. Merrill*, 84 Mo. App. 150 [1900]; *New England Safe*

the time limited has expired without performance, grant a proportional assessment under another statute, authorizing a proportional assessment where the contract has been performed in part and in part abandoned.⁵ Upon the expiration of the time limited, the contract if unperformed becomes a nullity, so that the property owner does not waive any right by failing to file objections thereto.⁶ The time within which the contract is to be performed may be fixed by the city council in the improvement ordinance,⁷ or by passing a general ordinance applicable to contracts of that character.⁸ If the time is not fixed in the ordinance it is to be presumed that a reasonable time is intended and if the time fixed by the contract is a reasonable time the contract must be performed within such time or the assessment is invalid.⁹ If the time fixed is not reasonable, it is said that the property owner may object, but that the contractor cannot, since he has entered into such contract voluntarily and cannot be allowed to take advantage of the remaining terms of the contract while repudiating the terms which fixed the time of performance.¹⁰ In case of a conflict between the contract and the ordinance with reference to the time of performance the ordinance controls. If the ordinance does not fix a time for performance, a reasonable time is intended; and if the contract fixes a definite time for performance, which is in fact a reasonable time, such contract and the assessment levied for the contract price thereof are valid.¹¹ A certain time may be fixed within which the contract is to be performed

Deposit and Trust Company of Missouri v. James, 77 Mo. App. 616 [1898]; Rose v. Trestrail, 62 Mo. App. 352 [1895].

⁵ John Kelso v. Gillette, 136 Cal. 603, 69 Pac. 296 [1902]; Kelso v. Cole, 121 Cal. 121, 53 Pac. 353 [1898].

⁶ Winfrey v. Linger, 89 Mo. App. 159 [1901]; Richter v. Merrill, 84 Mo. App. 150 [1900].

⁷ Barber Asphalt Paving Company v. Ridge, 169 Mo. 376, 68 S. W. 1043 [1902]; Smith v. City of Westport, 105 Mo. App. 221, 79 S. W. 725 [1904].

⁸ Rose v. Trestrail, 62 Mo. App. 352 [1895]; City of Springfield ex rel. Gilsonite Construction Co. v.

Schmook, 120 Mo. App. 41, 96 S. W. 257 [1906].

⁹ Schibel v. Merrill, 185 Mo. 534, 83 S. W. 1069 [1904]; Hilgert v. Barber Asphalt Paving Company, 107 Mo. App. 385, 81 S. W. 496 [1904]; Allen v. La Force, 95 Mo. App. 324, 68 S. W. 1057 [1902]; Ayers v. Schmohl, 86 Mo. App. 349 [1900]. For a contract held to imply performance in a reasonable time because of indefinite provisions as to time of performance, see Paul v. Conqueror Trust Co., 125 Mo. App. 483, 102 S. W. 1070 [1907].

¹⁰ Ayers v. Schmohl, 86 Mo. App. 349 [1900].

¹¹ Heman v. Gilliam, 171 Mo. 258, 71 S. W. 163 [1902].

and provision may further be made for the payment of a certain sum per day either as a penalty or liquidated damages in case of failure to perform within the time limited. Whether failure to perform within the time limited makes the contract and the assessment levied therefor invalid, or whether the only effect of such breach is to render the contractor liable for payment of the specified sum per day agreed upon, depends upon whether the time for performance is fixed by the ordinance or merely by the contract. If the time for performance is fixed by the ordinance, the provisions of the contract are subordinate thereto, the provisions fixing the time for performance control the stipulation for the deduction of a certain sum per day as liquidated damages, and failure to perform within the time limited makes the contract unenforceable and an assessment or tax bill therefor, void.¹² On the other hand, if the ordinance does not fix the time within which the contract is to be performed but the contract fixes such time and further contains a provision for deducting a certain amount per day in case of failure to perform, the latter provision is regarded as fixing the effect of failure to perform and accordingly, if the contract is performed within a reasonable time the fact that it is not performed within the time limited does not invalidate the contract.¹³ Where such a contract was extended twenty days and was not performed within such time, it was held that the contract must at least be performed within a reasonable time, that twenty days was a reasonable time and that by reason of such non-performance the contract became invalid.¹⁴ If a contract has become unenforceable through failure to perform within the time limited, a subsequent statute which attempts to revive such contract and render it enforceable is unconstitutional.¹⁵ Whether a city has power to extend the time for the performance of a contract under statutes which render such contract unenforceable if

¹² *Barber Asphalt Paving Co. v. Munn*, 185 Mo. 552, 83 S. W. 1062 [1904]; *McQuiddy v. Brannock*, 70 Mo. App. 535 [1897].

¹³ *City of Sedalia ex rel. Taylor v. Smith*, 206 Mo. 346, 104 S. W. 15 [1907]; *Allen v. Labsap*, 188 Mo. 692, 87 S. W. 926 [1905]; *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163 [1902]; *Paul v. Conqueror Trust Co.*, 125 Mo. App. 483, 102 S. W. 1070 [1907]; *Hill-O'Meara Con-*

struction Company v. Hutchinson, 100 Mo. App. 294, 73 S. W. 318 [1903].

¹⁴ *Schibel v. Merrill*, 185 Mo. 534, 83 S. W. 1069 [1904].

¹⁵ *Fanning v. Schammel*, 68 Cal. 428, 9 Pac. 427 [1886]; *People v. McCune*, 57 Cal. 153 [1880]; *Brady v. King*, 53 Cal. 44 [1878]; *People of the State of California v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677 [1875].

not performed within the time limited, depends entirely upon the provisions of the statute applicable. Under some statutes the city has no power to extend the time of performance and the attempting so to do is a nullity.¹⁶ Under other statutes the city may have power, if it thinks the case a proper one, to extend the time of performance.¹⁷ In California it was first held that the city had power to extend the time of performance if such extension were made before breach.¹⁸ Subsequently it was held that no such power existed;¹⁹ and the latter decision was held to be applicable to contracts entered into before such decision.²⁰ A statute which authorizes the marshal to fix the time for the commencement of work under all contracts entered into by him and which gives him power under direction of the city council to extend the time "so fixed" is held to authorize him to extend the time for performance and not merely the time for the commencement of the work.²¹ In a resolution extending the time for the performance of the work, a description of the work is sufficient if it indicates what contract is to be extended.²² If the resolution specifies the streets on which the work is to be done, and the nature of the work, and the number of the contract, it is sufficient although the contractor is mis-named.²³ Under a statute requiring the superintendent of streets to endorse an extension of time upon the contract, it is not necessary that he endorse such extension before the expiration of the time originally fixed by the contract.²⁴ Statutory provisions requiring the superintendent of streets to

¹⁶ *Beveridge v. Livingstone*, 54 Cal. 54 [1879]; *Spalding v. Forsee*, 109 Mo. App. 675. 83 S. W. 540 [1904]; *Smith v. City of Westport*, 105 Mo. App. 221, 79 S. W. 725 [1904].

¹⁷ *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432 [1899]; *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125 [1896]; *Buckman v. Cuneo*, 103 Cal. 62, 36 Pac. 1025 [1894]; *Anderson v. De Urioste*, 96 Cal. 404, 31 Pac. 266 [1892]; *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860 [1892]; *Oakland Paving Company v. Barstow*, 79 Cal. 45, 21 Pac. 544 [1889]; *Taylor v. Palmer*, 31 Cal. 240 [1866]; *Houston v. McKenna*, 22 Cal. 550 [1863]; *Conlin v. Seamen*, 22 Cal. 546 [1863]; *Jenkins v. Stetler*, 118 Ind.

275, 20 N. E. 788 [1888]; *City of Leavenworth v. Mills*, 6 Kan. 288 [1870]; *People ex rel. Knox v. Village of Yonkers*, 39 Barb. (N. Y.) 266 [1863].

¹⁸ *Taylor v. Palmer*, 31 Cal. 241.

¹⁹ *Beveridge v. Livingstone*, 54 Cal. 54.

²⁰ *Wood v. Brady*, 150 U. S. 18, 37 L. 981, 14 S. 6 [1893].

²¹ *Oakland Paving Company v. Barstow*, 79 Cal. 45, 21 Pac. 544 [1889].

²² *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432 [1899].

²³ *Anderson v. De Urioste*, 96 Cal. 404, 31 Pac. 266 [1892].

²⁴ *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125 [1896].

cause a resolution extending the time of performance of a given contract to be recorded, and to specify in his certificate of extension the number of the resolution granting the extension, are intended for the help and information of county officers to enable them to refer quickly and readily to the resolution applicable; are directory merely, and the omission to perform such acts does not invalidate the contract.²⁵ The city may under such statute grant a second extension,²⁶ even before the extension previously granted has gone into effect.²⁷ Application for an extension which is refused does not authorize performance after the time originally limited.²⁸ If a street commissioner has accepted the work and issued an assessment and warrant, the fact that the city council sets aside such assessment and warrant and directs that further work be done in order to complete the performance of the contract does not amount to an extension of time for such performance.²⁹ If a property owner has promised to waive defects and pay for work done upon consideration that the contractor will do extra work, such contract is legal and if the contract is performed after the time limited and no extension of time is obtained, the contractor may maintain an action upon such promise, although he cannot obtain a legal assessment.³⁰ Under statutes authorizing an extension of time, such extension must ordinarily be obtained before the expiration of the time originally limited by the contract or in case of a prior extension before the expiration of the time as extended.³¹ After the expiration of such time, the contract has become invalid and cannot be ratified by the city,³² and a subsequent extension of time is a nullity.³³ The

²⁵ *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860 [1892].

²⁶ *Buckman v. Cuneo*, 103 Cal. 62, 36 Pac. 1025 [1894].

²⁷ *Puckman v. Cuneo*, 103 Cal. 62, 36 Pac. 1025 [1894].

²⁸ *Mappa v. City Council of the City of Los Angeles*, 61 Cal. 309 [1882].

²⁹ *Heft v. Payne*, 97 Cal. 108, 31 Pac. 844 [1892].

³⁰ *Bernstein v. Downs*, 112 Cal. 197, 44 Pac. 557 [1896].

³¹ *Kelso v. Cole*, 121 Cal. 121, 53 Pac. 353 [1898]; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52 [1891].

³² *Kelso v. Cole*, 121 Cal. 121, 53 Pac. 353 [1898]; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52 [1891]; *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885 [1891]; *Dougherty v. Nevada Bank*, 81 Cal. 162, 22 Pac. 513 [1889]; *Dougherty v. Collin*, 69 Cal. 454, 10 Pac. 672 [1886]; *Fanning v. Schammel*, 68 Cal. 428, 9 Pac. 767 [1889].

³³ *Kelso v. Cole*, 121 Cal. 121, 53 Pac. 353 [1898]; *Dougherty v. Coffin*, 69 Cal. 454, 10 Pac. 672 [1886]; *Fanning v. Schammel*, 68 Cal. 428, 9 Pac. 427 [1886].

act of the supervisors in refusing to set such contract aside on appeal cannot make it valid.³⁴ Extension of time does not render the contract a new contract from and after the time originally fixed for performance.³⁵ Hence a constitutional provision forbidding an extension of time, does not apply to a contract entered into before the adoption of such provision, although an extension of time was obtained thereon after such constitutional provision took effect.³⁶ The legislature may grant specific authority to public officials to extend the time for performance.³⁷ A statute authorizing county commissioners to grant further time for the completion of free turnpike roads is not a special law since it is applicable generally, although it may be passed to meet a special case.³⁸ The fact that an injunction has been allowed restraining the city from levying and collecting assessments for an improvement is no excuse for a failure to perform within the time specified, where an injunction against the performance of the contract was dissolved.³⁹ It has been said that an injunction preventing the completion of the work would not be an excuse for a delay in the absence of some specific provision covering such case.⁴⁰ This remark, however, was in the nature of an *obiter* since the contract under consideration provided that in case of suspension of work for any cause, the contractor should have an extension of time to complete the contract equal to the delay caused by such extension and it was held that such provision included suspension of work caused by an injunction.⁴¹ Under a provision in a contract for an extension of time for delay due to any hindrance, the fact that the city delayed the performance of a grading contract by constructing a culvert across the street, and that such performance was further delayed by the existence, upon the ground taken for a street, of the building of the property owner who was resisting the assessment, it was held that an extension of time for such hindrances should be given.⁴² So under a

³⁴ *Dougherty v. Nevada Bank*, 81 Cal. 162, 22 Pac. 513 [1889].

³⁵ *Ede v. Cogswell*, 79 Cal. 278, 21 Pac. 767 [1889].

³⁶ *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860 [1892]; *Ede v. Cogswell*, 79 Cal. 278, 21 Pac. 767 [1889].

³⁷ *Foster v. Commissioners of Wood County*, 9 O. S. 540 [1859].

³⁸ *Foster v. Commissioners of Wood*

County, 9 O. S. 540 [1859].

³⁹ *Butler v. Detroit*, 43 Mich. 552, 5 N. W. 1078.

⁴⁰ *Whittemore v. Sills*, 76 Mo. App. 248 [1898].

⁴¹ *Whittemore v. Sills*, 76 Mo. App. 248 [1898].

⁴² *Sparks v. Villa Rosa Land Company*, 99 Mo. App. 489, 74 S. W. 120 [1903].

provision of a contract providing for completion within a certain number of days excluding the time during which the work was delayed, delays caused by the presence of a building upon the line of a street, and telegraph poles thereon; and delay caused by failure of another contractor to lay water pipes in time should all be deducted from the number of days fixed for performance.⁴³ However, the fact that unfavorable weather and failure to obtain the use of the city's roller caused delay in performance, does not constitute an excuse unless an extension of time was provided.⁴⁴ If an extension of time is granted as a part of a fraudulent scheme against the property owner, the assessment may be invalid, not because of the extension, but because of the fraud.⁴⁵ Under some ordinances which provide that a contract shall be void if not performed within a certain time, a city may ratify a contract not performed within the time limited; and may thus render valid the contract and assessment levied therefor.⁴⁶ Power to extend time, even if given without authority, does not invalidate a contract if such power is not exercised, but the contract is performed within the time fixed by the ordinance.⁴⁷ If the statutes, ordinances and contract do not expressly make time of the essence and if the contractor is allowed to continue performance after the time limited by the contract, such contract is held to be valid as is an assessment levied therefor,⁴⁸ at least if the property owner does not show that he has been injured by such delay.⁴⁹ If the council declares the contract terminated by formal resolution, on the ground of delay under a clause in the contract reserving such power, its action is final unless it is unreasonable or wanton.⁵⁰ A contractual provision for beginning performance within a certain time after the contract was entered into and for completing performance within a certain time thereafter

⁴³ *F. V. Smith Contracting Co. v. City of New York*, 100 N. Y. S. 756, 115 App. Div. 180 [1906].

⁴⁴ *Paul v. Conqueror Trust Co.*, 125 Mo. App. 483, 102 S. W. 1070 [1907].

⁴⁵ *Foote v. City of Milwaukee*, 18 Wis. 270 [1864].

⁴⁶ *Philadelphia to Use v. Jewell*, 135 Pa. St. 329, 19 Atl. 947 [1890].

⁴⁷ *City of Excelsior Springs, to Use of McCormick v. Ettenson*, 120 Mo. App. 215, 96 S. W. 701 [1906].

⁴⁸ *Mayor and City Council of Baltimore v. Raymo*, 68 Md. 569, 13 Atl. 383 [1888]; *Hubbard v. Norton*, 28 O. S. 116 [1875]; *Philadelphia to the Use of Dyer v. Brooks*, 81 Pa. St. (31 P. F. Smith) 23 [1876]; *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533 [1884].

⁴⁹ *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533 [1884].

⁵⁰ *Miller v. Atlantic City*. — N. J. —, 68 Atl. 64 [1907].

makes time of the essence both as to commencement and as to completion.⁵¹

§ 539. Remedies for defective performance if assessment held valid.

In jurisdictions in which the property owner is precluded from raising questions as to the performance of the contract by the act of the city in accepting performance an attempt has been made to find some method of giving the property owner relief, because of the wrong done him and to uphold the assessment at the same time. It seems unfair to assess a property owner for the cost of an improvement which as performed is of no benefit to him, and to justify such assessment upon the theoretical benefit which he receives from the determination from the city that such improvement has been constructed in a proper manner. In some jurisdictions it is said that the property owner may maintain an action against the city,¹ or against the specific officers who have accepted such performance,² for the injury which he has sustained by having a defective improvement instead of one properly constructed. In the absence of evidence to show that a public official is acting wrongfully or with corrupt motives he cannot be held liable for mere mistakes in judgment.³ In other jurisdictions it has been said that no judgment can be rendered against the city for damages for accepting defective performance.⁴ In some jurisdictions it is said that the remedy of the property owner is to bring some action in the nature of injunction to prevent the city from paying the contractor until the contract is performed, or to prevent the defective performance of the contract,⁵ or in the nature of mandamus to compel the city to complete the con-

⁵¹ *Merine v. Barber Asphalt Paving Co.*, 125 Mo. App. 623, 103 S. W. 508 [1907].

¹ *Gage v. Springer*, 211 Ill. 200, 103 Am. St. Rep. 191, 71 N. E. 860 [1904]; (reversing, *Gage v. Springer*, 112 Ill. App. 103 [1904]); *Astoria Heights Land Company v. City of New York*, 179 N. Y. 579, 72 N. E. 1139; (affirming, 86 N. Y. S. 651, 89 App. Div. 512 [1904]).

² *Commissioners of Putnam County*

v. Krauss, 53 O. S. 628, 42 N. E. 831 [1895].

³ *City of St. Joseph ex rel. King Hill Brick Manufacturing Company v. McCabe*, 58 Mo. App. 542 [1894].

⁴ *City to Use of McGrath v. Clemens*, 49 Mo. 552 [1872].

⁵ *People ex rel. Raymond v. Whidden*, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133 [1901]; *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895]; *Ricketts v. Village of Hyde Park*, 85 Ill. 110 [1877].

tract,⁶ instead of resisting the assessment on the ground of defective performance.

§ 540. Effect of abandonment of prior contract.

In the absence of specific statute a public corporation has a right as against the property owners to rescind a contract, entered into with the consent of the contractor, and to let a new contract.¹ The fact that such contract is let at a higher rate does not invalidate the assessment.² A new contract entered into between the city and the same contractor for the construction of the same public improvement is regarded as discharging a former contract between the same two parties.³ This is true even if the new contract is let for a higher price than the original contract.⁴ It will be assumed in the absence of evidence to the contrary that the city had proper reasons for such action. If a prior contract for a public improvement has been abandoned by the contractor the public corporation has, in the absence of some specific statute, authority to make a new contract for the completion of the improvement already under construction.⁵ The public authorities have ordinarily power in such cases to proceed to readvertise for bids without repeating the steps necessary to obtain jurisdiction.⁶ The jurisdiction acquired by them to make the original contract is regarded as continuing to enable them to make such contracts as are necessary to secure the complete performance

¹ *People ex rel. Raymond v. Whidden*, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133 [1901]; *Shannon v. Village of Hinsdale*, 180 Ill. 202, 54 N. E. 181 [1899]; *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171 [1898]; *Callister v. Kochersperger*, 168 Ill. 334, 48 N. E. 156 [1897]; *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895]; *Hackett v. State for Use of Martindale*, 113 Ind. 532, 15 N. E. 799 [1887]; *Indianapolis and Cumberland Gravel Road Co. v. State ex rel. Flaek*, 105 Ind. 37, 4 N. E. 316 [1885]; *Simonton v. Hays*, 88 Ind. 70 [1882].

² *Fitzgerald v. Walker*, 55 Ark. 148, 17 S. W. 702 [1891]; *Marshall v. Commonwealth to the Use of*

Mayor, etc., of Allegheny City, 59 Pa. St. (9 P. F. Smith) 455 [1868].

³ *Marshall v. Commonwealth to the Use of Mayor, etc., of Allegheny City*, 59 Pa. St. (9 P. F. Smith) 455 [1868].

⁴ *Spaulding v. North San Francisco Homestead and Railroad Association*, 87 Cal. 40, 24 Pac. 600, 25 Pac. 249 [1890].

⁵ *Spaulding v. North San Francisco Homestead and Railroad Association*, 87 Cal. 40, 24 Pac. 600, 25 Pac. 249 [1890].

⁶ *Femper v. King*, 11 Mo. App. 116 [1881].

⁷ *Himmelmann v. Oliver*, 34 Cal. 246 [1867]; *Dougherty v. Foley*, 32 Cal. 403 [1867].

of the work originally contracted for.⁷ The reletting of a contract is, however, in some states a separate and distinct proceeding, though under jurisdiction already acquired.⁸ Accordingly, the grant by a board to its clerk of authority to invite proposals under which the original contract was let does not authorize him to give notice inviting proposals for reletting the contract. He can give such notice only upon a new and specific grant of authority from the board.⁹ If a second contract for an improvement is let for an increased price while the original contract is in force, it has been said that the remedy of the land-owner is by appeal to the board of supervisors and not by awaiting performance of the contract and then resisting the assessment.¹⁰ If the city has accepted a bid and a bidder has given bond with solvent sureties and the city subsequently releases him, readvertises for bids and lets the contract to the lowest bidder on such second advertising, whose bid is higher than that of the original contractor, it has been said that property owners are entitled to recover from the city their proportionate share of such differences.¹¹ If a contractor has given bond for the performance of his contract and he makes default in performance and the contract is relet at an increased price, the city must enforce such bond and apply the amount recovered thereon upon the contract price under the new contract instead of assessing the property owners for the full amount of the contract price under the new contract.¹² Such facts are said, in some jurisdictions, to invalidate the assessment,¹³ and in other jurisdictions to be ground for reducing the amount of the assessment, but not for vacating it.¹⁴ If, as part of a contract for an original construction, the contractor has agreed to keep such improvement in repair, the

⁷ *Himmelmann v. Oliver*, 34 Cal. 246 [1867]; *Dougherty v. Foley*, 32 Cal. 403 [1867].

⁸ *Meuser v. Risdon*, 36 Cal. 239 [1868].

⁹ *Meuser v. Risdon*, 36 Cal. 239 [1868].

¹⁰ *Spaulding v. North San Francisco Homestead and Railroad Association*, 87 Cal. 40, 24 Pac. 600, 25 Pac. 249 [1890].

¹¹ *Barfield v. Gleason*, 111 Kv. 491, 23 Kv. Law Rep. 128, 63 S. W. 964 [1901].

¹² *Eno v. Mayor, Aldermen and Commonalty of the City of New York*, 68 N. Y. 214 [1877]; (reversing *Eno v. Mayor, Aldermen and Commonalty of the City of New York*, 7 Hun. (N. Y.) 320 [1876]).

¹³ *Spaulding v. North San Francisco Homestead and Railroad Association*, 87 Cal. 40, 24 Pac. 600, 25 Pac. 249 [1890].

¹⁴ *In the Matter of the Petition of Upson to Vacate an Assessment*, 89 N. Y. 67 [1882].

fact that the contractor becomes insolvent and does not perform such contract does not prevent the city from levying another assessment for necessary repairs.¹⁵ The fact that a part of the fund raised by assessment has been misappropriated is no defense as against the collection of further installments of such assessment.¹⁶ The remedy of the property owner is to compel the proper application of such fund. So, if an assessment is levied to pay bonds, issued to obtain money for the cost of a public improvement, the fact that part of the fund has been wasted in litigation is no defense.¹⁷ An assessment cannot be levied for work which has been abandoned entirely and which is not and will not be performed.¹⁸ An improvement which has been begun may be abandoned by the city as far as the rights of the property owners are concerned.¹⁹ This right exists even if an assessment has been levied for such an improvement and confirmed.²⁰ A municipality to which a smaller municipality has been annexed has a right to abandon an improvement commenced by such smaller municipality.²¹ If the city has entered into a contract for constructing the improvement, it has no greater right to terminate such contract than a private individual as against the adversary party to the contract. Accordingly, if the city orders further proceedings to be stayed after confirmation, such order is not a defense to an application for judgment for the assessment;²² nor is it ground for setting aside at a subsequent term such judgment of confirmation.²³

§ 541. Modification of contract.

In the absence of statutory authority a public corporation can-

¹⁵ *Bacas v. Adler*, 112 La. 806, 36 So. 739 [1904]; *State ex rel. Woulfe v. St. Paul*, Judge, 107 La. 775, 32 So. 88 [1901-1902].

¹⁶ *State, Sigler, Pros. v. Fuller*, 34 N. J. L. (5 Vr.) 227 [1870].

¹⁷ *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890].

¹⁸ In the *Matter of Eager*, 41 Howard (N. Y.) 107 [1870]; In the *Matter of Eager*, 58 Barb. (N. Y.) 557 [1871]; In the *Matter of Eager*, 10 Abb. Pr. N. S. (N. Y.) 229 [1871].

¹⁹ *City of Chicago v. Weber*, 94 Ill. App. 561 [1900].

²⁰ *City of Chicago v. Weber*, 94 Ill.

App. 561 [1900]. (This decision was based in part upon the theory that in an application for judgment for the assessment, the abandonment of the improvement being a matter which had occurred since confirmation, might be interposed as a defense.)

²¹ *City of Chicago v. Weber*, 94 Ill. App. 561 [1900].

²² *Clingman v. People ex rel. Raymond*, 183 Ill. 339, 55 N. E. 727 [1899].

²³ *People ex rel. McCornack v. McWethy*, 165 Ill. 222, 46 N. E. 187 [1897].

not modify a public contract after it has been entered into between the parties.¹ Thus, a contractor cannot be authorized to improve a portion of a street not included in his contract in lieu of similar work which he was bound to do on another street.² Under the discretionary power conferred by many statutes upon public corporations with reference to public improvements, it is held that a public corporation has the power to modify a contract for a public improvement once entered into.³ This result is most easily reached under statutes which specifically authorize a public corporation to change a contract for a public improvement already entered into.⁴ If by statute a contract is to be let to the lowest bidder, it is held in many jurisdictions that the public corporation has no power to modify the contract so as to make a material variance between the contract as entered into and the specifications and bids by means of which the contract was originally let; since if the power to make such change did exist, it would be impossible to determine who was the lowest bidder upon the contract as finally entered into.⁵ It has been held that if the city permits the lowest bidder to change his bid in a material respect after the contract is awarded, an unsuccessful bidder may maintain an injunction suit to restrain the city from

¹ *Schneider v. District of Columbia*, 7 Mackey (D. C.) 252 [1889]; *Windsor v. District of Columbia*, 7 Mackey (D. C.) 96 [1889]; *Galbreath v. Newton*, 30 Mo. App. 381.

² *Windsor v. District of Columbia*, 7 Mackey (D. C.) 96 [1889].

³ *Reclamation District No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676 [1884]; *Sims v. Hines*, 121 Ind. 534, 23 N. E. 515 [1889]; *Jenkins v. Stetler*, 118 Ind. 275, 20 N. E. 788 [1888]; *Gulick v. Connely*, 42 Ind. 134 [1873]; *Hellenkemp v. City of Lafayette*, 30 Ind. 192 [1868]; *Strasheim v. Jerman*, 56 Mo. 104 [1874]; *Weston v. City of Syracuse*, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899]; *In the Matter of the Protestant Episcopal Public School*, 40 Howard (N. Y.) 198 [1870].

⁴ *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676 [1884]; *Sims v. Hines*, 121 Ind. 534, 23 N. E.

515 [1889]; *Lindenberger Land Co. v. R. B. Park & Co.*, — Ky. —, 85 S. W. 213, 27 Ky. L. Rep. 437 [1905]; *Weston v. City of Syracuse*, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899]; *In the Matter of the Protestant Episcopal Public School*, 40 Howard (N. Y.) 198 [1870].

⁵ *Young v. People ex rel. Raymond*, 196 Ill. 603, 63 N. E. 1075 [1902]; *Mohr v. City of Chicago*, 114 Ill. App. 283 [1904]; *Steffins v. Stewart*, 53 Kans. 92, 36 Pac. 55 [1894]; *City of Henderson v. Lambert*, 77 Ky. (14 Bush.) 24 [1878]; *Auditor General v. Stoddard*, 147 Mich. 329, 110 N. W. 944 [1907]; *Butler v. Detroit*, 43 Mich. 552, 5 N. W. 1078; *Ely v. City of Grand Rapids*, 84 Mich. 336, 47 N. W. 447 [1890]; *Spalding v. Forsee*, 109 Mo. App. 675, 83 S. W. 540 [1904]; *Smith v. City of Westport*, 105 Mo. App. 221, 79 S. W. 725 [1904].

entering into such contract.⁶ Such a change under statutes which provide for letting the contract to the lowest bidder has been held to invalidate the assessment levied for the cost of such improvement.⁷ Thus, if after a contract is let, the grade of the street is changed materially and the contract is regarded as modified to suit the grade thus fixed without letting the contract anew, an assessment for the cost of such improvement is invalid.⁸ So if time is of the essence of the contract, the city cannot extend the time after the contract has been let in the absence of statutory authority therefor.⁹ If, by statute, power is given to a city to make changes in the plans of public improvements with the consent of the contractor, and by another statute it is provided that the contract must be let to the lowest bidder, a question arises whether the power to make such changes in public improvements extends to contracts which by the terms of the statute are to be let to the lowest bidder. If the legislature has not provided specifically either that such power to make changes applies to contracts let to the lowest bidder or does not apply, we have a case in which the courts have to determine the intention of the legislature upon a question which was probably not in the mind of the legislature when it enacted the statutes in question. In some jurisdictions it is held that under such a combination of statutes the public corporation may change the terms of public contracts after they are made.¹⁰ In other jurisdictions, under such a combination of statutes, it is held that the power to make changes does not extend to contracts which must be awarded to the lowest bidder.¹¹ The fact

⁶ *Mohr v. City of Chicago*, 114 Ill. App. 283 [1904].

⁷ *Young v. People ex rel. Raymond*, 196 Ill. 603, 63 N. E. 1075 [1902]; *Steffins v. Stewart*, 53 Kans. 92, 36 Pac. 55 [1894]; *City of Henderson v. Lambert*, 77 Ky. (14 Bush.) 24 [1878]; *Auditor General v. Stoddard*, 147 Mich. 329, 110 N. W. 944, [1907]; *Butler v. Detroit*, 43 Mich. 552, 5 N. W. 1078; *Ely v. City of Grand Rapids*, 84 Mich. 336, 47 N. W. 447 [1890].

⁸ *Steffins v. Stewart*, 53 Kans. 92, 36 Pac. 55 [1894].

⁹ *Spalding v. Forsee*, 109 Mo. App.

675, 83 S. W. 540 [1904]; *Smith v. City of Westport*, 105 Mo. App. 221, 79 S. W. 725 [1904].

¹⁰ *Lindenberger Land Co. v. R. B. Park & Co.*, — Ky. —, 27 Ky. L. Rep. 437, 85 S. W. 213 [1905]; *Weston v. City of Syracuse*, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899].

¹¹ *Auditor General v. Stoddard*, 147 Mich. 329, 110 N. W. 944 [1907]; *Butler v. Detroit*, 43 Mich. 552, 5 N. W. 1078; *Ely v. City of Grand Rapids*, 84 Mich. 336, 47 N. W. 447 [1890].

that the commissioners of public works have reserved the right to increase or diminish the amount of work to be done, has been held in the absence of fraud not to impair the validity of the contract.¹² In some jurisdictions it has been said that the fact that the contract was changed after it was made is not a ground for resisting a special assessment, but that if the objection is valid it must be interposed by an injunction before the work is completed.¹³ In the same jurisdiction it has been said in a later case that the remedy is to enjoin the payment to the contractors and not to resist the assessment.¹⁴ If the property owners acquiesce in the change, they cannot use such change as a means of defeating the assessment.¹⁵ An immaterial change in the contract is held not to affect its validity.¹⁶ Thus, if a resolution calls for grading and macadamizing a portion of a street beginning and ending at certain specified limits, a contract which provides for grading and macadamizing that portion of such street, except where already done, is held to conform sufficiently to the contract and to be valid.¹⁷ A change in the contract which is intended to correct a clerical mistake in the original ordinance does not invalidate the contract.¹⁸ Thus, where bids were received upon the understanding that the assessments were to be paid in ten annual installments the counsel may correct a mistake in a prior resolution which provided for receiving payments in five annual installments.¹⁹ Material alterations in a contract whereby the price of the work is increased may constitute fraud, which will invalidate the assessment.²⁰ If the original contract is regarded as rescinded and after a new resolution of intention has been published a contract is let for the same improvement to the same contractor at a higher price, the action of the city will, in the absence of evidence to the contrary, be assumed to be based upon a sufficient reason, and the assessment levied for

¹² In the Matter of the Petition of Merriam to Vacate an Assessment, 84 N. Y. 596 [1881].

¹³ Ricketts v. Village of Hyde Park, 85 Ill. 110 [1877].

¹⁴ Heinroth v. Koehersnerger, 173 Ill. 205, 50 N. E. 171 [1898].

¹⁵ Shepard v. Barron, 194 U. S. 553, 24 S. 737, 48 L. 1115 [1904].

¹⁶ Emery v. San Francisco Gas Co., 28 Cal. 346 [1865].

¹⁷ Emery v. San Francisco Gas Co., 28 Cal. 346 [1865].

¹⁸ Lister v. City of Tacoma, 44 Wash. 222, 87 Pac. 126 [1906].

¹⁹ Lister v. City of Tacoma, 44 Wash. 222, 87 Pac. 126 [1906].

²⁰ Miller's Case, 12 Abb. Prac. (N. Y.) 121 [1861].

such improvement will be valid.²¹ An inferior agent of the city has no power to modify the terms of the contract entered into by proper authority.²² It has even been held that if such change is made, the city council cannot subsequently ratify it,²³ even if the alteration is to the benefit of the lot owner,²⁴ so as to make valid an assessment for the cost of such improvement. It has been held in some jurisdictions that if the power to modify a contract exists, the property owner is not bound by the contract price, but that he can be compelled to pay only what the work as finally done was reasonably worth.²⁵ Items not covered by the bid cannot be included in the contract where the contract must be let to the lowest bidder.²⁶ Expenses incurred and work done under a former resolution for an improvement which has been abandoned cannot be included in an assessment for the same improvement when constructed under a subsequent resolution.²⁷ If, however, a pre-existing corporation, after making a contract for a public improvement, is annexed to a city, such city may make a new contract for the same improvement without the consent of the property owners.²⁸

§ 542. Extras.

Under many statutes no allowance to a contractor can be made for extra work and material not provided for in the contract or ordinance.¹ The ordinance is the sole authority of the city officials for entering into such contract. A contract in excess of the authority thus conferred is invalid whether it is express or implied. Extra work done by reason of a mistake of the city

²¹ *Spaulding v. North San Francisco Homestead and Railroad Association*, 87 Cal. 40, 24 Pac. 600, 25 Pac. 249 [1890].

²² *Murray v. Tucker*, 10 Bush. (73 Ky.) 241 [1874]; *In the Matter of Wood*, 51 Barb. (N. Y.) 275 [1868].

²³ *Murray v. Tucker*, 10 Bush. (73 Ky.) 241 [1874].

²⁴ *Murray v. Tucker*, 10 Bush. (73 Ky.) 241 [1874].

²⁵ *City to the Use of Peters v. Arrott*, 8 Phil. (Pa.) 41 [1870].

²⁶ *Smith v. City of Portland*, 25 Ore. 297, 35 Pac. 665 [1894].

²⁷ *Fitzhugh v. Ashworth*, 119 Cal. 393, 51 Pac. 635 [1897].

²⁸ *Allegheny City v. Blair*, 74 Pa. St. (24 P. F. Smith) 225 [1873]; That the property owners are not parties to the original contract see *Schenley v. Commonwealth for Use of City of Allegheny*, 36 Pa. St. (12 Casey) 29; and that the consent of the property owners is not necessary to the rescission of the contract, see *Marshall v. Commonwealth*, 59 Pa. St. (9 P. F. Smith) 455.

¹ *Blair v. Luning*, 76 Cal. 134, 18 Pac. 153 [1888]; *Donnelly v. Howard*, 60 Cal. 291 [1882]; *State Board, Pros. v. City of Hoboken*, 36 N. J. L. (7 Vr.) 378 [1873]; *Smith v. City of Portland*, 25 Or. 297, 35 Pac. 665 [1894].

engineer cannot be the basis of recovery.² Where the statute requires the letting of a contract on competitive bidding, the purpose of such statute would fail if the contract so let were merely the point of departure from which the city and the contractor could agree for further expenditures without advertising for bids. For these reasons, extras can ordinarily not be included in the assessments.³ Thus, under an ordinance for buying cast iron water pipe the city authorities cannot make a valid contract for cast iron hydrants.⁴ No authority exists for awarding extra compensation for performance before the time fixed by the contract.⁵ The extra work can ordinarily be severed from the work provided for by contract.⁶ Where this can be done the assessment is valid for the work provided for by the contract but invalid as to such extras.⁷ Under statutes which leave public officials a wide discretion after the contract has been entered into, extras may be ordered and included in the assessment.⁸ Even where a contract is awarded to the lowest bidder a provision that the contractor shall do extra work as the street commissioner shall direct at a price to be fixed by the commissioner does not invalidate the contract.⁹ An award against the city for extra work under an agreement to arbitrate has been upheld and an assessment therefor has been held valid.¹⁰ Under statutory authority a reassessment may include extra work not provided for by the original contract.¹¹ Even under statutes which require the letting of contracts on competitive bidding, it has

² *Wilson v. City of St. Joseph*, 125 Mo. App. 460, 102 S. W. 600 [1907].

³ *Piedmont Paving Company v. Allman*, 136 Cal. 88, 68 Pac. 493 [1902]; *McDonald v. Mezes*, 107 Cal. 492, 40 Pac. 808 [1895]; *Great Falls Ice Company v. District of Columbia*, 19 D. C. 327; *Town of Cicero v. Green*, 211 Ill. 241, 71 N. E. 884 [1904]; *Prendergast v. Richards*, 2 Mo. App. 187 [1876]; In the Matter of the Petition of Wood, 51 Barb. (N. Y.) 275 [1868]; In the Matter of the Petition of Eager, 41 Howard (N. Y.) 107 [1870]; Matter of Eager, 10 Abb. Pr. N. S. (N. Y.) 229 [1871].

⁴ *Town of Cicero v. Green*, 211 Ill. 241, 71 N. E. 884 [1904].

⁵ In the Matter of the Petition of Eager, 41 Howard (N. Y.) 107 [1870]; Matter of Eager, 10 Abb. Pr. N. S. (N. Y.) 229 [1871].

⁶ *McDonald v. Mezes*, 107 Cal. 492, 40 Pac. 808 [1895].

⁷ *McDonald v. Mezes*, 107 Cal. 492, 40 Pac. 808 [1895].

⁸ *State, Vanderbeck, Pros. v. Mayor and Common Council of Jersey City*, 29 N. J. L. (5 Dutch.) 441 [1861]; *Allen v. Rogers*, 20 Mo. App. 290 [1885].

⁹ *Allen v. Rogers*, 20 Mo. App. 290 [1885].

¹⁰ *Brady v. Mayor, etc., of Brooklyn*, 1 Barb. (N. Y.) 584 [1847].

¹¹ *Seattle v. Kelleher*, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904].

been held that changes may be made in a contract after performance is begun if the city officials decide that such changes are necessary to the proper construction of the improvement, and the expense thereof may be included in the assessment without advertising for bids.¹² So a retaining wall, the necessity of which as well as the size and character of which could not be determined until excavation had begun, was allowed to be constructed at the expense of the abutting property owners.¹³ Full effect is given to a term in the contract fixing the compensation to be awarded for extra work.¹⁴ A provision in a contract that no recovery could be had for extra work not specified in the contract unless done on the written order of the commissioner of public works, which order was to be annexed to the contract, applies only to extra work, which becomes necessary in the course of the improvement for the proper completion of work previously done or for its security.¹⁵

§ 543. Impossibility.

Provisions in a contract which become legally impossible are discharged, and failure to perform the same does not invalidate an assessment levied for such contract.¹ Thus, after a contract for a street improvement was let, a railroad switch was constructed in the street with the consent of the city, and the construction of such switch rendered compliance with the contract impossible. It was held that the contractor could recover for the work and material spent in performing the contract as far as, under the circumstances, was possible.²

§ 544. Assignment of improvement contract.

In the absence of some specific statute to the contrary, it is generally assumed that the contract for the construction of a public improvement is assignable. Whether assignable or not, in

¹² *Hastings v. Columbus*, 42 O. S. 585 [1885].

¹³ *Longworth v. City of Cincinnati*, 30 O. S. 101 [1877].

¹⁴ *Talbott v. Town of New Castle*, — Ind. —, 81 N. E. 724 [1907], transferred from Appellate Court, 81 N. E. 82.

¹⁵ *Roemheld v. City of Chicago*, 231 Ill. 467, 83 N. E. 291 [1907].

¹ *Fell v. Philadelphia to the use of Cunningham*, 61 Pa. St. (31 P. F. Smith) 58 [1876].

² *Lake Erie & Western R. R. Co. v. Walters*, 13 Ind. App. 275, 41 N. E. 465 [1895].

case the city objected to such assignment, the property owner cannot object to performance by an assignee if a city has acquiesced upon such performance and the contract has been performed by the assignee without objection.¹ This is true even if the assignee is a corporation which possibly had no power to take the assignment or to do the work, but which has nevertheless performed such contract.²

¹Chadwick v. Kelley, 187 U. S. 540, 47 L. 293, 23 S. 175 [1903]; (affirming Kelley v. Chadwick, 104 La. 719, 29 So. 295 [1901]); Brick & Terra Cotta Company v. Hull, 49

Mo. App. 433 [1892]; Gest v. City of Cincinnati, 26 O. S. 275 [1875]; Ernst v. Kunkle, 5 O. S. 521 [1856].

²Gest v. City of Cincinnati, 26 O. S. 275 [1875].

CHAPTER XII.

PROPERTY SUBJECT TO ASSESSMENT.

§ 545. Corporeal property.

Corporeal real property is the kind of property which generally receives a special benefit from the improvement for which the special assessment is levied. Where this is the case, no objection whatever can be made to levying an assessment upon the realty thus benefited.¹ The fact that by statute certain interests in realty are to be regarded for purposes of general taxation, as personal property does not prevent such interests from being assessed as real property to pay for the cost of local improvements. Real property may be assessed notwithstanding the different estates and interests which may exist therein.² A question that is raised under statutes, which authorize the assessment of realty but make no provision as to personalty, is whether improvements of a permanent nature constructed on such realty so as to become a part thereof can be assessed. Under statutes of this sort it has been held that the improvements may be assessed if the officials to whose discretion such question is entrusted

¹ *City of Seattle v. Board of Home Missions of Methodist Protestant Church*, 138 Fed. 307, 70 C. C. A. 597 [1905]; *Piper's Appeal in the Matter of Widening Kearney Street*, 32 Cal. 530 [1867]; *Cicero and Proviso Street Railway Company v. City of Chicago*, 176 Ill. 501, 52 N. E. 866 [1898]; *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894]; *City of Chicago v. Baer*, 41 Ill. 306 [1866]; *Higgins v. City of Chicago*, 18 Ill. 276 [1857]; *Excelsior Planting and Manufacturing Company v. Green*, 39 La. Ann. 455, 1 So. 873 [1887]; *Mound City Construction Company v. Macgurn*, 97 Mo. App. 403, 71 S. W. 460 [1902]; *Chancellor*

of the State of New Jersey v. City of Elizabeth, 66 N. J. Law (37 Vr.) 688, 52 Atl. 1130 [1901]; (affirming *Chancellor of State v. City of Elizabeth*, 65 N. J. L. (36 Vr.) 483, 47 Atl. 455 [1900]); *Clark v. Village of Dunkirk*, 75 N. Y. 612; (affirming without report *Clarke v. Village of Dunkirk*, 12 Hun. 181 [1878]); *Hof-feld v. City of Buffalo*, 130 N. Y. 387, 29 N. E. 747 [1892]; *City of Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077 [1891]; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898].

² *Cicero and Proviso Street Railway Company v. City of Chicago*, 176 Ill. 501, 52 N. E. 866 [1898].

decide as a fact that such improvements are benefited by the local improvement for which such assessment is levied.³ If, on the other hand, such officials decide that such improvements are not so benefited, they may exclude them.⁴ Accordingly, if the assessors assume as a matter of law that such improvements must be excluded, their action is plainly erroneous.⁵ The propriety of including improvements is especially clear, where by statute it is provided that the term "real property" shall include all improvements thereon.⁶ On the other hand, under a statute which authorizes local assessments upon "real estate only," it is improper to include the permanent improvements on real property in such assessment.⁷ Under such a statute, including improvements invalidates the entire assessment,⁸ even if the land and the improvements thereon are valued separately.⁹ The act of the owners in carving different estates out of the fee in such realty does not preclude the state from levying an assessment against the corpus of such property if it so desires.¹⁰ The fact that certain lands have been conveyed in trust, thus causing a separation of the legal and equitable titles, does not prevent them from being assessed for local improvements. This is true even if the title to such property is taken in the name of a state official.¹¹

³ *Kennedy v. City of Troy*, 77 N. Y. 493 [1879]; *Clark v. Village of Dunkirk*, 75 N. Y. 612 [1878]; (affirming without report *Clark v. Village of Dunkirk*, 12 Hun. 181 [1877]).

⁴ *Hoffeld v. City of Buffalo*, 130 N. Y. 387, 29 N. E. 747 [1892].

⁵ *Kennedy v. City of Troy*, 77 N. Y. 493 [1879]; *Clark v. Village of Dunkirk*, 75 N. Y. 612 [1878]; (affirming without report, *Clark v. Village of Dunkirk*, 12 Hun. 181 [1877]).

⁶ *Mound City Construction Company v. Macgurn*, 97 Mo. App. 403, 71 S. W. 460 [1902].

⁷ *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898]; *City of Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077 [1891]. In consider-

ing the question of damages caused by a change of grade the effect upon the property as improved is the question to be considered. *City of Seattle v. Board of Home Missions of Methodist Protestant Church*, 138 Fed. 307, 70 C. C. A. 597 [1905].

⁸ *City of Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077 [1891].

⁹ *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898].

¹⁰ *City of Chicago v. Baer*, 41 Ill. 306 [1866]; *Higgins v. City of Chicago*, 18 Ill. 276 [1857].

¹¹ *Chancellor of State v. City of Elizabeth*, 65 N. J. L. (36 Vr.) 483, 47 Atl. 455 [1900]; (affirmed without opinion in *Chancellor of the State of New Jersey v. City of Elizabeth*, 66 N. J. L. (37 Vr.) 688, 52 Atl. 1130 [1901]).

§ 546 Easements.

Whether land subject to an easement in favor of a number of persons is so far public that it is exempt from assessment is a question on which there is some conflict of authority. The owner of certain land dedicated it as a park for the benefit of the owners of lots fronting on the same, to be ornamented and improved in such manner as the majority of such owners should desire. It was held that, although such land was dedicated to the trustees of the town, it was not, by reason of the peculiarity of such dedication, the property of the town or a public park, but that it remained private property and as such was subject to local assessment.¹ The owner of certain land reserved a strip one foot in width along the east and south boundary of the given lot until the owner of such lot should give ten feet along such boundaries for an alley. It was held that such strip of ground was not dedicated to public use until such condition was fulfilled and that in the meantime such land was subject to assessment.² A strip of land two feet in width lying between a street and the lots adjoining was reserved for a fence. It was to be for the use of several lots along such strip. It was held that such land could not be assessed or sold for a street improvement, the court regarding it by reason of such dedication as analogous to a sidewalk.³ An easement is not land and is therefore not ordinarily subject to local assessment. A right of way leading through an improved street to property at some distance therefrom is not regarded as benefited by the improvement of such street and therefore cannot be assessed for such improvement.⁴ If property is conveyed subject to building restrictions and subsequently a decree is rendered at the instance of the grantee relieving such property from the operation of such restrictions, the former existence of such restrictions cannot prevent the assessment of such property.⁵

¹ *McChesney v. People ex rel. Johnson*, 99 Ill. 216 [1881].

² *Creamer v. McCune*, 7 Mo. App. 91 [1879].

³ *Town of Woodruff Place v. Raschig*, 147 Ind. 517, 46 N. E. 990 [1896].

⁴ *Whiting v. Mayor and Aldermen of the City of Boston*, 106 Mass. 89 [1870]; *Board of Health v. Gloria Dei*, 23 Pa. St. 259 [1854].

⁵ *Cummings v. West Chicago Park Com'rs.*, 181 Ill. 136, 54 N. E. 941 [1899].

§ 547. Interest of owner in land subject to public easement.

If land has been appropriated for a public use by proceeding in eminent domain, and the use for which it is appropriated is one which is in the ordinary course of things a permanent one, no assessment can be levied against the land so appropriated even if the former owner of such land is regarded as retaining an interest therein.¹ Thus, that part of a lot which was appropriated for a street cannot be assessed.² If an assessment, made upon an estimate of the cost of the improvement, is apportioned according to the frontage and a part of such frontage is subsequently appropriated by a municipal corporation for a street, the courts should not, in subsequently reducing the amount of the assessment because the actual cost fell below the estimate, subtract the amount of frontage thus appropriated and thereby cast an increased burden upon the rest of the property. The city should pay the assessment upon such property.³ Land which has been appropriated for a public drain cannot be assessed.⁴ On account of the presumption of the regularity of the action of public officials,⁵ it will be presumed that if a lot is assessed by a lot number, the part of such lot which has been appropriated for a street has not been regarded as benefited by such taking, and the amount of such assessment does not include any allowance for benefits to the parts so taken.⁶ If an attempt is made to assess the residue of the land left, after appropriating a part of it for public use, we find a conflict of authority as to whether such residue can be assessed for the cost of taking the part which has been taken.⁷ It is well settled that such residue

¹ *City of Joliet v. Spring Creek Drainage Dist.*, 222 Ill. 441, 78 N. E. 836 [1906]; *Waggeman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895]; *Leman v. City of Lake View*, 131 Ill. 388, 23 N. E. 346 [1890].

² *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894]; *Waggeman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895]; *Leman v. City of Lake View*, 131 Ill. 388, 23 N. E. 346 [1890].

³ *Spangler v. City of Cleveland*, 35 O. S. 469 [1880].

⁴ *City of Joliet v. Spring Creek Drainage Dist.*, 222 Ill. 441, 78 N. E. 836 [1906].

⁵ See § 1279.

⁶ *Waggeman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895]. See to the same effect, *DeKoven v. City of Lake View*, 129 Ill. 399, 21 N. E. 813 [1890].

⁷ See § 308.

Such expense may be paid for by local assessment levied on the theory of benefits. *Waggeman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895]; but not by special taxation levied without regard to benefits, *City of Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1893].

may be assessed for the cost of improving the part which has been taken, as by grading, paving and the like.⁸ This question has been discussed in connection with the subject of the improvements for which an assessment may be levied.⁹

§ 548. Personal property.

From the nature of the improvements for which special assessments are levied upon the theory of the benefits conferred by the improvement upon the property assessed, it is, in the greater number of cases, real property which is benefited by the improvement, while personal property situated near such improvement usually derives no benefit therefrom. In a general discussion of the subject, we often find the special or local assessment treated as if it were levied upon the real estate only, and occasionally we find remarks to the effect that it must be levied upon real estate only in order to be an assessment;¹ and that if levied upon the personal property, as well as real property, it is in its essential nature a general tax and not a local assessment.² If the improvement is one which from its nature cannot benefit personal property, it is proper to exclude personal property from the operation of the assessment and it would be improper to include it.³ An assessment upon a railway, based on a valuation which includes personal property as well as real property, has been held to be invalid because of the inclusion of personalty.⁴

⁸ See § 313 *et seq.*

⁹ See § 301 *et seq.*

In *Davis v. City of Newark*, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891] the question was raised but not decided whether houses and buildings damaged by a change of grade, which damage had been paid to the owner, could be assessed for benefits caused by such change of grade.

¹ *Holley v. County of Orange*, 106 Cal. 420, 39 Pac. 790 [1895]; *City of Chicago v. Baer*, 41 Ill. 306 [1866]; *Chicago, Milwaukee & St. Paul Ry. Co. v. Phillips*, 111 Ia. 377, 82 N. W. 787 [1900]; *Beecher v. City of Detroit*, 92 Mich. 268, 52 N. W. 731 [1892]; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451 [1879]; *State, King, Pros. v. Duryea*, 45 N. J. L. (16 Vr.) 258 [1883]; *City of*

Spokane Falls v. Browne, 3 Wash. 84, 27 Pac. 1077 [1891]. "A local assessment can only be levied on land" They "apply to land and are a charge on land only." *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451 [1879].

² *Holley v. County of Orange*, 106 Cal. 420, 39 Pac. 790 [1895]; *Chicago, Milwaukee and St. Paul Railway Company v. Phillips*, 111 Ia. 377, 81 N. W. 787 [1900].

³ *City of Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077 [1891].

⁴ *Chicago, Milwaukee and St. Paul Railway Company v. Phillips*, 111 Ia. 377, 82 N. W. 787 [1900]; *Commissioners of Chatham County v. Seaboard Air Line Railway Company*, 133 N. C. 216, 45 S. E. 566 [1903].

The assessments in these cases were, however, levied for purposes which, it was held, could not confer benefits upon the personal property, such as the construction of a sewer,⁵ or of a fence in a public fencing district.⁶ Remarks of this sort are generally *obiter* when they attempt to extend beyond the particular case, and to lay down principles applicable to all kinds of assessments. Probably in each case in which such observations are found, the particular assessment under discussion was one which could be levied upon real property, but not upon personal property, because the personal property was not benefited by such assessment while the real property was; and an attempt to levy such exaction against personal property, as well as real property, could be justified only under the power of general taxation. A tax levied upon realty and personalty alike at a certain per cent. of its value is ordinarily an example of general taxation.⁷ On the other hand a general tax levied upon realty only has been held invalid in some jurisdictions.⁸ Other cases seem to assume the validity of such form of general tax.⁹ If, on the other hand, the improvement is one which can confer a special benefit upon personal property, we find some conflict in authority, though chiefly a conflict in *obiter dicta*. The conflict is, however, chiefly confined to *obiter* and as far as the general principles of general law are involved, the question should seem clear. If the improvement is one which can confer a special benefit upon personal property, no reason is apparent either from the nature of the property or from general principles of assessment law for omitting such property from the operation of the assessment. It is true that local assessments are, as a general rule, levied on land alone; but this is only because land is the kind of property which is usually benefited. There exists no constitutional or other restriction on the legislative power in this regard, and when particular personal property has enjoyed a benefit from the work to which it owes its existence and pres-

⁵ Chicago, Milwaukee and St. Paul Railway Company v. Phillips, 111 Ia. 377, 82 N. W. 787 [1900].

⁶ Commissioners of Chatham County v. Seaboard Air Line Railway Company, 133 N. C. 216, 45 S. E. 566 [1903].

⁷ Krumberg v. City of Cincinnati, 29 O. S. 69 [1875].

⁸ Gilman v. City of Sheboygan, 2 Black (67 U. S.) 510, 17 L. 305 [1862]; Cobb v. Corporation of Elizabeth City, 75 N. C. 1 [1876].

⁹ Thomas v. Leland, 24 Wend. (N. Y.) 65; Barker v. State, 18 Ohio 514 [1849].

ervation, nothing prevents the legislature from assessing it.¹⁰ There seems to be no reason under the constitutional provisions generally in force, or under the general theory of local assessments why a local assessment may not be levied upon personal property if the improvement for which the local assessment is levied does in fact confer a special benefit upon such personal property.¹¹ Some assessments exist in which the improvement for the cost of which the assessment was levied confers a benefit on certain designated personal property, and in such cases assessments levied against the personal property thus benefited have been upheld and regarded as local assessments as distinct from general taxation.¹² A form of assessment of this type is found in some of the assessments for the construction of levees. In some of the statutes on this subject it is provided that a tax or assessment of a certain amount per bale upon each bale of cotton raised upon the land protected by the levee shall be levied as a means of paying for such improvement. Such an exaction is held to be a special assessment and not a general tax.¹³ A similar charge is made upon each bushel of oysters grown in salt water from which fresh water is kept out by levees.¹⁴ Such a charge is not affected by the limitations of the constitution applicable to general taxation.¹⁵ The

¹⁰ *Excelsior Planting and Manufacturing Company v. Green*, 39 La. Ann. 455, 1 So. 873 [1887].

¹¹ "It is vain to say that a bale of cotton is personal property and that local assessments can only be levied on real estate. There exists no such constitutional or other restriction on the legislative power. 'It is true,' as Mr. Burroughs says, 'that as a general rule the local assessment is solely on land, and not on personal property.' [Citing Burroughs on Taxation, p. 473.] When, as in the present case, the particular personal property assessed has enjoyed a benefit from the works to which it owes its existence and preservation, and when the legislature has in the exercise of its judgment determined that it should contribute for such benefit, no principle or precedent can be found which would justify a court in overruling its decision." *Excel-*

sior Planting and Manufacturing Co. v. Collector Green, 39 La. Ann. 455, 464, 1 So. 873 [1887].

¹² *Hughes v. Board of Commissioners of the Caddo Levee District*, 108 La. 146, 32 So. 218 [1901, 1902]; *George v. Young*, 45 La. Ann. 1232, 14 So. 137 [1893]; *Excelsior Planting and Manufacturing Company v. Green*, 39 La. Ann. 455, 1 So. 873 [1887].

¹³ *Hughes v. Board of Commissioners of the Caddo Levee District*, 108 La. 146, 32 So. 218 [1901, 1902]; *George v. Young*, 45 La. Ann. 1232, 14 So. 137 [1893]; *Excelsior Planting and Manufacturing Company v. Green, Collector*, 39 La. Ann. 455, 1 So. 873 [1887].

¹⁴ *Board of Commissioners for Buras Levee District v. Mialeghich*, 52 La. Ann. 1292, 27 So. 790 [1900].

¹⁵ *George v. Young*, 45 La. Ann. 1232, 14 So. 137 [1893].

justice of such legislation is upheld as far as third persons are concerned, because the cotton is assessed not simply as a bale of cotton, but a bale of cotton which has been produced on lands protected by the levees, and has, during the period of its cultivation and growth, enjoyed the benefit of its protection. No one dealing with such cotton can be prejudiced, because all are advised by the law, from the moment when the cotton is planted, that when it reaches the condition of ginned bale, it must pay this tax.¹⁶ While such a charge is undoubtedly a local assessment, it is doubtful whether it is a true charge upon personal property or whether it is not essentially a charge upon realty based upon the amount of the product thereof, different from the ordinary assessment on realty only as to the manner of apportionment. By some constitutional provisions express authority to assess real property is given without any corresponding reference to personal property.¹⁷ It is often provided by statute that assessments shall be levied on "real property" or "real estate."¹⁸ Under statutes of this sort two different classes of questions may be raised. Such statute evidently excludes personal property from local assessment. If the personal property is not in fact benefited by the improvement for which the assessment is levied, there is no impropriety in omitting it and the assessment is not on that account invalid.¹⁹ Under a statute which authorizes the assessment of all the real property within the district, an irrigation district cannot assess the poles and wires of a telegraph company which have been constructed by such company upon the land of a railroad company under a contract whereby they are reserved as the personal property of the telegraph company.²⁰ If the improvement is constructed and the original assessment provided for under a statute which makes the assessment a lien upon the real property in the district, a subsequent statute which authorizes the board of directors of such district to pledge the real, personal and mixed property of the district, without the consent of the property owners, as

¹⁶ *Excelsior Planting and Manufacturing Company v. Green*, 39 La. Ann. 455, 1 So. Rep. 873 [1887].

¹⁷ Article XIX., § 27, Constitution of Arkansas. *Little Rock v. Katzenstein*, 52 Ark. 107, 12 S. W. 198 [1889].

¹⁸ *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894].

¹⁹ See § 641.

²⁰ *Western Union Telegraph Co. v. Modesto Irrigation Co.*, 149 Cal. 662, 87 Pac. 190 [1906].

security for the improvement bonds, impairs the obligation of the contract as affecting the property owners, and is therefore unconstitutional.²¹

§ 549. Property benefited subject to assessment in absence of statutory restrictions.

The general theory underlying the local assessment is, as we have seen,¹ that such assessment is levied upon property which receives an especial and peculiar benefit from an improvement of a public character, and that such assessment is levied in return for such benefits.² The general rule in determining what property may be assessed on the theory of benefits conferred by the improvement for which the assessment is levied, is that any property which is in fact benefited by such improvement may be subjected to assessment therefor, if the legislature authorizes such assessment and does not in some way restrict the area of the property subject to assessment.³ This statement of the rule

²¹ Merchants' National Bank v. Escondido Irrigation District, 144 Cal. 329, 77 Pac. 937 [1904].

¹ See § 11.

² "Assessments for street and other similar improvements are upheld upon the theory that each lot or tract of land assessed is benefited in a special and peculiar manner in a sum equal to the amount estimated or assessed against it." Becker v. Baltimore and Ohio South Western Railway Company, 17 Ind. App. 324, 328, 46 N. E. 685 [1897]; (citing Jackson v. Smith, 120 Ind. 520, 22 N. E. 431 [1889]; Ross v. Stackhouse, 114 Ind. 200, 16 N. E. 591 [1887]; Heick v. Voight, 110 Ind. 279, 11 N. E. 306 [1886]; Lipes v. Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160 [1885]; City of New Albany v. Cook, 29 Ind. 220 [1867]; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289 [1878]; Chamberlain v. Cleveland, 34 O. S. 551; Hammett v. Philadelphia, 65 Pa. St. (15 P. F. Smith) 146, 3 Am. Rep. 615 [1870]).

³ Feighley's Case, 10 Rep. 139 a. b.; Shoemaker v. United States, 147 U. S. 282, 37 L. 170, 13 S. 361 [1893];

Chadwick v. Kelley, 187 U. S. 540, 47 L. 293, 23 S. 175 [1903]; (affirming, Kelley v. Chadwick, 104 La. 719, 29 So. 295 [1901]); Board of Improvement District Number Five of Texarkana v. Offenhauser, 84 Ark. 257, 105 S. W. 265 [1907]; Cribbs v. Benedict, 64 Ark. 555, 44 S. W. 707 [1897]; Little Rock v. Katzenstein, 52 Ark. 107, 12 S. W. 198 [1889]; Martin v. Wagner, 120 Cal. 623, 53 Pac. 167 [1898]; Boyle v. Tibbey, 82 Cal. 11, 22 Pac. 1128 [1889]; Reclamation District No. 108 v. Hagar, 66 Cal. 54, 4 Pac. 945 [1884]; Bixler v. Board of Supervisors of the County of Sacramento, 59 Cal. 698 [1881]; Hagar v. Board of Supervisors of Yolo Co., 47 Cal. 222 [1874]; Chambers v. Satterlee, 40 Cal. 497 [1871]; Piper's Appeal in the Matter of Widening Kearney Street, 32 Cal. 530 [1867]; Burnett v. Mayor and Common Council of the City of Sacramento, 12 Cal. 76, 73 Am. Dec. 518 [1859]; City of Denver v. Kennedy, 33 Colo. 80, 80 Pac. 122, 467 [1905]; Dann v. Woodruff, 51 Conn. 203 [1883]; Hungerford v. City of Hartford, 39 Conn. 279 [1872]; Clapp v. City of

leaves out of consideration for the present the fact that the determination of the legislature as to what property is bene-

- Hartford, 35 Conn. 66 [1868]; Snyder v. Village of West Hammond, 225 Ill. 154, 80 N. E. 93 [1907]; The Chicago Union Traction Co. v. City of Chicago, 204 Ill. 363, 68 N. E. 519 [1903]; Washburn v. City of Chicago, 198 Ill. 506, 64 N. E. 1064 [1902]; Shurtleff v. City of Chicago, 190 Ill. 473, 60 N. E. 870 [1901]; Sanitary District of Chicago v. City of Joliet, 189 Ill. 270, 59 N. E. 566 [1901]; Chicago & Alton Railroad Company v. City of Joliet, 153 Ill. 649, 39 N. E. 1077 [1894]; Briggs v. Union Drainage District No. 1, 140 Ill. 53, 29 N. E. 721 [1893]; Gaun v. Moredock and Ivy Landing Drainage District, No. 1, 131 Ill. 446, 23 N. E. 633 [1890]; Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District, 127 Ill. 581, 21 N. E. 206 [1890]; Murphy v. City of Peoria, 119 Ill. 509, 9 N. E. 895 [1888]; Hundley and Rees v. Commissioners of Lincoln Park, 67 Ill. 559 [1873]; Trustees of the Illinois and Michigan Canal v. City of Chicago, 12 Ill. 403 [1851]; (followed Wright v. Chicago, 46 Ill. 44 [1867]); Commissioners of Spoon River Drainage District in Champaign County v. Conner, 121 Ill. App. 450 [1905]; Mittel v. City of Chicago, 9 Bradwell (Ill.) 534 [1881]; Pittsburgh, C. C. & St. L. Ry. Co. v. Taber, 168 Ind. 419, 77 N. E. 741 [1906]; Culbertson v. Knight, 152 Ind. 121, 52 N. E. 700 [1898]; Zigler v. Menges, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782 [1889]; Board of Commissioners of Montgomery County v. Fullen, 111 Ind. 410, 12 N. E. 298 [1887]; Ray v. City of Jeffersonville, 90 Ind. 567 [1883]; Bate v. Sheets, 64 Ind. 209 [1878]; City of New Albany v. Cook, 29 Ind. 220 [1867]; Byram v. Foley, 17 Ind. App. 629, 47 N. E. 351 [1897]; Mock v. City of Muncie, 9 Ind. App. 536, 37 N. E. 281 [1893]; Chambliss v. Johnson, 77 Ia. 611, 42 N. W. 427 [1889]; Buell v. Ball, 20 Ia. 282 [1866]; City of Kansas City v. Gibson, 66 Kan. 501, 72 Pac. 222 [1903]; Morton v. Sullivan, — Ky. —, 96 S. W. 807, 29 Ky. L. Rep. 943 [1906]; Durrett v. Kenton County, — (Ky.) —, 27 Ky. Law Rep. 1173, 87 S. W. 1070 [1905]; Hollingsworth v. Thompson, 45 La. Ann. 222, 40 Am. St. Rep. 220, 12 So. 1 [1893]; Munson v. Board of Commissioners of the Atchafalaya Basin Levee District, 43 La. Ann. 158 So. 906 [1891]; City of New Orleans praying for opening of Casacaloo and Moreau Streets, 20 La. Ann. 497 [1868]; Beals v. James, 173 Mass. 591, 54 N. E. 245 [1899]; Holt v. City Council of Somerville, 127 Mass. 408 [1879]; Howe v. City of Cambridge, 114 Mass. 388 [1874]; Power v. City of Detroit, 139 Mich. 30, 102 N. W. 288 [1905]; Goodrich v. City of Detroit, 123 Mich. 559, 82 N. W. 255 [1900]; Warren v. City of Grand Haven, 30 Mich. 24 [1874]; Hoyt v. City of East Saginaw, 19 Mich. 39, 2 Am. Rep. 76 [1869]; State ex rel. Hughes v. District Court of Ramsey County, 95 Minn. 70, 103 N. W. 744 [1905]; State ex rel. Eaton v. District Court of Ramsey County, 95 Minn. 503, 104 N. W. 553 [1905]; State of Minnesota v. Robert P. Lewis Company, 72 Minn. 87, *sub nomine*; Ramsey County v. Robert P. Lewis Company, 42 L. R. A. 639, 75 N. W. 108 [1898]; State of Minnesota ex rel. Cunningham v. District Court of Ramsey County, 29 Minn. 62, 11 N. W. 133 [1882]; Smith v. Willis, 78 Miss. 243, 28 So. 878 [1900]; Daily v. Swone, 47 Miss. 367 [1872]; South Highland Land and Improvement Co. v. Kansas City, 172 Mo. 523, 72 S. W. 944 [1902]; Heman v. Gilliam, 171 Mo. 258, 71 S. W.

fited by a given type of improvement is of great and sometimes of controlling weight.⁴ In like manner the effect of the determination of the city or other municipality or of the public officers to whom the legislature has entrusted the duty of determining what property is benefited, which is of great weight and which sometimes is controlling, is omitted from the present discussion. These questions are considered elsewhere.⁵ The question of what constitutes benefit in point of fact and what determines the amount of benefit is also reserved for discussion elsewhere.⁶ If property is benefited by a public improvement it may be assessed, although it belongs to a non-resident.⁷ The same principles apply in cases of an improvement by a drainage or levee cor-

163 [1902]; *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600 [1896]; *Columbia Bottom Levee Company v. Meier*, 39 Mo. 53 [1866]; *State v. Several Parcels of Land*, —Neb. —, 113 N. W. 248 [1907]; *Hart v. City of Omaha*, 74 Neb. 836, 105 N. W. 546 [1905]; *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866 [1900]; *McCormick v. City of Omaha*, 37 Neb. 829, 56 N. W. 626 [1893]; *Durrell v. City of Woodbury*, — N. J. Sup. —, 65 Atl. 198 [1906]; *DeWitt v. City of Elizabeth*, 56 N. J. L. (27 Vroom) 119, 27 Atl. 801 [1893]; *State, Agens, Pros. v. Mayor and Common Council of Newark*, 37 N. J. L. (8 Vr.) 415, 18 Am. Rep. 729 [1874]; *State, Morris and Essex Railroad Company, Pros. v. Jersey City*, 36 N. J. L. (7 Vr.) 56 [1872]; *State, Britton, Pros. v. Blake*, 35 N. J. L. (6 Vr.) 208 [1871]; *State Gregory, Pros. v. Mayor and Aldermen of Jersey City*, 34 N. J. L. (5 Vr.) 390 [1871]; *Voght v. City of Buffalo*, 133 N. Y. 463, 31 N. E. 340 [1892]; *In the Matter of the Application of the Common Council of the City of Amsterdam to take Lands for the Extension of Grove and Jay Streets*, 126 N. Y. 158, 27 N. E. 272 [1891]; *Fennedy v. City of Troy*, 77 N. Y. 493 [1879]; *In the Matter of Broadway Widening*, 63 Barb. 572 [1872]; *Mayor, etc., of New York*

v. Whitney, 7 Barb. 485 [1849]; *Harper v. Commissioners of New Hanover County*, 133 N. C. 106, 45 S. E. 526 [1903]; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902]; *Maloy v. City of Marietta*, 11 O. S. 636 [1860]; *City of Toledo for Use v. Beaumont*, 3 Ohio N. P. 287 [1895]; *Paulson v. City of Portland*, 16 Ore. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]; (affirmed, *Paulsen v. Portland*, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]); *Allentown v. Henry*, 73 Pa. St. 404 [1873]; *In re Fifth Avenue Sewer*, 4 Brewster (Pa.) 364 [1870]; *Kettle v. City of Dallas*, 35 Tex. Civ. App. 632, 80 S. W. 874 [1904]; *Violett v. City Council of Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 905 [1896]; *Meggett v. City of Eau Claire*, 81 Wis. 326, 51 N. W. 566 [1892]; *Robinson v. City of Milwaukee*, 61 Wis. 585, 21 N. W. 610 [1884]; *Gilman v. City of Milwaukee*, 55 Wis. 328, 13 N. W. 266 [1882]; *Rabel v. City of Seattle*, 44 Wash. 482, 87 Pac. 520 [1906]; *Johnson v. City of Tacoma*, 41 Wash. 51, 82 Pac. 1092 [1905].

⁴ See § 553 *et seq.*

⁵ See § 555 *et seq.*

⁶ See § 652 *et seq.*

⁷ *Dewey v. City of Des Moines*, 101 Ia. 416, 70 N. W. 605 [1897].

poration. Under statutory authority land belonging to one not a member of such corporation may, if especially benefited, be assessed.⁸ The question of want of especial benefits may also be waived by failure to raise it in the proper way.⁹ As has before been said,¹⁰ the general theory which underlies the doctrine of local assessments is repudiated in some states, and it is there denied that there is any essential and vital connection between the local assessment and the especial and peculiar benefits for which such assessment is ordinarily said to be levied. Where this doctrine is expressed or is entertained in any way, we find it said that it is not necessary that the land upon which the assessment is levied should receive an especial benefit by reason of the improvement for which such an assessment is levied.¹¹ The converse of the foregoing rule is also true. If property is not benefited in an especial and peculiar manner by the improvement for which the assessment is levied, it is not proper to assess the same for such improvement.¹² This state-

⁸ *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53 [1866].

⁹ *Whiting v. Townsend*, 57 Cal. 515 [1881]; *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163 [1902].

¹⁰ See § 12.

¹¹ *Oliver v. Monona County*, 117 Iowa 43, 90 N. W. 510 [1902]; *Chicago, Milwaukee and St. Paul Railway Co. v. Phillips*, 111 Ia. 377, 82 N. W. 787 [1900]. "Such an improvement of a street is a public object which will support such an assessment regardless of the fact of whether or not it is a benefit to the abutting property." *Dewey v. City of Des Moines*, 101 Ia. 416, 70 N. W. 605 [1897]; (not affected by reversal in *Dewey v. Des Moines*, 173 U. S. 193, 43 L. 665, 19 S. 379 [1899]).

¹² *Case of Isle of Ely*, 10 Rep. 141 a.; *City of Hartford v. West Middle District*, 45 Conn. 462, 29 Am. Rep. 687 [1878]; *Benson v. Bunting*, 141 Cal. 462, 75 Pac. 59 [1903]; *Parker v. Reay*, 76 Cal. 103 [1888]; *Sebuck v. Toberman*, 56 Cal. 508 [1880]; *Allman v. District of Columbia*, 3 App. D. C. 8 [1894]; *Clark v. City of Chicago*, 214 Ill.

318, 72 N. E. 358 [1905]; *West Chicago Park Comrs. v. Chicago Terminal Transfer Railroad Company*, 183 Ill. 68, 56 N. E. 1134 [1899]; *Johnson v. People ex rel. Kochersperger*, 177 Ill. 64, 52 N. E. 308 [1898]; *Culver v. City of Chicago*, 171 Ill. 399, 49 N. E. 573 [1898]; *City of Chicago v. Adeock*, 168 Ill. 221, 48 N. E. 155 [1897]; *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894]; *Edwards v. City of Chicago*, 140 Ill. 440, 30 N. E. 350 [1893]; *The Chicago, Rock Island & Pacific Railroad Company v. City of Chicago*, 139 Ill. 573, 28 N. E. 1108 [1893]; *The City of Bloomington v. The Chicago and Alton R. R. Company*, 134 Ill. 451, 26 N. E. 366 [1890]; *Mascall v. Commissioners of Drainage District*, 122 Ill. 620, 14 N. E. 47 [1889]; *Park County Coal Company v. Campbell*, 140 Ind. 28, 39 N. E. 149 [1894]; *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160 [1885]; *Bate v. Sheets*, 64 Ind. 209 [1878]; *Tillman v. Kircher*, 64 Ind. 104 [1878]; *Chicago, Milwaukee and St. Paul Railway Company v. Phillips*, 111 Ia. 377, 82 N. W. 787

ment of this rule, like the statement of the former rule, omits for the present both the question of the effect of proper determination by the legislature, city or authorized public officers as to what land is benefited and also the question of what amounts to an especial and peculiar benefit. The true reason that property which is not benefited in an especial degree should not be assessed is to be found in the very nature of the assessing power. The only right which the legislature possesses by virtue of its power to assess, is to assess property benefited by a public improvement in proportion to and not exceeding the benefits conferred by such improvement. To use such a power as a justification for a tax levied upon property which is not benefited by the improvement for which the assessment is levied, would be to attempt to support by the theory of the power of local assessment, an exaction which has none of the elements of the local assessment. Another reason that property not benefited

[1900]; *Hollingsworth v. Thompson*, 45 La. Ann. 222, 40 Am. St. Rep. 220, 12 So. 1 [1893]; *Munson v. Board of Commissioners of The Atchafalaya Basin Levee District*, 43 La. Ann. 15, 8 So. 906 [1893]; *Yeatman v. Crandall*, 11 La. Ann. 220 [1856]; *Lincoln v. Board of Street Commissioners of the City of Boston*, 176 Mass. 210, 57 N. E. 356 [1900]; *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175 [1901]; *State of Minnesota ex rel. Cunningham v. District Court of Ramsey County*, 29 Minn. 62, 11 N. W. 133 [1882]; *Corrigan v. Gage*, 68 Mo. 541 [1878]; *Hansecom v. City of Omaha*, 11 Neb. 37, 7 N. W. 739 [1881]; *Vreeland v. Mayor, etc., of Bayonne*, 58 N. J. L. (29 Vr.) 126, 32 Atl. 68 [1895]; *State, New Jersey Railroad & Transportation Co., Pros. v. City of Elizabeth*, 37 N. J. L. (8 Vr.) 330 [1875]; *State, King, Pros. v. Peed*, 43 N. J. L. (14 Vr.) 186 [1881]; *State, Skinkle, Pros. v. Inhabitants of the Township of Clinton*, 39 N. J. L. (10 Vroom) 656 [1877]; *State, Hunt, Pros. v. Mayor and Common Council of the City of Rahway*, 39 N. J. L. (10 Vroom) 646 [1877]; *State, Mann, Pros. v.*

Mayor and Common Council of Jersey City, 24 N. J. L. (4 Zab.) 662 [1855]; *People ex rel. Keim v. Desmond*, 186 N. Y. 232, 78 N. E. 857 [1906]; (reversing, 97 N. Y. S. 795, 111 App. Div. 757 [1906]); *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902]; *Chicago & Erie Railroad Company v. Keith*, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902]; *Ford v. City of Toledo*, 64 O. S. 92, 59 N. E. 779 [1901]; *Bloch v. Godfrey*, 26 Ohio C. C. R. 781 [1904]; *Hildebrand v. Toledo*, 27 Ohio C. C. R. 427 [1905]; *Bowler v. Biddinger Tree Turnpike Co.*, 6 W. L. B. (Ohio) 404 [1881]; *Oregon & California R. R. Co. v. City of Portland*, 25 Or. 229, 22 L. R. A. 713, 35 Pac. 452 [1894]; *Beechwood Avenue Sewer (1) Pittsburg's Appeal (1)*, 179 Pa. St. 499, 36 Atl. 209 [1897]; *Philadelphia to Use of Westor v. Spring Garden Farmers Market Company*, 161 Pa. St. 522, 29 Atl. 286 [1894]; *Kettle v. City of Dallas*, 35 Tex. Civ. App. 632, 80 S. W. 874 [1904]; *Bovden v. Village of Brattleboro*, 65 Vt. 504, 27 Atl. 164 [1893].

cannot be assessed is found in the constitutional provisions which forbid the taking of property except by due process of law.¹³ This reason is not necessarily inconsistent with the former reason. Taking by legitimate taxation is not a taking without due process of law. Taking under guise of taxation or of that branch of that power of taxation known as local assessment, in defiance of the essential elements of such power, is a taking of property without due process of law. One who resides upon certain land, but has no interest therein, cannot be assessed for an improvement which results in benefit to such land.¹⁴ Accordingly, the legislature cannot charge persons who reside upon a given street with the expense of improving such street.¹⁵ The rule that only property which receives a special benefit from a public improvement can be assessed, while applicable to assessments levied upon the theory of benefits, has no application to assessments which are in the nature of charges for the performance of a legal duty which the owner of certain realty is bound to perform for the benefit of the public. When charges of this sort are involved the land which may be assessed is the land with reference to which the owner thereof owes the legal duty for the non-performance of which the charge is exacted.¹⁶ Thus, while the construction of a sidewalk along real property ordinarily confers a benefit upon it, the owner of such real property may be compelled in most states to construct such sidewalk at his own expense without any reference to the fact of benefits conferred by such improvement.¹⁷

§ 550. The assessment district.

From the nature of the local assessment it is generally necessary that the assessment district be laid out and defined before assessment can be apportioned and levied.¹ Under a statute

¹³ Oregon & California R. R. Co. v. City of Portland, 25 Ore. 229, 22 L. R. A. 713, 35 Pac. 452 [1894]. See § 118.

¹⁴ Creighton v. Manson, 27 Cal. 614 [1865].

¹⁵ Creighton v. Manson, 27 Cal. 614 [1865].

¹⁶ State, Agents, Pros. v. Mayor and Common Council of Newark, 37 N. J.

L. (8 Vr.) 415, 18 Am. Rep. 729 [1874].

¹⁷ State, Agents, Pros. v. Mayor and Common Council of Newark, 37 N. J. L. (8 Vr.) 415, 18 Am. Rep. 729 [1874].

¹ Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661 [1904]; German Sav-
ings and Loan Society v. Ramish,
138 Cal. 120, 69 Pac. 89, 70 Pac. 1067

authorizing council to assess such non-abutting lands as will in their opinion be specially benefited and requiring the council to fix the amount to be so assessed, it has been held that non-abutting lands cannot be assessed unless the same are fixed and designated.² It is not necessary, however, that the assessment district should be defined in advance.³ This is the general and proper method of procedure, but special circumstances may make it necessary to depart therefrom.⁴ Thus, if to define the assessment district in advance would result in placing the assessment of damages and benefits in different hands to be managed separately, the district should not be laid out in advance.⁵ By statute, however, it may be provided specifically that an assessment district must be laid out as a preliminary step in assessment proceedings.⁶ By statute, it may be made necessary to divide the entire city into assessment districts for improvements of a given character, such as sewers, before any improvement is constructed. In the absence of unequivocal language, this construction will not, however, be adopted.⁷ In laying off such assessment district the legislature may ignore the boundaries of counties, townships and municipalities.⁸ If the city is authorized to create special assessment districts within the city, it may include the

[1902]; *Lake v. City of Decatur*, 91 Ill. 596 [1879]; *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902]; *Edwards v. Cooper*, 168 Ind. 54, 79 N. E. 1047 [1907]; *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605 [1891]; *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]; *Boehme v. City of Monroe*, 106 Mich. 401, 64 N. W. 204 [1895]; *In the Matter of the Appeal of Powers*, 29 Mich. 504 [1874]; *City of Asheville v. Wachovia Loan & Trust Co.*, 143 N. C. 360, 55 S. E. 800 [1906]; *Raymond v. Cleveland*, 42 O. S. 522 [1885]; *Kelly v. City of Cleveland*, 34 O. S. 468 [1878]. By statute the necessity for a district may be dispensed with. *Wilson v. City of Cincinnati*, 5 Ohio N. P. 68 [1897].

² *Kelly v. City of Cleveland*, 34 O. S. 468 [1878].

³ *Boehme v. City of Monroe*, 106 Mich. 401, 64 N. W. 204 [1895]; *In the Matter of the Appeal of Powers*, 29 Mich. 504 [1874]; *Stowbridge v. City of Portland*, 8 Ore. 67 [1879].

⁴ *In the Matter of the Appeal of Powers*, 29 Mich. 504 [1874]; *Eyeraman v. Blaksley*, 78 Mo. 145 [1883]; *Stowbridge v. City of Portland*, 8 Ore. 67 [1879].

⁵ *In the Matter of the Appeal of Powers*, 29 Mich. 504 [1874].

⁶ *In the Matter of the Petition of Ford to Vacate an Assessment*, 6 Lansing (N. Y.) 92 [1872].

⁷ *In the Matter of the Application of the Protestant Episcopal Public School to Vacate an Assessment*, 40 Howard 198 [1870].

⁸ *Board of Commissioners of County of Monroe v. Harrell*, 147 Ind. 500, 46 N. E. 124 [1876].

entire city in an assessment district.⁹ A city may create a new sewer district within the limits of a larger sewer district.¹⁰ Power to create sewer districts includes power to create sub-districts.¹¹ The fact that a city council has fixed an assessment district for the cost of opening a street and subsequently the council of such city, after a change of membership, fixed a slightly different district for the grading and curbing of such street in which two tracts included in the first district were omitted, does not invalidate the second district.¹² Authority to grade and improve streets at the expense of the owners of adjacent lots impliedly confers power to create assessment districts consisting of such adjacent lots.¹³ A statute giving specific authority to cities having a population exceeding a given amount to create special assessment districts does not give such authority to cities having a smaller population.¹⁴

The commissioners who are to lay out the work and report to the court upon the limits of the assessment district, may change the boundaries thereof at any time before the court has finally declared the district established, subject to the ultimate approval of the court.¹⁵ If an assessment district has been laid out and subsequently the improvement has been extended so as to benefit other lands, it has been held that the question of the determination of the assessment district should be considered again and that it is improper to leave the district as it was fixed with reference to the original plan of the improvement.¹⁶ On the other hand, if the remedy provided by law in such a case is mandamus to compel the addition to the district of the land benefited by the extension, failure to extend the district does not make the assessment invalid.¹⁷ Under a statute providing that the subdivisions of a dis-

⁹ *Minnesota & M. Land and Improvement Co. v. City of Billings*, 111 Fed. Rep. 972, 50 C. C. S. 70 [1901]; *Grimmell v. City of Des Moines*, 57 Ia. 144, 10 N. W. 330 [1881].

¹⁰ *Shannon v. City of Omaha*, 73 Neb. 507, 103 N. W. 53, 106 N. W. 592 [1905].

¹¹ *McGilvery v. City of Lewiston*, 13 Idaho 338, 90 Pac. 348 [1907].

¹² *Harriman v. City of Yonkers*, 181 N. Y. 24, 73 N. E. 493; (affirming judgment, 81 N. Y. S. 823, 82 App. Div. 403 [1903]).

¹³ *State v. Moss*, 44 Wash. 1129, 86 Pac. 1129 [1906].

¹⁴ *State v. Moss*, 44 Wash. 1129, 86 Pac. 1129 [1906].

¹⁵ *Gauen v. Moredock and Ivy Land- ing Drainage District No. 1*, 131 Ill. 446, 23 N. E. 633 [1890].

¹⁶ *Edwards v. Cooper*, 168 Ind. 54, 79 N. E. 1047 [1907]; *City of Columbus v. Storey*, 35 Ind. 97 [1871].

¹⁷ *Heinroth v. Koehersperger*, 173 Ill. 205, 50 N. E. 171 [1898].

trict, or joint district, should not be changed after a sewer has been constructed therein, it has been held that where a number of small districts have been combined into joint districts, it is still possible to combine all of such districts into a larger joint district in order to construct a sewer which will complete the drainage system of all of such districts.¹⁸ A drainage district may be laid out within the boundaries of a pre-existing drainage district.¹⁹ If an improvement has not been completed, the assessment district as originally laid out may be changed.²⁰ In the absence of specific statutory provision, it is not necessary that lands assessed for the original construction of a ditch or drain should be assessed for the repair thereof.²¹ Only lands benefited by such repair should be assessed therefor.²² However, it has been held that the legislature may provide specifically that the land which is assessed for the original construction of the ditch or drain should be assessed for the repair thereof.²³ In case of reassessment, it is not necessary that the district as originally fixed for assessment purposes, should be assessed.²⁴ Land in such district which is not benefited, or upon which the original assessment has been paid voluntarily,²⁵ may be omitted. Land outside of such original district which is benefited, may be included.²⁶ If the statute which defines the property which may be assessed for a given improvement has been changed after the original assessment has been made and before

¹⁸ *People ex rel. Miller v. Scott*, 132 Ill. 427, 23 N. E. 1119 [1891].

¹⁹ *South Highland Land Improvement Company v. Kansas City*, 172 Mo. 523, 72 S. W. 944 [1902].

²⁰ *The City of St. Joseph ex rel. v. Farrel*, 106 Mo. 437, 17 S. W. 497 [1891].

²¹ *Goodrich v. City of Minonk*, 62 Ill. 121 [1871]; *Roundenbush v. Mitchell*, 154 Ind. 616, 57 N. E. 510 [1900]; *Parke County Coal Company v. Campbell*, 140 Ind. 28, 39 N. E. 149 [1894]; *Morrow v. Greeting*, 15 Ind. App. 358, 41 N. E. 848, 44 N. E. 59 [1896]; *Dean v. Treasurer of Clinton County*, 146 Mich. 645, 109 N. W. 1131 [1906].

²² *Roundenbush v. Mitchell*, 154 Ind. 616, 57 N. E. 510 [1900]; *Parke County Coal Company v. Campbell*, 140 Ind. 28, 39 N. E. 149

[1894]; *Morrow v. Greeting*, 15 Ind. App. 358, 41 N. E. 848, 44 N. E. 59 [1896]; *Dean v. Treasurer of Clinton County*, 146 Mich. 645, 109 N. W. 1131 [1906].

²³ *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953 [1892].

²⁴ *State ex rel. Eaton v. District Court of Ramsey County*, 95 Minn. 503, 104 N. W. 553 [1905]; *In the Matter of Van Antwerp*, 56 N. Y. 261 [1874]; *In the Matter of Broadway Widening*, 63 Barb. (N. Y.) 572 [1872]; *Cline v. City of Seattle*, 13 Wash. 444, 43 Pac. 367 [1896].

²⁵ *State ex rel. Eaton v. District Court of Ramsey County*, 95 Minn. 503, 104 N. W. 553 [1905].

²⁶ *State ex rel. Eaton v. District Court of Ramsey County*, 95 Minn. 503, 104 N. W. 553 [1905].

the reassessment, the reassessment should be made in accordance with the law in force at the time at which it is made.²⁷

§ 551. Description of assessment district.

It is not necessary specifically to state that the assessment district is situated in the state, the county or the city, since it will be presumed that it is in the city by which such assessment is levied.¹ A description of an assessment district is sufficient, if it would have constituted a valid description of land in a conveyance,² or a sufficient description in an act of the legislature of a political district or municipal corporation.³ Thus, where a street called Sixth Street ran east, then turned in a semi-circle at almost right angles and ran south, a description of the assessment district as extending "to the easterly side of Sixth Street" was held to be sufficiently definite.⁴ It is not necessary that the assessment district should be defined by ordinance in the absence of a statute specifically requiring such definition.⁵ It is sufficient, if the entire record of the tax proceeding clearly shows what property is to be assessed.⁶ Where a plat or diagram has been filed with the city clerk, showing all the parcels of land abutting on the portion of street to be paved, and showing the relative location of each lot, the lot numbers, the names of the various plats where the land has been platted, the frontage and boundary lines of each lot and the names of the owners of each, it has been held that a resolution of the city council, which describes the assessing district as, "all the lots, premises and parcels of land fronting upon" the part of the street to be paved, "as shown by a map of the proposed district on file in the office of the city clerk," is a sufficiently definite description of the assessed district.⁷ Under a

²⁷ *Cline v. City of Seattle*, 13 Wash. 444, 43 Pac. 367 [1896].

¹ *Kansas City v. Napiecek*. — Kan. —, 92 Pac. 827 [1907].

² *German Savings and Loan Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902]; *Thomason v. Cuneo*, 119 Cal. 25, 50 Pac. 846 [1897]; *Central Irrigation District v. De Lappe*, 79 Cal. 352, 21 Pac. 825.

³ In the Matter of the Bonds of the Madera Irrigation District, 92 Cal.

296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891].

⁴ *German Savings & Loan Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902].

⁵ *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605 [1891]; *State ex rel. Peters v. Mayor and Common Council of City of Newark*, 31 N. J. L. (2 Vr.) 360.

⁶ *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605 [1891].

⁷ *Boehme v. City of Monroe*, 106 Mich. 401, 64 N. W. 204 [1895].

statute authorizing an assessment to be levied upon the lots fronting the street, along which a sewer is to be constructed, it is not necessary that the city should formally lay out an assessment district for such improvement.⁸ Even if the statute provides that the common council must "describe or designate the lot and premises or locality to be assessed," it is held that it is sufficient to describe the taxing district as the property fronting upon the improvement for which the assessment is to be levied.⁹ So a description of property as "contiguous," "adjacent" and "abutting" has been held sufficient as fixing the assessment district.¹⁰ A description of the improvement, as consisting of plank sidewalks to be constructed upon a given street between two others named, is held, when taken in connection with the statute authorizing the property situated upon the improvement to be assessed, to be a sufficient description of the assessment district.¹¹ At the time that a commissioner was appointed to lay out an assessment district, the statute required the assessment district to be described by boundaries. After such appointment, but before the assessment roll was filed, the statute was amended so as to make it necessary to describe the assessment district by boundaries only in case of sewer improvements. It has been held that such assessment roll was valid if it described the property to be assessed with sufficient accuracy, although it did not describe the assessment district by boundaries.¹² If, in the description of the assessment district by courses and distances and by monuments, the calls for the angles and the directions of the lines are at variance with the calls for the streets and the fixed points upon them, the streets will be regarded as monuments and the calls therefor will control the calls for angles and directions of the boundary lines.¹³ The resolution of a city council described an assessment district as including "North Fourth Avenue, from the north side of Primrose Avenue to the northerly city line." Primrose Avenue started at Fourth Avenue and ran east, but did not cross Fourth Avenue or extend west thereon. It was held that under

⁸ *White v. Harris*, 103 Cal. 528, 37 Pac. 502 [1894].

⁹ *City of Kalamazoo v. Francoise*, 115 Mich. 554, 73 N. W. 801 [1898].

¹⁰ *Raymond v. Cleveland*, 42 O. S. 522 [1885].

¹¹ *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373 [1888].

¹² *Field v. City of Chicago*, 198 Ill. 224, 64 N. E. 840 [1902]; (distinguishing *Yaggy v. City of Chicago*, 194 Ill. 88, 62 N. E. 316 [1901]).

¹³ *Thomason v. Cuneo*, 119 Cal. 25, 50 Pac. 846 [1897].

such description, property on the west side of Fourth Avenue north of Primrose Avenue was included.¹⁴ If the statute requires the assessment district to be described by a resolution of the council "specifying the exterior boundaries" of the district to be assessed, an ordinance which described such district as consisting of "all lots and parcels of land fronting" on a certain street between two other specified streets, is not sufficient.¹⁵ Such ordinance does not show the extent of the district either way from the part of the street which is to be improved.¹⁶ Under statutory provisions, it is necessary to describe an assessment district, if non-abutting property is to be assessed, and failure so to do renders the assessment invalid.¹⁷ Under a statute fixing the assessment district at a mile and one-half on either side of the turnpike for the construction of which the assessment is levied, a location of the proposed turnpike on the route of an existing turnpike, or "as near thereto as practicable," has been held to be too indefinite, since it is not possible from such description to mark out the boundaries of the assessment district.¹⁸ That a tract of land connected voluntarily with a drainage district is so described that some of the land therein cannot be identified, is said not to be a defense available to those whose lands are properly described.¹⁹ A drainage district, described as bounded on the west, north and east by the "summit of the ridge" forming the water shed, and on the south side by the proposed canal, or where the canal does not extend by arable lands, was held upon the first hearing to be sufficiently described as to the north, east and west boundaries and on a re-hearing was held valid as to the south boundary, also.²⁰ If the property abutting a street is made an assessment district for the improvement thereof, the fact that the city has constructed a portion of such street without letting contracts therefor, and has paid for such improvement out of its general funds, does not show that the assessment

¹⁴ *Farrington v. City of Mt. Vernon*, 166 N. Y. 233, 59 N. E. 826 [1901].

¹⁵ *Dehail v. Morford*, 95 Cal. 457, 30 Pac. 593 [1892].

¹⁶ *Dehail v. Morford*, 95 Cal. 457, 30 Pac. 593 [1892].

¹⁷ *Bennett v. City of Emmetsburg*, — Ia. —, 115 N. W. 582 [1908].

¹⁸ *Turner v. Thorntown and Mechanicsburg Gravel Road Company*, 33 Ind. 317 [1870].

¹⁹ *People ex rel. Herman v. Commissioners of Bug River Special Drainage District*, 189 Ill. 55, 59 N. E. 605.

²⁰ *Richard v. Cyremort Drainage District*, 107 La. 657, 32 So. 27 [1901-1902].

district is to be restricted to the land abutting the rest of such street.²¹ If, however, a street is improved in sections under different ordinances and the land opposite each section is made an assessment district, land opposite one section cannot be assessed for the improvement of another section.²² In the absence of a statute requiring the exterior boundaries of an assessment district to be specified, a description of the property assessed as that fronting on the improvement is sufficient.²³ If, however, the statute requires the council to specify the exterior boundaries of the district to be assessed, a description of the land as that fronting on a given street between two intersecting streets is insufficient.²⁴

§ 552. Legislative discretion in laying out assessment district.

The legislature has a wide discretion in determining the area of the assessment district upon which an assessment is to be levied; and it may confer a similar discretion upon a city or other public corporation. Accordingly, unless such discretion is exceeded, complaint cannot be made that the assessment district does not include all the territory which possibly might have been included within it.¹ Thus, it may be provided that only land bordering upon the actual improvement is to be assessed.² Land which borders upon a part of a street which has already been improved may be omitted from an assessment district formed to pay the cost of improving the rest of the street.³ If a street is constructed

²¹ *Town of Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353.

²² *Smith v. Small*, 50 Mo. App. 401 [1892].

²³ *White v. Harris*, 103 Cal. 528, 37 Pac. 502 [1894]; *Ronan v. People ex rel. Shafter*, 193 Ill. 631, 61 N. E. 1042 [1901].

²⁴ *Dehail v. Morford*, 95 Cal. 457, 30 Pac. 593 [1892].

¹ *McSherry v. Wood*, 102 Cal. 647, 36 Pac. 1010 [1894]; *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71 [1893]; *Bacon v. Mayor and Aldermen of Savannah*, 86 Ga. 301, 12 S. E. 580 [1890]; *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794 [1897]; *Gilerest v. McCartney*, 97 Ia. 138, 66 N. W. 103 [1896]; *Kendig v. Knight*, 60 Ia. 29, 14 N. W. 78 [1892]; *Power v. City of Detroit*,

139 Mich. 30, 102 N. W. 288 [1905]; *Smith v. City of Toledo*, 24 O. S. 126 [1873]; *Creighton v. Scott*, 14 O. S. 438 [1863]; *Weston v. Commissioners of Hamilton Co.*, 6 Ohio C. C. 641 [1892]; *Blount v. City of Janesville*, 31 Wis. 648 [1872].

² *McSherry v. Wood*, 102 Cal. 647, 36 Pac. 1010 [1894]; *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71 [1893]; *Kendig v. Knight*, 60 Ia. 29, 14 N. W. 78 [1882]; *Smith v. City of Toledo*, 24 O. S. 126 [1873]; *Creighton v. Scott*, 14 O. S. 438 [1863].

³ *McSherry v. Wood*, 102 Cal. 647, 36 Pac. 1010 [1894]; *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71 [1893]; *Kendig v. Knight*, 60 Ia. 29, 14 N. W. 78 [1882]; *Smith v. City of Toledo*, 24 O. S. 126 [1873];

in different parts of different materials, assessment districts may be formed of land bounding on each separate section.⁴ If the street is of different widths, each section may be treated as a separate improvement.⁵ If, however, the statute provides for levying the assessment for a street as an entirety, the public corporation cannot levy separate assessments for separate sections upon the property bounding on each section, although the sections are constructed of different materials.⁶ Such division into sections for purposes of apportionment is not necessary, if not required by statute.⁷ The action of a city council in bounding an assessment district for opening a street by lines three hundred feet on each side of such street cannot be reviewed by the courts.⁸ If the assessment district is so small as to impose an assessment greatly in excess of benefits upon the property assessed, a clear abuse of discretion exists and the assessment is invalid.⁹

§ 553. Power of legislature to determine what lands are benefited.

The question of what property is benefited by a public improvement is said to be a legislative question.¹ This statement means

Creighton v. Scott, 14 O. S. 438 [1863]; *Northern Indiana R. R. Co. v. Connelly*, 10 O. S. 159 [1859]. See to the same effect *Blount v. City of Janesville*, 31 Wis. 648 [1872].

⁴ *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794 [1897]; *Gilcrest v. McCartney*, 97 Ia. 138, 66 N. W. 103 [1896].

⁵ *Bacon v. City of Mayor and Aldermen of Savannah*, 86 Ga. 301, 12 S. E. 580 [1890].

⁶ *Cossitt Land Co. v. Neuscheler*, — N. J. Sup. —, 60 Atl. 1128 [1905]. Where part of the street was paved with brick and part with asphalt, and each section was treated as a separate improvement, the court said: "The basis they did take is evidently unjustifiable. It imposes upon the owners of property on the brick part an assessment for the total expense of that kind of pavement, notwithstanding those fronting on the asphalt are also peculiarly benefited thereby. Each person on a street is

peculiarly benefited by the entire paving of the street and the assessment should be laid with relation to the benefit derived by the improvement as a whole. It cannot under the conditions in this case be divided up and one-half assessed one way and another another." *Cossitt Land Co. v. Neuscheler*, — N. J. —, 60 Atl. 1128 [1905].

⁷ *Smith v. City of Cincinnati*, 6 Ohio N. P. 175 [1898].

⁸ *Power v. City of Detroit*, 139 Mich. 30, 102 N. W. 288 [1905].

⁹ *Clay v. Grand Rapids*, 60 Mich. 451, 27 N. W. 596 [1886].

¹ *Illinois Central Railroad Company v. Decatur*, 147 U. S. 190, 197, 37 L. 132, 13 S. 293 [1893]; *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309 [1901]; *Hadley v. Daone*, 130 Cal. 207, 62 Pac. 500 [1900]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rev. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; *Board of Commissioners of County of Monroe v.*

that the legislature possesses a wide range of discretion in determining what property is benefited by the improvement for which the assessment is levied.² It is well settled that in ordinary cases the legislature may determine what property is benefited by the improvement,³ and may fix the limits of the assessment district

Harrell, 147 Ind. 500, 46 N. E. 124 [1896]; Atchison, Topeka & Santa Fe Railroad Company v. Peterson, 5 Kan. App. 103, 48 Pac. 877 [1897]; Pleasants v. City of Shreveport, 110 La. 1046, 35 So. 283 [1903]; Smith v. Mayor and Aldermen of Worcester, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40 [1902]; Rogers v. City of St. Paul, 22 Minn. 494 [1876]; Meier v. City of St. Louis, 180 Mo. 391, 79 S. W. 955 [1903]; Prior v. Buehler & Cooney Construction Company, 170 Mo. 439, 71 S. W. 205 [1902]; McMillan v. City of Butte, 30 Mont. 220, 76 Pac. 203 [1904]; State, Sigler, Pros. v. Fuller, 34 N. J. L. (5 Vr.) 227 [1870]; People ex rel. Griffin v. Mayor, etc., of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; People ex rel. Crowell v. Lawrence, 36 Barb. (N. Y.) 178 [1862]; Astor v. Mayor, Aldermen and Commonalty of the City of New York, 37 N. Y. Sup. Ct. Rep. 539 [1874]; Weston v. Commissioners of Hamilton Co., 6 Ohio C. C. 641 [1892]; St. Benedict's Abbey v. Marion County, — Or. —, 93 Pac. 231 [1908].

² French v. Barber Asphalt Paving Co., 181 U. S. 324, 45 L. 879, 21 S. 625 [1901]; (affirming, Barber Asphalt Paving Company v. French, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]); Carsons v. District of Columbia, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898]; Walston v. Nevin, 128 U. S. 578, 32 L. 544, 9 S. 192 [1888]; (affirming, Nevin v. Roach, 86 Ky. 492, 5 S. W. 546 [1887]); In the Matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675 [1891]; English v. Mayor and Coun-

cil of Wilmington, 2 Marv. (Del.) 63, 37 Atl. 158 [1896]; Speer v. Mayor and Council of Athens, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890]; Chicago, Milwaukee & St. Paul Railway Company v. Phillips, 111 Ia. 377, 82 N. W. 787 [1900]; Coates v. Nugent, — Kan. —, 92 Pac. 597 [1907]; Barfield v. Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. R. 128 [1901]; Broadway Baptist Church v. McAtee, 8 Bush (71 Ky.) 508, 8 Am. Rep. 480 [1871]; Smith v. Mayor and Aldermen of Worcester, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40 [1902]; City of St. Louis v. Excelsior Brewing Company, 96 Mo. 677, 10 S. W. 477 [1888]; City of St. Louis v. Ranken, 96 Mo. 497, 9 S. W. 910 [1888]; Simmons v. City of Millville, — N. J. Sup. —, 66 Atl. 895 [1907]; State, Board of Chosen Freeholders of the County of Hudson, Pros. v. Peterson Avenue and Secaucus Road Commissioners, 41 N. J. L. (12 Vr.) 83 [1879]; Northern Indiana Railroad Company v. Connelly, 10 O. S. 160 [1859]; (followed in Daniels v. Keeler, 10 O. S. 169 [1859] and Fitch v. Keeler, 10 O. S. 169 [1859]). Such determination is said to be "a judgment not final . . . but certainly not for judicial revision except in clear cases of wrong and oppression . . ." Hill v. Fontenot, 46 La. Ann. 1563, 1566, 16 So. 475 [1894]. So Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771 [1890].

³ Williams, Treasurer, v. Eggleston, 170 U. S. 304, 42 L. 1047, 18 S. 617 [1898]; (affirming State ex rel. Bulkeley v. Williams, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 421 [1896]); Bauman v. Ross, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897];

in accordance with such determination.⁴ This is, in effect, a legislative declaration or adjudication that the land within the assessment district so fixed will be benefited by the proposed improve-

(reversing, *District of Columbia v. Armes*, 8 App. D. C. 393 [1896]; *Bauman v. Ross*, 9 App. D. C. 260 [1896]; *Abbott v. Ross*, 9 App. D. C. 289 [1896]); *Banaz v. Smith*, 135 Cal. 102, 65 Pac. 309 [1901]; *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500 [1900]; *In the Matter of the Bonds of the Madera Irrigation District*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675 [1891]; *United States ex rel. Henderson v. Edmunds*, 3 Mackey (D. C.) 142 [1884]; *City of Ottawa v. Macy*, 20 Ill. 413 [1858]; *Board of Commissioners of County of Monroe v. Harrell*, 147 Ind. 500, 46 N. E. 124 [1896]; *Atchison, Topeka & Santa Fe Railroad Company v. Peterson*, 5 Kans. App. 103, 48 Pac. 877 [1897]; *Pleasants v. City of Shreveport*, 110 La. 1046, 35 So. 283 [1903]; *Hughes v. Board of Commissioners of the Caddo Levee District*, 108 La. 146, 32 So. 216 [1901-1902]; *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475 [1894]; *George v. Young*, 45 La. Ann. 1232, 14 So. 137 [1893]; *Mayor and City Council of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1 [1880]; *Smith v. Mayor and Aldermen of Worcester*, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40 [1902]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *Smith v. Willis*, 78 Miss. 243, 28 So. 878 [1900]; *McMillan v. City of Butte*, 30 Mont. 220, 73 Pac. 203 [1904]; *State, Central New Jersey Land and Improvement Company, Pros. v. Mayor and Council of the City of Bayonne*, 56 N. J. L. (27 Vr.) 297, 28 Atl. 713 [1893]; *State, Society for Establishing Useful Manufactures, Pros. v. Mayor and Aldermen of City of Paterson*, 42 N. J. L. (13 Vr.) 615 [1880]; *State, Board of Chosen Freeholders of the*

County of Hudson, Pros. v. Peterson Avenue and Secaucus Road Commissioners, 41 N. J. L. (12 Vr.) 83 [1879]; *People ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; *People ex rel. Crowell v. Lawrence*, 36 Barb. (N. Y.) 178 [1862]; *Astor v. Mayor, Aldermen and Commonalty of the City of N. Y.*, 37 N. Y. Sup. Ct. Rep. 539 [1874]; *Weston v. Commissioners of Hamilton County*, 6 Ohio C. C. 641 [1892]; *City of Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077 [1891].

⁴ *Webster v. Fargo*, 181 U. S. 394, 45 L. 912, 21 S. 623, 645 [1901]; (affirming, *Webster v. City of Fargo*, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]); *Bauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; (reversing, *District of Columbia v. Armes*, 8 App. D. C. 393 [1896]; *Bauman v. Ross*, 9 App. D. C. 260 [1896]; *Abbott v. Ross*, 9 App. D. C. 289 [1896]); *Lent v. Tillson*, 140 U. S. 316, 35 L. 419, 11 S. 825 [1891]; (affirming, *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]); *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming, *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]); *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904]; *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500 [1900]; *English v. Mayor and Council of Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158 [1896]; *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902]; *Chicago, Milwaukee and St. Paul Railroad Company v. Phillips*, 111 Ia. 377, 82 N. W. 787 [1900]; *Olsson v. City of Topeka*, 42 Kan. 709, 21 Pac. 219 [1889]; *Hill v. Fontenot*, 46 La. Ann. 1563, 1566, 16 So. 475 [1894]; *Smith v. Mayor and Aldermen of Worcester*, 182 Mass. 232, 59

ment.⁵ The legislature may declare conclusively that no property except that within the assessment district as fixed by legislative determination, is benefited.⁶ In the exercise of its wide discretion, the legislature may lay out an assessment district from which is excluded some property which is in fact benefited.⁷ A city, in the exercise of discretion delegated to it by the legislature, may exclude from an assessment district, property which is in fact benefited.⁸ Thus, under a statute empowering the city to lay out assessment districts, but not restricting the assessment district to the property contiguous to the improvement, the city may, nevertheless, in laying out such district, restrict the property assessed to the property contiguous to such improvement.⁹ The propriety of this exercise of power by the legislature, or the city, or public official, is especially clear where it is not shown that there is any property outside of the assessment district which is in fact benefited.¹⁰ In the exercise of its discretion the legislature, or a public corporation, or officer authorized by statute, may lay out an assessment district which contains property which is not in fact benefited by the improvement for which the assess-

L. R. A. 728, 65 N. E. 40 [1902]; *State ex rel. Skrainka Construction Co. v. City of St. Louis*, — Mo. —, 111 S. W. 89 [1908]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *McMillan v. City of Butte*, 30 Mont. 220, 76 Pac. 203 [1904]; *State, Graham, Pros. v. Mayor, etc., of Paterson*, 37 N. J. L. (8 Vr.) 380 [1875]; *Kelly v. City of Cleveland*, 34 O. S. 468 [1878].

⁵ *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500 [1900]; *Board of Commissioners of County of Monroe v. Harrell*, 147 Ind. 500, 46 N. E. 1124 [1896]; *Smith v. Mayor and Aldermen of Worcester*, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40 [1902]; *McMillan v. City of Butte*, 30 Mont. 220, 76 Pac. 203 [1904]. The contrary view denying the power of the legislature to lay out assessment districts has been entertained, as in *People ex rel. Post v. Mayor, etc., of Brooklyn*, 6 Barb. 209 [1849] but has been since abandoned.

⁶ *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114.

⁷ *White v. Harris*, 103 Cal. 528, 37 Pac. 502 [1894]; *In the Matter of the Bonds of the Madera Irrigation District*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891]; *Bigelow v. City of Chicago*, 90 Ill. 49 [1878]; *Mock v. City of Muncie*, 9 Ind. App. 536, 37 N. E. 281 [1893]; *State, Board of Chosen Freeholders of the County of Hudson, Pros. v. Peterson Avenue and Secaucus Road Commissioners*, 41 N. J. L. (12 Vr.) 83 [1879]; *Weston v. Commissioners of Hamilton County*, 6 Ohio C. C. 641 [1892].

⁸ *Lenon v. Brodie*, 81 Ark. 208, 98 S. W. 979 [1906]; *Kansas City Grading Company v. Holden*, 107 Mo. 305, 17 S. W. 798 [1891].

⁹ *Lake v. City of Decatur*, 91 Ill. 596 [1879].

¹⁰ *Hennessey v. Douglas County*, 99 Wis. 129, 74 N. W. 983 [1898].

ment is to be levied.¹¹ As long as the determination of the legislature or public corporation or official is not fraudulent, arbitrary or unreasonable within the limits already indicated, the validity of such action cannot be attacked on the ground that some of the property in the district is not in fact benefited.¹² If, however, it appears that the improvement is not intended for the benefit of the particular district, it has been said in some jurisdictions that the action of the city in laying out an assessment district is not conclusive.¹³ This conclusion appears to have been reached under the provisions of a statute which gave to the city the power to lay out an assessment district only in cases where the improvement was intended to benefit the property therein. While the statements found in many of the cases would seem to imply that the legislature has sole and exclusive discretion in the determination of this question, it is nevertheless clear that there are some limits to such discretion.¹⁴ If no such limits exist, the power of local assessment would be but another name for arbitrary exaction and confiscation. What these limits are is not clearly established. It may be impossible to state them in accurate and precise terms. It has been said that the legislature has a wide range of discretion in determining what property is especially benefited and that the courts will interfere only when it is shown conclusively that the legislature is wrong in making the determination which it has made.¹⁵ Another form of stating the restriction which exists upon the power of the legislature to determine what property is benefited, is that the court can ignore such legislative determination only in a clear case.¹⁶ It is said to be conclusive in any case admitting of a substantial difference of opinion.¹⁷ Another form of expressing the same idea is that the question of benefit to the property owner is not a judicial question unless the court can plainly see that no benefit can exist and this absence

¹¹ In the Matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891]; City of Kansas City v. Gibson, 66 Kan. 501, 72 Pac. 222 [1903].

¹² City of Kansas City v. Gibson, 66 Kan. 501, 72 Pac. 222 [1903].

¹³ Mayor and City Council of Baltimore v. Hughes's Adm'r., 1 Gill & Johnson (Md.) 480, 19 Am. Dec. 243 [1829]; Mayor, etc., of Baltimore v.

Moore, 6 Harris and Johnson (Md.) 375 [1825].

¹⁴ Bowler v. Biddinger Free Turnpike Co., 6 W. L. B. 404 [1881].

¹⁵ Barfield v. Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. R. 128 [1901].

¹⁶ Hill v. Fontenot, 46 La. Ann. 1563, 16 So. 475 [1894].

¹⁷ Coates v. Nucent, — Kan. —, 92 Pac. 597 [1907].

of benefit is so clear as to admit of no dispute or controversy by evidence.¹⁸ It has been said that the determination of the legislature is conclusive except in extraordinary cases presenting a manifest abuse of legislative authority.¹⁹ If the area which the legislature has determined to be benefited by the improvement is so small that the benefits cannot equal the cost, such determination is not conclusive.²⁰ The power of the legislature to determine the question of what land is benefited is not, of course, discussed carefully in those jurisdictions in which the power of local assessment is assumed not to depend upon the existence of benefits.²¹ The correctness of a legislative determination as to what property is benefited may be attacked upon either of two distinct grounds. It may be claimed that certain land is included by the legislative determination, which is not in fact benefited and which should not therefore be subject to assessment.²² It may be claimed by the owners of land assessed, that by the legislative determination, land which is in fact benefited is excluded from the assessment district and that the assessments of those whose property is included are therefore increased by the omission of such property.²³ The general principles already stated as to the

¹⁸ *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904].

¹⁹ *Speer v. Mayor and Council of Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890].

²⁰ *State, Graham, Pros. v. Mayor of Paterson*, 37 N. J. L. (8 Vr.) 380 [1875].

²¹ *Oliver v. Monona County*, 117 Iowa 43, 90 N. W. 510 [1902]; *Chicago, Milwaukee and St. Paul Railway Company v. Phillips*, 111 Ia. 377, 82 N. W. 787 [1900].

²² *Bauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; (*reversing, District of Columbia v. Armes*, 8 App. D. C. 393 [1896]; *Bauman v. Ross*, 9 App. D. C. 260 [1896]; *Abbott v. Ross*, 9 App. D. C. 289 [1896]); *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904]; *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309 [1901]; *Hadley v. Darne*, 130 Cal. 207, 62 Pac. 500 [1900]; *In the Matter of the Bonds of the Madera Irrigation District*, 92 Cal. 296, 27 Am.

St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891]; *United States ex rel. Henderson v. Edmunds*, 3 Mackey (D. C.) 142 [1884]; *Speer v. Mayor and Council of Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890]; *Pleasants v. City of Shreveport*, 110 La. 1046, 35 So. 283 [1903]; *Hughes v. Board of Commissioners of Caddo Levee District*, 108 La. 146, 32 So. 218 [1901-1902]; *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475 [1894]; *George v. Young*, 45 La. Ann. 1232, 14 So. 137 [1893]; *Smith v. Mayor and Aldermen of Worcester*, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40 [1902]; *Smith v. Willis*, 78 Miss. 243, 28 So. 878 [1900]; *McMillan v. City of Butte*, 30 Mont. 220, 76 Pac. 203 [1904].

²³ *In the Matter of the Bonds of the Madera Irrigation District*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891]; *City of Ottawa v. Macy*, 20

conclusiveness of legislative determination seem to be applied alike to both classes of cases, as far as can be deduced from the somewhat vague and general language used. However, in spite of similarity between the two classes of cases in the abstract statement of the principles controlling, the legislative determination is attacked with success in cases in which it is claimed that property not benefited is included, far oftener than in cases in which it is claimed that property benefited is excluded from the assessment district.²⁴

§ 554 Legislative determination conclusive as to subordinate officials.

If a district has been fixed by the legislature, or by public corporation, or official authorized by statute, subordinate officials cannot omit from assessment any of the land within such district, if such omission will materially increase the assessment upon the rest of the land assessed.¹ This principle has been applied to

Ill. 413 [1858]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *State, Society for Establishing Useful Manufactures, Pros. v. Mayor and Aldermen of City of Paterson*, 42 N. J. L. (13 Vr.) 615 [1880]; *State, Board of Chosen Freeholders of the County of Hudson, Pros. v. Peterson Avenue and Secaucus Road Commissioners*, 41 N. J. L. (12 Vr.) 83 [1879]; *People ex rel. Crowell v. Lawrence*, 36 Barb. 178 [1862]; *Weston v. Commissioners of Hamilton County*, 6 Ohio C. C. 641 [1892]; *City of Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077 [1891]. (Where it was claimed unsuccessfully that the legislature could not provide for assessing the land only, exclusive of the improvements thereon.)

²⁴ "Whether the assessment shall be confined to contiguous property, or whether all property benefited shall bear a part of the burden the instrument is silent, and as the legislature has the right to confer the power without restriction in this regard, we are aware of no reason why that power may not be exercised." *Lake*

v. City of Decatur, 91 Ill. 596, 601 [1879]; (quoted in *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 158, 49 N. E. 427 [1898]).

¹ *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373 [1888]; *People of the State of California v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677 [1875]; *Gauen v. Moredock and Ivy Landing Drainage District No. 1*, 131 Ill. 446, 23 N. E. 633 [1890]; *Nevins and Otter Creek Township Draining Company v. Alkire*, 36 Ind. 189 [1871]; *Greencastle and Bowling Green Turnpike Company v. Albin*, 34 Ind. 554 [1870]; *Robbins v. Sand Creek Turnpike Company*, 34 Ind. 461 [1870]; *Hardwick v. Danville and North Salem Gravel Road Company*, 33 Ind. 321 [1870]; *New Haven and Fort Wayne Turnpike Company v. Bird*, 33 Ind. 325 [1870]; *Drake v. Grout*, 21 Ind. App. 534, 52 N. E. 775 [1898]; *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410 [1903]; *State, Culver, Pros. v. Town of Bergen in the County of Hudson*, 29 N. J. L. (5 Dutch.) 266 [1861]; *People ex rel. Connelly v. Reis*, 96 N. Y. S. 597, 109 App. Div. 748 [1905]; *People ex*

assessments for streets,² roads,³ sewers,⁴ and drains.⁵ In this respect local assessment differs from general taxation, since the improper omission of property from general taxation does not invalidate the tax.⁶ Thus, where the council had determined that a certain specifically described district was benefited by an improvement and the commissioners appointed to apportion the benefits, divided such district into two parts and found that one part was not benefited at all, it was held that such action on the part of the commissioners was invalid.⁷ If the drainage commissioners have determined what land is benefited, a jury subsequently appointed to assess damages and benefits has no power to determine that certain land within the limits fixed by such commissioners is not benefited. The determination of the drainage commissioners is final and cannot be ignored by the jury.⁸ The omission from assessment of property within the district as determined is not, however, ground for enjoining the construction of the improvement in the absence of a showing that there is not in existence a sufficient fund to pay the cost of such improvement, outside of such assessment.⁹ If an assessment is levied for the construction of a road by a turnpike company, and the assessors are appointed by the county commissioners and omit part of the land within the assessment district, such conduct is not ground for an information against the company, since the assessors are not appointed by the

rel. *Tietjen v. Reis*, 96 N. Y. S. 601, 109 App. Div. 919 [1905]; *City of Seranton v. Levere*, 200 Pa. St. 56, 49 Atl. 980 [1901]; *Fraser v. Mulany*, 129 Wis. 377, 109 N. W. 139 [1906].

² *Drake v. Grout*, 21 Ind. App. 534, 52 N. E. 775 [1898]; *State, Culver, Pros. v. Town of Bergen in the County of Hudson*, 29 N. J. L. (5 Dutch.) 266 [1861].

³ *Greencastle and Bowling Green Turnpike Company v. Albin*, 34 Ind. 554 [1870]; *Robbins v. Sand Creek Turnpike Company*, 34 Ind. 461 [1870]; *Hardwick v. Danville and North Salem Gravel Road Company*, 33 Ind. 321 [1870]; *New Haven and Fort Wayne Turnpike Company v. Bird*, 33 Ind. 325 [1870].

⁴ *People ex rel. Connelly v. Reis*, 96 N. Y. S. 597, 109 App. Div. 748 [1905]; *People ex rel. Tietjen v. Reis*, 96 N. Y. S. 601, 109 App. Div. 919 [1905]; *City of Seranton v. Levers*, 200 Pa. St. 56, 49 Atl. 980 [1901].

⁵ *Nevins and Otter Creek Township Draining Company v. Alkire*, 36 Ind. 189 [1871]; *Fraser v. Mulany*, 129 Wis. 377, 109 N. W. 139 [1906].

⁶ *Van Deventer v. Long Island City*, 139 N. Y. 133, 34 N. E. 774 [1893].

⁷ *Ellwood v. City of Rochester*, 122 N. Y. 229, 25 N. E. 238 [1890].

⁸ *Gauen v. Moredock and Ivy Land-in's Drainage District No. 1*, 131 Ill. 446, 23 N. E. 633 [1890].

⁹ *Hoke v. Perdue*, 62 Cal. 545 [1881].

company nor subject to its control.¹⁰ Since the legislature has power to provide that commissioners specially appointed for that purpose may determine in the first instance what land is benefited, the legislature may provide for the laying out of an assessment district and then permit the commissioners to determine what property in such district is in fact benefited.¹¹ Accordingly, if the jury appointed to assess benefits assesses certain land in the district, and further reports that "against all property in the benefit district not herein specifically described and assessed with benefits, we find and assess no benefits," it has been held that such report is proper and that it cannot be said that the jury has omitted to assess property within such district.¹² An omission of property within the district as laid out which does not result in materially increasing the assessment upon the rest of the property within such district, cannot be objected to by such property owners.¹³ If the omission of such land within the assessment district results in an increase of the assessment upon the rest of the property in such district, it has been said that the remaining property owners cannot enjoin the collection of such assessment without tendering the amount which is actually due.¹⁴ If the legislature or public corporation or official authorized by statute has determined what property is benefited, has laid out an assessment district, such determination cannot be revised by subordinate officials. Accordingly, such subordinate officials cannot include in the assessment, land outside of such district, even if in fact benefited.¹⁵ If the legislature has determined what

¹⁰ *State on the Relation of Lingenfelter v. Danville and North Salem Gravel Road Company*, 33 Ind. 133 [1870].

¹¹ *Reclamation District No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676 [1884]; *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605 [1891]; *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860 [1898].

¹² *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860 [1898].

¹³ *Ottumwa Brick & Construction Co. v. Ainley*, 109 Ia. 386, 80 N. W. 510 [1899]; *State, Humphreys, Pros. v. Mayor and Council of the City of Bayonne*, 60 N. J. L. 406, 38 Atl. 761 [1897]; *Davis v. City of New-*

ark, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891].

¹⁴ *City of Ottawa v. Barney*, 10 Kan. 270 [1872].

¹⁵ *Benson v. Bunting*, 141 Cal. 462, 75 Pac. 59 [1903]; *Miller v. Mayo*, 88 Cal. 568, 26 Pac. 364 [1891]; *Lill v. City of Chicago*, 29 Ill. 31 [1861]; *City of Ottawa v. Macy*, 20 Ill. 413 [1858]; *State ex rel. Keith v. Common Council of the City of Michigan City*, 138 Ind. 455, 37 N. E. 1041 [1894]; *Caldwell v. Rupert*, 10 Bush. (73 Ky.) 179 [1873]; *People ex rel. Nostrand v. Wilson*, 119 N. Y. 515, 23 N. E. 1064 [1890]; *Wheeler v. Treasurer of Muskingum County*, 3 Ohio C. C. 596 [1889]; *Park Avenue*

property is benefited, the city cannot assess property outside of the limits of the district as marked out by the determination of the legislature.¹⁶ Thus, if the legislature has determined that only land fronting on an improvement,¹⁷ or abutting thereon,¹⁸ or bounding and abutting thereon,¹⁹ is benefited by such improvement, the city has no power to assess the property benefited by such improvement, if any of the property benefited lies outside of the assessment district as fixed by the legislature. If the council has exercised its power to determine what property is benefited, the commissioners or appraisers to apportion such assessment upon the property benefited cannot modify or revise the determination of the council either by excluding property which the council has determined is benefited, or by adding other property thereto.²⁰ If the exercise of discretion as to what property is benefited is given to the council, it cannot delegate such discretion to other officers.²¹ Thus, where a city fixed an assessment district, a contract which provides for doing the work and assessing the cost thereof upon a district different from that fixed by the ordinance of the city council, is invalid.²² If, on the other hand, the legislature has given to commissioners specially appointed for that purpose, power to determine what property is benefited and thus to lay out the assessment district, the city council cannot, by restricting the district to the property contiguous to the improvement, prevent the commissioners from includ-

Sewers, Appeal of Parker, 169 Pa. St. 433, 32 Atl. 574 [1895]; Beechwood Avenue Sewer, Pittsburgh's Appeal, 179 Pa. St. 490, 36 Atl. 209 [1897]; Morewood Avenue, Chamber's Appeal, 159 Pa. St. 20, 28 Atl. 123 [1893]; Fraser v. Mulany, 129 Wis. 377, 109 N. W. 139 [1906].

¹⁶ Miller v. Mayo, 88 Cal. 568, 26 Pac. 364 [1891]; Kelly v. City of Cleveland, 34 O. S. 468 [1878]; Wheeler v. Treasurer of Muskingum County, 3 Ohio C. C. 596 [1889]; Fifty Fourth St., Pittsburgh's Appeal, 165 Pa. St. 8, 30 Atl. 503 [1894]; Morewood Avenue, Chamber's Appeal, 159 Pa. St. 20, 28 Atl. 123 [1893].

¹⁷ Miller v. Mayo, 88 Cal. 568, 26 Pac. 364 [1891].

¹⁸ Fifty Fourth St., Pittsburgh's Appeal, 165 Pa. St. 8, 30 Atl. 503 [1894]; Morewood Avenue, Chamber's Appeal, 159 Pa. St. 20, 28 Atl. 123 [1893].

¹⁹ Kelly v. City of Cleveland, 34 O. S. 468 [1878].

²⁰ Kansas City Grading Company v. Holden, 107 Mo. 305, 17 S. W. 798 [1891]; Ellwood v. City of Rochester, 122 N. Y. 229, 25 N. E. 238 [1890]; Hassen v. City of Rochester, 65 N. Y. 516 [1875].

²¹ Such as assessors, Savage v. City of Buffalo, 59 Hun. 606, 14 N. Y. Supp. 101 [1891].

²² Haisch v. City of Seattle, 10 Wash. 435, 38 Pac. 1131 [1894].

ing property benefited by the improvement but not contiguous thereto.²³

§ 555. Delegation of power to public corporation.

The legislature may delegate to municipal corporations the power to determine what property within such municipal corporation is especially benefited by public improvements.¹ The determination of the city, under statutes of this character, is said to be final and conclusive in the absence of fraud,² or fraud or mis-

²³ In the Matter of Westlake Avenue, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

¹ Minnesota & M. Land & Improvement Co. v. City of Billings, 111 Fed. Rep. 972, 50 C. C. A. 70 [1901]; English v. Territory, — Ariz. —, 89 Pac. 501 [1907]; Board of Improvement District No. Five of Texarkana v. Offenhauser, 84 Ark. 257, 105 S. W. 265 [1907]; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661 [1904]; Thomason v. Cuneo, 119 Cal. 25, 50 Pac. 846 [1897]; Diggins v. Brown, 76 Cal. 318, 18 Pac. 373 [1888]; Hallett v. United States Security & Bond Co., — Colo. —, 90 Pac. 683 [1907]; Spalding v. City and County of Denver, 33 Colo. 172, 80 Pac. 126 [1904]; City of Denver v. Kennedy, 33 Colo. 80, 80 Pac. 122 [1904]; 80 Pac. 467 [1905]; Wolff v. City of Denver, 20 Colo. App. 135, 77 Pac. 364 [1904]; Field v. City of Chicago, 198 Ill. 224, 64 N. E. 840 [1902]; Gray v. Town of Cicero, 177 Ill. 459, 53 N. E. 91; Payton v. Village of Morgan Park, 172 Ill. 102, 49 N. E. 1003 [1898]; Lightner v. City of Peoria, 150 Ill. 80, 37 N. E. 69 [1894]; Davis v. City of Litchfield, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; State ex rel. Keith v. Common Council of the City of Michigan City, 138 Ind. 455, 37 N. E. 1041 [1894]; Grimmell v. City of Des Moines, 57 Ia. 144, 10 N. W. 330 [1881]; City of Kansas City v. Gibson, 66 Kan. 501, 72 Pac. 222 [1903];

Gleason v. Barnett, 106 Ky. 125, 50 S. W. 67 [1899]; Power v. City of Detroit, 139 Mich. 30, 102 N. W. 288 [1905]; Goodrich v. City of Detroit, 123 Mich. 559, 82 N. W. 255 [1900]; Shimmons v. City of Saginaw, 104 Mich. 511, 62 N. W. 725 [1895]; Warren v. City of Grand Haven, 30 Mich. 24 [1874]; Hoyt v. City of East Saginaw, 19 Mich. 39, 2 Am. Rep. 76 [1869]; Carpenter v. City of St. Paul, 23 Minn. 232 [1876]; Rogers v. City of St. Paul, 22 Minn. 494 [1876]; Kansas City Grading Company v. Holden, 107 Mo. 305, 17 S. W. 798 [1891]; Shannon v. City of Omaha, 73 Neb. 507, 103 N. W. 53, 106 N. W. 592 [1905]; Hariman v. City of Yonkers, 181 N. Y. 24, 73 N. E. 493 [1905]; (affirming judgment, 81 N. Y. S. 823, 82 App. Div. 408 [1903]); Ellwood v. City of Rochester, 122 N. Y. 229, 25 N. E. 238 [1890]; Genet v. City of Brooklyn, 99 N. Y. 296, 1 N. E. 777 [1885]; People ex rel. Griffin v. Mayor, etc., of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; Coates v. Village of Norwood, 16 Ohio C. C. 196 [1898]; St. Benedict's Abbey v. Marion County, — Or. —, 93 Pac. 231 [1908]; Strowbridge v. City of Portland, 8 Ore. 67 [1879]; State v. Moss, 44 Wash. 91, 86 Pac. 1129 [1906]; Haisch v. City of Seattle, 10 Wash. 435 [1894].

² Shimmons v. City of Saginaw, 104 Mich. 511, 62 N. W. 725 [1895].

take,³ or unless such action on the part of the city is fraudulent or unreasonable,⁴ or unless the absence of benefit makes it manifest that the burden amounts to spoliation and not taxation.⁵ If the legislature gives to a municipal corporation power to determine what land is benefited by a public improvement, the exercise of this power is most frequently lodged in the city council.⁶

³ State ex rel. Hughes v. District Court of Ramsey County, 95 Minn. 70, 103 N. W. 744 [1905]; State of Minnesota ex rel. Powell v. District Court of Ramsey County, 47 Minn. 406, 50 N. W. 476 [1891].

⁴ City of Denver v. Kennedy, 33 Colo. 80, 80 Pac. 122, 80 Pac. 467 [1905].

⁵ Preston v. Rudd, 84 Ky. 150 [1886]; Clay v. Grand Rapids, 60 Mich. 451, 27 N. W. 596 [1886].

⁶ Lenon v. Brodie, 81 Ark. 208, 98 S. W. 979 [1906]; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661 [1904]; German Savings and Loan Society v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902]; Dann v. Woodruff, 51 Conn. 203 [1883]; Storrs v. City of Chicago, 208 Ill. 364, 70 N. E. 347 [1904]; Chicago and Northwestern Railway Company v. Village of Elmhurst, 165 Ill. 148, 46 N. E. 437 [1897]; Davis v. City of Litchfield, 155 Ill. 384, 40 N. E. 354 [1895]; Chicago and Alton Railroad Company v. City of Joliet, 153 Ill. 649, 39 N. E. 1077 [1894]; People ex rel. Thatcher v. Village of Hyde Park, 117 Ill. 462, 6 N. E. 33 [1887]; Lake v. City of Decatur, 91 Ill. 596 [1879]; Wray v. Fry, 158 Ind. 92, 62 N. E. 1004 [1901]; State ex rel. Keith v. Common Council of the City of Michigan City, 138 Ind. 455, 37 N. E. 1041 [1894]; City of Fort Wayne v. Cody, 43 Ind. 197 [1873]; Klein v. Tulhev, 13 Ind. App. 74, 40 N. E. 144 [1895]; Minneapolis & St. Louis R. R. Co. v. Lindquist, 119 Ia. 144, 93 N. W. 103 [1903]; Buell v. Ball, 20 Ia. 282 [1866]; City of Atchison v. Price, 45 Kan. 296, 25 Pac. 605 [1891]; Blair v. City of

Atchison, 40 Kan. 353, 19 Pac. 815 [1883]; Mayor and City Council of Baltimore v. Johns Hopkins Hospital, 56 Md. 1 [1880]; Jones v. Board of Aldermen of the City of Boston, 104 Mass. 461 [1870]; Power v. City of Detroit, 139 Mich. 30, 102 N. W. 288 [1905]; Goodrich v. City of Detroit, 123 Mich. 559, 82 N. W. 255 [1900]; Brown v. City of Saginaw, 107 Mich. 643, 65 N. W. 601; Boehme v. City of Monroe, 106 Mich. 401, 64 N. W. 204 [1895]; Grand Rapids School Furniture Company v. City of Grand Rapids, 92 Mich. 564, 52 N. W. 1028 [1892]; Beecher v. City of Detroit, 92 Mich. 268, 52 N. W. 731 [1892]; Davies v. City of Saginaw, 87 Mich. 439, 49 N. W. 667 [1891]; Whitney v. Village of Hudson, 69 Mich. 189, 37 N. W. 184 [1888]; Beniteau v. City of Detroit, 41 Mich. 116, 1 N. W. 899 [1879]; Warren v. City of Grand Haven, 30 Mich. 24 [1874]; Carpenter v. City of St. Paul, 23 Minn. 232 [1876]; Meier v. City of St. Louis, 180 Mo. 391, 79 S. W. 955 [1903]; Prior v. Buehler & Cooney Construction Company, 170 Mo. 439, 71 S. W. 205 [1902]; Heman v. Schulte, 166 Mo. 409, 66 S. W. 163 [1901]; Johnson v. Duer, 115 Mo. 366, 21 S. W. 800 [1892]; Keith v. Bingham, 100 Mo. 300, 13 S. W. 683 [1889]; Corrigan v. Gage, 68 Mo. 541 [1878]; Heman v. Wolff, 33 Mo. App. 200; Beck v. Holland, 29 Mont. 234, 74 Pac. 410 [1903]; Ellwood v. City of Rochester, 122 N. Y. 229, 25 N. E. 238 [1890]; Hassan v. Rochester, 67 N. Y. 528; Hassan v. City of Rochester, 65 N. Y. 516 [1875]; People ex rel. Marvin v. City of Brooklyn, 23 Barb. (N. Y.)

The decision of the city council upon a question of this sort is often said to be final.⁷ This general statement must be taken, however, with the proper limitations. When the exact meaning of the rule becomes material, it is qualified in various ways, as by holding that the determination of the council is final as long as its discretion is honestly exercised and not abused,⁸ or in the absence of fraud,⁹ or in the absence of fraud or mistake,¹⁰ or in the absence of fraud or such gross mistake as to preclude sound judgment,¹¹ or in the absence of fraud and corruption,¹² or fraud and oppression,¹³ or in case of a clear abuse of such discretion.¹⁴ It has been said that the courts will not review the decision of the council unless the property assessed is so situated as to render it physically impossible for the improvement to benefit it.¹⁵ It

166 [1856]; *City of Asheville v. Wachovia Loan & Trust Co.*, 143 N. C. 360, 55 S. E. 800 [1906]; *City of Toledo v. Ford*, 20 Ohio C. C. 290 [1900]; *Coates v. Village of Norwood*, 16 Ohio C. C. 196 [1898]; *Conner v. City of Cincinnati*, 11 Ohio C. C. 336 (affirmed 55 O. S. 82 [1896]); *Or. & Cal. R. R. Co. v. City of Portland*, 25 Ore. 229, 22 L. R. A. 713, 35 Pac. 452 [1894]; *Michener v. City of Philadelphia*, 118 Pa. St. 535, 12 Atl. 174 [1888]; *Brientnall v. City of Philadelphia*, 103 Pa. St. 156 [1883]; *Wray v. Mayor, etc., of Pittsburg for Use, etc.*, 46 Pa. St. (10 Wright) 365 [1863]; *Commonwealth for Use, etc., v. Woods*, 44 Pa. St. (8 Wright) 113 [1862]; *Kettle v. City of Dallas*, 35 Tex. Civ. App. 632, 80 S. W. 874 [1904]; *Northern Pacific Ry. Co. v. City of Seattle*, — Wash. —, 91 Pac. 244 [1907]; *Haisch v. City of Seattle*, 10 Wash. 435, 38 Pac. 1131 [1894]; *Meggett v. City of Eau Claire*, 81 Wis. 326, 51 N. W. 566 [1892]; *Teegarden v. City of Racine*, 56 Wis. 545, 14 N. W. 614 [1883]; *Gilman v. City of Milwaukee*, 55 Wis. 328, 13 N. W. 266 [1882].

⁷ *Chicago and Northwestern Railway Company v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437 [1897]; *Davis v. City of Litchfield*, 155 Ill. 384, 40 N. E. 354 [1895]; *Chicago*

and Alton Railroad Company v. City of Joliet, 153 Ill. 649, 39 N. E. 1077 [1894]; *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004 [1901]; *Klein v. Tuley*, 13 Ind. App. 74, 40 N. E. 141 [1895]; *Buell v. Ball*, 20 Ia. 282 [1866]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *Prior v. Buehler & Cooney Construction Company*, 170 Mo. 439, 71 S. W. 205 [1902]; *Johnson v. Dner*, 115 Mo. 366, 21 S. W. 800 [1892]; *Ellwood v. City of Rochester*, 122 N. Y. 229, 25 N. E. 238 [1890]; *Meggett v. City of Eau Claire*, 81 Wis. 326, 51 N. W. 566 [1892].

⁸ *Oregon & California R. R. Co. v. City of Portland*, 25 Ore. 229, 22 L. R. A. 713, 35 Pac. 452 [1894].

⁹ *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163 [1901].

¹⁰ *Lenon v. Brodie*, 81 Ark. 208, 98 S. W. 979 [1906].

¹¹ *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410 [1903].

¹² *City of Ft. Wayne v. Cody*, 43 Ind. 197 [1873].

¹³ *City of Toledo v. Ford*, 20 Ohio C. C. 290 [1900].

¹⁴ *Storrs v. City of Chicago*, 208 Ill. 364, 70 N. E. 347 [1904].

¹⁵ *Paulson v. City of Portland*, 16 Ore. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]; (affirmed *Paulsen v. Portland*, 199 U. S. 30, 37 L. 637, 13 S. 750 [1893]).

has been said that the willful, arbitrary and intentional omission by the city council to assess a part of the property benefited by local improvement, thereby increasing the burden upon the owners of property assessed, renders the assessment void.¹⁶ Thus, where it was physically impossible to drain certain property by a sewer because of the high ground intervening between such property and the sewer, it was said that a finding by the city council that such property was benefited was "a fraud on its face."¹⁷ Where council created an assessment district of a frontage of one hundred and forty feet and charged such district with the cost of what the council termed a street improvement, which consisted in reality of rebuilding a sewer under a street and running diagonally across it, it was held that the action of the council in determining that this property was benefited by such improvement and other property was not, with the result that the entire cost of such improvement was thrown upon such small district, was subject to review by the courts.¹⁸ This was said to be a very peculiar exercise of the power of creating assessment district and solitary in the experience of the court. Council determined to construct a sewer and determined what property would be benefited thereby. Subsequently, council decided to construct such sewer upon a larger scale and draining a greater territory, at an increased expense, without changing its determination as to the property benefited thereby. It was held that such determination of the council as to the property benefited was subject to review by the courts.¹⁹ The determination of the council that a sidewalk benefits adjoining property which is vacant and unoccupied, except for one small shanty and over which there is no travel, has been held subject to review.²⁰

§ 556. Grant of power to public officers or boards.

The legislature may grant to some local board or officer the power to determine what property is benefited by a public improvement.¹ This power may be granted to a board of super-

¹⁶ *Masters v. City of Portland*, 24 Ore. 161, 33 Pac. 540 [1893].

¹⁷ *Hanscom v. City of Omaha*, 11 Neb. 37 [1881].

¹⁸ *Clay v. City of Grand Rapids*, 60 Mich. 451, 27 N. W. 596 [1886].

¹⁹ *City of Columbus v. Storey*, 35 Ind. 97 [1871].

²⁰ *Corrigan v. Gage*, 68 Mo. 541 [1878].

¹ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; *Bauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; (*reversing District of Columbia v. Armes*, 8 App. D. C. 393

visors,² as in drainage and reclamation improvements. The determination of drainage supervisors is said not to be final where they fraudulently or arbitrarily omit lands from the assessment which are directly benefited and assessed lands which are not benefited.³ This discretion may be conferred upon a board of public works.⁴ The determination of such board is said to be final except in case of fraud,⁵ or fraud, mistake or transgression of authority,⁶ or fraud, demonstrable mistake of fact, or the application of an erroneous rule of law.⁷ If the statute provides for entering the finding of the board as to what property is benefited, upon the records of such board, it has been held that where the board has determined upon a sewer improvement and made a finding as to the property benefited, and subsequently changes

[1896]; *Bauman v. Ross*, 9 App. D. C. 260 [1896]; *Abbott v. Ross*, 9 App. D. C. 289 [1896]; *Shoemaker v. United States*, 147 U. S. 282, 37 L. 170, 13 S. 361 [1893]; *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184; *In re Change of Grade of Beale Street*, 39 Cal. 495 [1870]; *Appeal of Piper*, 32 Cal. 530 [1867]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688; *Clinton Township v. Teachout*, 150 Mich. 124, 111 N. W. 1052 [1907]; *Grand Rapids School Furniture Company v. City of Grand Rapids*, 92 Mich. 564, 52 N. W. 1028 [1892]; *Hoyt v. City of East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76 [1869]; *State v. Several Parcels of Land*. — Neb. —, 110 N. W. 753 [1907].

² *Lower King's River Reclamation District No. 531 v. McCullah*, 124 Cal. 175, 56 Pac. 887 [1899]; *Appeal of Piper*, 32 Cal. 530 [1867]; *Chambliss v. Johnson*, 77 Ia. 611, 42 N. W. 427 [1889].

³ *Fraser v. Mulaney*, 129 Wis. 377, 109 N. W. 139 [1906].

⁴ *Elliott v. City of Chicago*, 43 Ill. 293 [1868]; *Edwards v. Cooper*, 168 Ind. 54, 79 N. E. 1047 [1907]; *State ex rel. Hughes v. District Court of Ramsey County*, 95 Minn. 70, 103 N. W. 744 [1905]; *State ex rel. v. District Court of Ramsey County*, 33

Minn. 164, 22 N. W. 295 [1885]; *State of Minnesota ex rel. Cunningham v. Board of Public Works of the City of St. Paul*, 27 Minn. 442, 8 N. W. 161 [1881]; *Rogers v. City of St. Paul*, 22 Minn. 494 [1876].

⁵ *Elliott v. City of Chicago*, 43 Ill. 293 [1868].

⁶ *State v. Several Parcels of Land*, —Neb. —, 110 N. W. 753 [1907].

⁷ *State ex rel. Hughes v. District Court of Ramsey County*, 95 Minn. 70, 103 N. W. 744 [1905]; *State of Minnesota ex rel. Cunningham v. Board of Public Works of the City of St. Paul*, 27 Minn. 442, 8 N. W. 161 [1881]. The finding of such board as to what property is benefited is said to be "conclusive except in case of fraud or demonstrable mistake of fact." *State of Minnesota ex rel. Lewis v. District Court of Ramsey County*, 33 Minn. 164, 22 N. W. 295 [1885]; (Citing *State of Minnesota ex rel. Cunningham v. District Court of Ramsey County*, 29 Minn. 62, 11 N. W. 133 [1882]; *State of Minnesota ex rel. Cunningham v. Board of Public Works of the City of St. Paul*, 27 Minn. 442, 8 N. W. 161 [1881]; *Carpenter v. City of St. Paul*, 23 Minn. 232 [1876]; *Rogers v. City of St. Paul*, 22 Minn. 494 [1876].

such improvement by constructing a branch of such sewer and does not make a new finding as to the property benefited by the improvement as modified, such failure to make such finding is a jurisdictional defect.⁸ Such power may be conferred upon drainage commissioners.⁹ The exercise of this power by a board of drainage commissioners is said to be conclusive in the absence of fraud.¹⁰ Such power may be conferred upon park commissioners.¹¹ The power to determine what property is benefited by a levee may be conferred upon levee inspectors.¹² The power to determine what property is benefited, may be conferred upon county commissioners.¹³ The power to determine what property is benefited may be conferred upon a permanent board of street commissioners.¹⁴ The power to determine what property is benefited may be conferred upon the board of trustees of a village.¹⁵ It may be conferred upon a board of equalization.¹⁶

§ 557. Grant of power to commissioners or jury.

A common method of determining what property is benefited by an improvement is found in the statutes which provide that such action shall be determined by a body of persons appointed for that purpose, often by a court. Such persons are frequently called commissioners.¹ The action of the commissioners is some-

⁸ *Edwards v. Cooper*, 168 Ind. 54, 79 N. E. 1047 [1907].

⁹ *City of Joliet v. Spring Creek Drainage District*, 222 Ill. 441, 78 N. E. 836 [1906]; *Gauen v. Moredock and Ivy Landing Drainage District No. 1*, 131 Ill. 446, 23 N. E. 633 [1890]; *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66 [1906]; *Turnquist v. Cass County Drain Commissioners*, 11 N. D. 514, 92 N. W. 852 [1902]; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947 [1889]; *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545 [1887].

¹⁰ *Turnquist v. Cass County Drain Commissioners*, 11 N. D. 514, 92 N. W. 852 [1902].

¹¹ *Genet v. City of Brooklyn*, 99 N. Y. 296, 1 N. E. 777 [1885].

¹² *McDermott v. Mathis*, 21 Ark. 60 [1860].

¹³ *Bowen v. Hester*, 143 Ind. 511, 41 N. E. 330 [1895].

¹⁴ *Lincoln v. Board of Street Commissioners of the City of Boston*, 176 Mass. 210, 57 N. E. 356 [1900].

¹⁵ *Crawford v. People ex rel. Rumsey*, 83 Ill. 557 [1876]; *People of the State of New York ex rel. Gage v. Lohnas*, 54 Hun. (N. Y.) 604, 8 N. Y. Supp. 104 [1889].

¹⁶ *State ex rel. Ashby v. Three States Lumber Co.*, 198 Mo. 430, 95 S. W. 333 [1906].

¹ *Bauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; (reversing *District of Columbia v. Armes*, 8 App. D. C. 393 [1896]; *Bauman v. Ross*, 9 App. D. C. 260 [1896]; *Abbott v. Ross*, 9 App. D. C. 289 [1896]); *Reclamation District No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676 [1884]; *Trigger v. Drainage District*, 193 Ill. 230, 61 N. E. 1114; *Allen v. City of Chicago*, 176 Ill. 113, 52 N. E. 33 [1898]; *Latham v. Village of Wilmette*, 168 Ill. 153, 48 N. E.

times said to be conclusive.² This is too broad a statement in view of the actual decisions.³ Under a statute authorizing commissioners to assess property benefited "according to your wisdom and discretion," it was held that arbitrary power was not given, but that such words meant according to law and justice.⁴ It is said that the action of the commissioners is conclusive except in case of fraud.⁵ It has been held that the action of commissioners in determining what land is benefited, cannot be reviewed unless their action was so negligent or improper as to be in effect fraudulent.⁶ Under most statutes some means is provided for reviewing their determination and setting it aside if clearly erroneous.⁷ The persons appointed especially to determine what lands are benefited are sometimes known as viewers,⁸ or assessors.⁹ Under some statutes it is left for some court to determine

311 [1897]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894]; *The People ex rel. Samuel, Sr., v. Cooper*, 139 Ill. 461, 29 N. E. 872 [1893]; *Wright v. City of Chicago*, 48 Ill. 285 [1868]; *Zumbro v. Parnin*, 141 Ind. 430, 40 N. E. 1085 [1895]; *Atchison, Topeka & Santa Fe Railroad Company v. Peterson*, 5 Kan. App. 103, 48 Pac. 877 [1897]; *City of St. Louis v. Brown*, 155 Mo. 545, 56 S. W. 298 [1899]; *St. Louis v. Excelsior Brewing Co.*, 96 Mo. 677, 10 S. W. 477 [1888]; *State, Aldridge, Pros. v. Essex Public Road Board*, 46 N. J. L. (17 Vr.) 126 [1884]; *State, Johnston, Pros v. Inhabitants of the City of Trenton*, 43 N. J. L. (14 Vr.) 166 [1881]; *State, Board of Chosen Freeholders of the County of Hudson, Pros. v. Paterson Avenue and Secaucus Road Commissioners*, 41 N. J. L. (12 Vr.) 83 [1879]; *State, Hunt, Pros. v. Mayor and Common Council of the City of Rahway*, 39 N. J. L. (10 Vroom) 646 [1877]; *Dyker Meadow Land & Improvement Co. v. Cook*, 159 N. Y. 6, 53 N. E. 690; *LeRoy et al. v. Mayor, Aldermen and Commonalty of the City of New York*, 20 John Sup. Ct. 430 [1823]; *Murray v. Graham*, 6 Paiges Chan. Rep. 622 [1837]; *In the Matter of Extension of Church Street in New York*, 49 Barb. 455

[1867]; *In the Matter of Westlake Avenue, Seattle*, 40 Wash. 144, 82 Pac. 279 [1905]; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947 [1889].

² *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894]; *Bigelow v. City of Chicago*, 90 Ill. 49 [1878].

³ *City of St. Joseph v. Crowther*, 142 Mo. 155, 43 S. W. 786 [1897].

⁴ *Keighley's Case*, 10 Rep. 139 a. b.

⁵ *Latham v. Village of Wilmette*, 168 Ill. 153, 48 N. E. 311 [1897]; *People ex rel. Samuel, Sr., v. Cooper*, 139 Ill. 461, 29 N. E. 872 [1893]; *Wright v. City of Chicago*, 48 Ill. 285 [1868].

⁶ *Allen v. City of Chicago*, 176 Ill. 113, 52 N. E. 33 [1898].

⁷ *Hoffeld v. City of Buffalo*, 130 N. Y. 387; 29 N. E. 747 [1892]; *Copeutt v. City of Yonkers*, 83 Hun. (N. Y.) 178, 31 N. Y. S. 659 [1894]; *In re Cedar Park*, 1 How. Pr. N. S. 257.

⁸ *Extension of Hancock Street*, 18 Pa. St. (6 Harr.) 26 [1851].

⁹ *In the Matter of the Petition of Cruger to Vacate an Assessment*, 84 N. Y. 619 [1881]; *People ex rel. Connelly v. Reis*, 96 N. Y. S. 597, 109 App. Div. 748 [1905]; *People ex rel. Tietjen v. Reis*, 96 N. Y. S. 601, 109 App. Div. 919 [1905].

in the first instance what land is benefited by the proposed improvement.¹⁰ Provisions of this sort are most frequently found in drainage and reclamation improvements. Under some statutes the question of what land is benefited by the improvement is referred to a jury.¹¹ The jury cannot lay out an assessment district arbitrarily, without reference to the existence of benefits as a fact.¹²

§ 558. Method of reviewing determination as to land benefited.

The statute may provide a special method of testing the correctness of the determination of the legislature, or public corporation, or official, in deciding that the lands included in the assessment district are benefited by the improvement. If this question is not raised in the manner pointed out by statute, the property owner is regarded as waiving such objection.¹ It cannot thereafter be raised in a collateral proceeding.² Thus, if it is held that the proper method of testing the right of drainage commissioners to annex certain lands to a drainage district is by a proceeding in quo warranto to compel them to show by what right they have annexed such territory, the validity of such annexation cannot

¹⁰ *Stiewel v. Fencing District No. 6 of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1903]; *Gauen v. Moredock and Ivy Landing Drainage District No. 1*, 131 Ill. 446, 23 N. E. 633 [1890]; *State ex rel. Stotts v. Wall*, 153 Mo. 216, 54 S. W. 465 [1899].

¹¹ *Drainage Commissioners of District No. 3, v. Illinois Central Railroad Company*, 158 Ill. 353, 41 N. E. 1073 [1895]; *Kelly v. City of Chicago*, 148 Ill. 90, 35 N. E. 752 [1894]; *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045 [1900]; *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860 [1898]; *Michael v. City of St. Louis*, 112 Mo. 610, 20 S. W. 666 [1892].

¹² *State ex rel. Greeley v. City of St. Louis*, 1 Mo. App. 503 [1876]; (except possibly in the case of abutting property).

¹ *Haughwout v. Raymond*, 148 Cal. 311, 83 Pac. 53 [1905]; *Dun-*

can v. Ramish, 142 Cal. 686, 76 Pac. 661 [1904]; *Spalding v. City and County of Denver*, 33 Colo. 172, 80 Pac. 126 [1904]; *Trigger v. Drainage District No. 1*, 193 Ill. 230, 61 N. E. 1114 [1901]; *Commissioners of Mason and Tazewell Special Drainage District v. Griffin*, 134 Ill. 330, 25 N. E. 995 [1891]; *Bodman v. Lake Fork Special Drainage District*, 132 Ill. 439, 24 N. E. 630 [1891]; *The People ex rel. Barber v. Chapman*, 127 Ill. 387, 19 N. E. 872 [1890]; *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902]; *Clinton Township v. Teachout*, 150 Mich. 124, 111 N. W. 1052 [1907]; *Smith v. Carlow*, 114 Mich. 67, 72 N. W. 22 [1897].

² *Haughwout v. Raymond*, 148 Cal. 311, 83 Pac. 53 [1905]; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904]; *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902].

be tested subsequently by a bill in equity.³ On the other hand, if no means is provided by which the correctness of the determination of the legislature, public corporation or public official in including certain lands in the assessment district is to be ascertained, such questions may be raised at the first hearing given to the property owner. Thus, in the absence of any special proceeding of this sort the question of benefits may be determined on confirmation.⁴ The method whereby such question may be raised seems to be largely in the discretion of the legislature. It has been held, that where at the time a drainage district was established, a means was given for determining directly the question whether certain lands could properly be included in such district, and such question could also be raised after the assessment was levied as a defense to such assessment, a subsequent change of statute taking away the right to raise such question after the assessment has been levied as a defense thereto, is valid.⁵ Under some statutes, which provide that some local officer or board shall determine what land is benefited by the proposed improvement, it is further provided that by a proceeding in the nature of an appeal from the decision of such officer, such question may be reviewed by a designated court.⁶

§ 559. By whom correctness of determination can be questioned.

The objection that property, which is benefited by an improvement and should have been assessed therefor, is omitted, is one which can be made only by a property owner who is able to show that the assessment levied against his property is by reason of

³ *Bodman v. Lake Fork Special Drainage District*, 132 Ill. 439, 24 N. E. 630 [1891]; *Smith v. Carlow*, 114 Mich. 67, 72 N. W. 22 [1897]. See to the same effect *People ex rel. Wood v. Jones*, 137 Ill. 35, 27 N. E. 294 [1892]; *Evans v. Lewis*, 121 Ill. 478, 13 N. E. 246 [1889]; *Osborn v. People*, 103 Ill. 224 [1882].

⁴ *Shanley v. People ex rel. Goedtner*, 225 Ill. 579, 80 N. E. 277 [1907]; *People ex rel. Selby v. Dver*, 205 Ill. 575, 69 N. E. 70 [1903]; *Edwards v. City of Chicago*, 140 Ill. 440, 30 N. E. 350 [1893].

⁵ *Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510 [1902].

⁶ *Chambliss v. Johnson*, 77 Iowa, 611, 42 N. W. 427 [1889]; *Beals v. James*, 173 Mass. 591, 54 N. E. 245 [1899]; *State ex rel. Greeley v. City of St. Louis*, 1 Mo. App. 503 [1876]; *Hart v. City of Omaha*, 74 Neb. 836, 105 N. W. 546 [1905]; *LeRoy v. Mayor, Aldermen and Commonalty of the City of New York*, 20 John Sup. Ct. 430, 11 Am. Dec. 289 [1823]; *In the Matter of the Contract for the Fifth Avenue Sewer in the City of Pittsburg*, (Pa.) 4 Brewster 364 [1870]; *Kirkpatrick v. Taylor*, 118 Ind. 329, 21 N. E. 20 [1888].

such omission greater than it would have been had such property been included in the assessment.¹ The objection that land which is not benefited by an improvement is assessed for the cost thereof, is one which can be made only by a party prejudiced by the inclusion of such land.² The owner of property, the benefit to which is not denied, cannot object that other property owners, whose property has not been benefited by the improvement, have been assessed therefor.³ If it is erroneous to include such other property, it is an error which operates to the benefit and not to the prejudice of the property owner in question.⁴

§ 560. Assessment district consisting of property benefited in fact.

The legislature may not attempt to exercise its discretion in determining what land is benefited, and may not attempt to describe the assessment district specifically, but may provide that land benefited by the improvement shall be assessed therefor, leaving it to be determined as a question of fact what land is in fact so benefited. Such method of indicating and describing the land which is to be subject to an assessment has been held to be valid.¹ While other methods of describing the land to be assessed

¹ Balfe v. Bell, 40 Ind. 337 [1872]; State, Humphreys, Pros. v. Mayor and Council of the City of Bayonne, 60 N. J. L. (31 Vr.) 406, 38 Atl. 761 [1897]; Davis v. City of Newark, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891]; State, Righter, Pros. v. Mayor and Common Council of the City of Newark, 45 N. J. L. (16 Vr.) 104 [1883].

² Piper's Appeal in the Matter of Widening Kearney Street, 32 Cal. 530 [1867]; Farrell v. West Chicago Park Commissioners, 182 Ill. 250, 55 N. E. 325 [1899]; Coreoran v. Board of Aldermen of Cambridge, — Mass. —, 85 N. E. 155 [1908]; Johnson v. Duer, 115 Mo. 366, 21 S. W. 800 [1892].

³ Piper's Appeal in the Matter of Widening Kearney Street, 32 Cal. 530 [1867]; Farrell v. West Chicago Park Commissioners, 182 Ill. 250, 55 N. E. 325 [1899]; White v. City of Alton, 149 Ill. 626, 37 N. E. 96

[1894]; Grimes v. Coe, 102 Ind. 406, 1 N. E. 735 [1885]; Johnson v. Duer, 115 Mo. 366, 21 S. W. 800 [1892].

⁴ White v. City of Alton, 149 Ill. 626, 37 N. E. 96 [1894]; Grimes v. Coe, 102 Ind. 406, 1 N. E. 735 [1885].

¹ Cribbs v. Benedict, 64 Ark. 555, 44 S. W. 707 [1897]; Piper's Appeal in the Matter of Widening Kearney Street, 32 Cal. 530 [1867]; City of Denver v. Kennedy, 33 Colo. 80, 80 Pac. 122 [1904]; 80 Pac. 467, [1905]; Hungerford v. City of Hartford, 39 Conn. 279 [1872]; Clapp v. City of Hartford, 35 Conn. 66 [1868]; Farrell v. West Chicago Park Commissioners, 182 Ill. 250, 55 N. E. 325 [1899]; Holdom v. City of Chicago, 169 Ill. 109, 48 N. E. 164 [1897]; Chicago, Rock Island and Pacific Railway Company v. City of Chicago, 139 Ill. 573, 28 N. E. 1108 [1893]; Murphy v. City of Peoria, 119 Ill. 509, 9 N. E. 895 [1888];

for a street improvement are more common,² the land to be assessed for a street improvement is very often, especially in recent statutes, defined as the land benefited by the improvement.³ This description is also used in the case of land to be assessed for

Shirk v. Hupp, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490 [1906]; *Culbertson v. Knight*, 152 Ind. 121, 52 N. E. 700 [1898]; *Nevins and Otter Creek Township Draining Company v. Alkire*, 36 Ind. 189 [1871]; *City of Columbus v. Storey*, 35 Ind. 97 [1871]; *City of New Orleans praying for opening of Casacaloo and Moreau Streets*, 20 La. Ann. 497 [1868]; *Atkins v. City of Boston*, 188 Mass. 77, 74 N. E. 292 [1905]; *Holt v. City Council of Somerville*, 127 Mass. 408 [1879]; *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]; *Warren v. City of Grand Haven*, 30 Mich. 24 [1874]; *Hart v. City of Omaha*, 74 Neb. 836, 105 N. W. 546 [1905]; *Durrell v. City of Woodbury*, — N. J. Sup. —, 65 Atl. 198 [1906]; *North Jersey Street Railway Company v. Mayor and Aldermen of Jersey City*, 68 N. J. L. (39 Vr.) 140, 52 Atl. 300 [1902]; *DeWitt v. City of Elizabeth*, 56 N. J. L. (27 Vroom) 119, 27 Atl. 801 [1893]; *State, Muller, Pros. v. Mayor and Council of the City of Bayonne*, 55 N. J. L. (26 Vr.) 102, 25 Atl. 267 [1892]; *State, Schulting, Pros. v. City of Passaic*, 47 N. J. L. (18 Vr.) 273 [1885]; *State, Henderson, Pros. v. Mayor, etc., of Jersey City*, 41 N. J. L. (12 Vroom) 489 [1879]; *State, Hunt, Pros. v. Mayor and Common Council of the City of Rahway*, 39 N. J. L. (10 Vroom) 646 [1877]; *State, Peters, Pros. v. Mayor and Common Council of City of Newark*, 31 N. J. L. (2 Vr.) 360 [1865]; *State, Culver, Pros. v. Town of Bergen in the County of Hudson*, 29 N. J. L. (5 Dutch.) 266 [1861]; *People of the State of New York ex rel. Lehigh Valley Railway Company v.*

City of Buffalo, 147 N. Y. 675, 42 N. E. 344 [1895]; *In the Matter of Common Council of the City of Amsterdam*, 126 N. Y. 158, 27 N. E. 272 [1891]; *Kelly v. City of Cleveland*, 34 O. S. 468 [1878]; *St. Benedict's Abbey v. Marion County*, — Or. —, 93 Pac. 231 [1908]; *Extension of Hancock Street*, 18 Pa. St. (6 Harr.) 26 [1851]; *Johnson v. City of Tacoma*, 41 Wash. 51, 82 Pac. 1092 [1905].

² See § 620 *et seq.*

³ *Piper's Appeal in the Matter of Widening Kearney Street*, 32 Cal. 530 [1867]; *Holdom v. City of Chicago*, 169 Ill. 109, 48 N. E. 164 [1897]; *Chicago, Rock Island and Pacific Railway Company v. City of Chicago*, 139 Ill. 573, 28 N. E. 1108 [1893]; *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895 [1888]; *Shirk v. Hupp*, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490 [1906]; *City of New Orleans praying for opening of Casacaloo and Moreau Streets*, 20 La. Ann. 497 [1868]; *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]; *Durrell v. City of Woodbury*, — N. J. Sup. —, 65 Atl. 198 [1906]; *State, Schulting, Pros. v. City of Passaic*, 47 N. J. L. (18 Vroom) 273 [1885]; *State, Van Horne, Pros. v. Town of Bergen*, 30 N. J. L. (1 Vr.) 307 [1863]; *State, Culver, Pros. v. Town of Bergen in the County of Hudson*, 29 N. J. L. (5 Dutch.) 266 [1861]; *In the Matter of Common Council of the City of Amsterdam*, 126 N. Y. 158, 27 N. E. 272 [1891]; *Kelly v. City of Cleveland*, 34 O. S. 468 [1878]; *Extension of Hancock Street*, 18 Pa. St. (6 Harr.) 26 [1851]; *Johnson v. City of Tacoma*, 41 Wash. 51, 82 Pac. 1092 [1905].

a viaduct,⁴ or a park,⁵ or boulevard.⁶ Land to be assessed for a sewer,⁷ or a ditch,⁸ is very often described in this way. Land to be assessed for improving the navigation of a stream has thus been described.⁹ Even if the statute describes the property to be assessed as the property "benefited" by the improvement, the context may restrict the meaning of the term "benefited."¹⁰ Thus, if such provision occurs in the statute which provides for the assessment of benefits and damages in one proceeding, it is held that since only the property through which the improvement passes can ordinarily be damaged thereby, and since the property which may be benefited is apparently regarded by the legislature as being the same as that which may be damaged, only the property abutting on the line of the improvement is to be regarded as benefited and as subject to assessment.¹¹

§ 561. Land benefited by street.

The property which is benefited by a street improvement is ordinarily the property abutting on such street which is rendered easier of access by such improvement.¹ Property which is benefited by the construction of a street or road may be assessed therefor.² The fact that the property assessed does not abut upon the street does not necessarily prevent it from being benefited

⁴ *City of Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122 [1904]; 80 Pac. 467 [1905].

⁵ *Holt v. City Council of Somerville*, 127 Mass. 408 [1879].

⁶ *Hart v. City of Omaha*, 74 Neb. 836, 105 N. W. 546 [1905].

⁷ *Hungerford v. City of Hartford*, 39 Conn. 279 [1872]; *Clapp v. City of Hartford*, 35 Conn. 66 [1868]; *Atkins v. City of Boston*, 188 Mass. 77, 74 N. E. 292 [1905]; *Warren v. City of Grand Haven*, 30 Mich. 24 [1874]; *Warren v. City of Grand Haven*, 30 Mich. 24 [1874]; *DeWitt v. City of Elizabeth*, 56 N. J. L. (27 Vroom) 119, 27 Atl. 801 [1893]; *State, Henderson v. Jersey City*, 41 N. J. L. (12 Vroom) 489.

⁸ *Cribbs v. Benedict*, 64 Ark. 553, 44 S. W. 707 [1897]; *Culbertson v. Knight*, 152 Ind. 121, 52 N. E. 700

[1898]; *City of Columbus v. Storey*, 38 Ind. 97 [1871]; *Nevins and Otter Creek Township Draining Company v. Alkire*, 36 Ind. 189 [1871].

⁹ *People of the State of New York ex rel. Lehigh Valley Railway Company v. City of Buffalo*, 147 N. Y. 675, 42 N. E. 344 [1895].

¹⁰ *Park Avenue Sewers, Appeal of Parker*, 169 Pa. St. 433, 32 Atl. 574 [1895].

¹¹ *Park Avenue Sewers, Appeal of Parker*, 169 Pa. St. 433, 32 Atl. 574 [1895]; *Witman v. City of Reading*, 169 Pa. St. 375, 32 Atl. 576 [1895]; *Harriott Avenue*, 24 Pa. Super. Ct. 597 [1904]; *Graffius' Run*, 31 Pa. Super. Ct. 638 [1906].

¹ See § 301; § 657.

² *Board of Commissioners of Montgomery County v. Fullen*, 111 Ind. 410, 12 N. E. 298 [1887].

thereby.³ The fact that property is contiguous to a street which is improved, does not necessarily establish as a matter of law that it is benefited by such improvement.⁴ If the grade of a street has been so changed in approaching a viaduct, that it is twelve feet above the adjoining property, it has been said that said adjoining property is not benefited by such improvement.⁵ The mere fact, however, that certain land abuts upon a given street, does not as a matter of law establish the existence of a benefit to such property by reason of the improvement of such street in the absence of any legislative determination that such property is benefited.⁶ Land which fronts upon an improved street may be benefited by the improvement of a street in the rear of such land, whereby access can be obtained from another direction.⁷ This is true, even if the street in the rear of this property is at a grade considerably below that of the front of such land.⁸ The fact that land does not abut upon a given street and does not receive direct access from such street, is not conclusive as to the fact that such land is not benefited by such street.⁹ If property in a certain section can have access to the heart of a city, only by means of a certain street which crosses a ravine filled with car tracks, an assessment for the improvement of such street may be made upon the land which will receive access to the business part of the city by means of such street.¹⁰ Property at the end of a street to be improved is benefited by such improvement and may be assessed therefor.¹¹ Whether such land is included in the legislative description of the land benefited and to be assessed, is a question depending upon the wording of the statute. Property at the end of the street and at right angles to the street line is not regarded as "fronting" upon said street, within the meaning of the statute authorizing the assessment of property fronting upon

³ *Shurtleff v. City of Chicago*, 190 Ill. 473, 60 N. E. 870 [1901]; *Louisville and Nashville Railroad Company v. City of East St. Louis*, 134 Ill. 656, 25 N. E. 962 [1891]; *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894].

⁴ *Holdom v. City of Chicago*, 169 Ill. 109, 48 N. E. 164 [1897].

⁵ *McFarlane v. City of Chicago*, 185 Ill. 242, 57 N. E. 12 [1900].

⁶ *Holdom v. City of Chicago*, 169 Ill. 109, 48 N. E. 164 [1897].

⁷ *Johnson v. City of Tacoma*, 41 Wash. 51, 82 Pac. 1092 [1905].

⁸ *Johnson v. City of Tacoma*, 41 Wash. 51, 82 Pac. 1092 [1905].

⁹ *Shurtleff v. City of Chicago*, 190 Ill. 473, 60 N. E. 870 [1901].

¹⁰ *State ex rel. Hughes v. District Court of Ramsey County*, 95 Minn. 70, 103 N. W. 744 [1905].

¹¹ *Brooks v. City of Chicago*, 168 Ill. 60, 48 N. E. 136 [1897]; *Helm v. Witz*, 35 Ind. App. 131, 73 N. E. 846 [1904].

the street improvement.¹² A tract of land on either side of a river on a part of which a canal was situated, and across which canal a brick building had been built, was held to be benefited by the paving of a street which crosses said river on a bridge.¹³ If the property which it is sought to assess for a street improvement is a corner lot, the street in front of which has already been improved, and it is sought to assess such lot for the improvement of the street along the side thereof, the question is presented whether such lot can properly be said to receive from the construction of such street any benefit in addition to that which it has already received from the construction of the street in front. There has been but little specific discussion of this question, as it seems to be generally assumed where it is presented that a benefit is conferred by improvements of this sort.¹⁴ Still clearer is the right of the city to assess for an abutting street, where another abutting street has been provided for by an ordinance which has been introduced in council, but not acted upon.¹⁵ The questions on the subject of corner lots, which have been presented to the courts, concern the method

¹² *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904].

¹³ *Powers v. City of Grand Rapids*, 98 Mich. 393, 57 N. W. 250 [1894]. (In this case it was possible to get access to such building from one of the footways of the bridge.)

¹⁴ *Wolf v. City of Keokuk*, 48 Ia. 129 [1878]; *Morrison v. Hershire*, 32 Ia. 271 [1871]; *Gleason v. Barnett*, 106 Ky. 125, 50 S. W. 67 [1899]; *Fox v. Middlesborough Town Company*, 96 Ky. 262, 28 S. W. 776 [1894]; *Broadway Baptist Church v. McAtee*, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871]; *Allen v. Krenning*, 23 Mo. App. 561 [1886]; *Cossitt Land Co. v. Neuscheler*, — N. J. Sup. —, 60 Atl. 1128 [1905]; *City of Cincinnati v. James*, 55 O. S. 180, 44 N. E. 925 [1896]; *City of Toledo v. Sheill*, 53 O. S. 447, 30 L. R. A. 598, 42 N. E. 323 [1895]; *Sandroek v. Columbus*, 51 O. S. 317, 42 N. E. 255 [1894]; *Findlay v. Frey*, 51 O. S. 390, 38 N. E. 114 [1894]; *Haviland v. City of Columbus*, 50 O. S.

471, 34 N. E. 679 [1893]; *Metcalf v. Carter*, 19 Ohio C. C. 196 [1900]; *Tompkins v. Village of Norwood*, 18 Ohio C. C. 883 [1897]; *Betz v. City of Canton*, 18 Ohio C. C. 676 [1893]; *Calkins v. City of Toledo*, 12 Ohio C. C. 202 [1896]; *Manns v. City of Cincinnati*, 10 Ohio C. C. 549 [1895]; *Baker v. Schott*, 10 Ohio C. C. 81 [1894]; *Rooney v. City of Toledo*, 9 Ohio C. C. 267 [1894]; *Gibson v. City of Cincinnati*, 9 Ohio C. C. 243 [1894]; *Barney v. City of Dayton*, 8 Ohio C. C. 480 [1894]; *Frey v. City of Findlay*, 7 Ohio C. C. 311 [1893]; *Squier v. City of Cincinnati*, 5 Ohio C. C. 400 [1891]; *Ehni v. City of Columbus*, 3 Ohio C. C. 494 [1889]; *Clements v. Village of Norwood*, 2 Ohio N. P. 274 [1895]. See also *Cossitt Land Co. v. Neuscheler*, — N. J. Sup. —, 60 Atl. 1128 [1905].

¹⁵ *In re Beechwood Avenue*, Appeal of O'Mara, 194 Pa. St. 86, 45 Atl. 127 [1899].

of estimating the assessable frontage of such lot upon the side street,¹⁶ and the method of apportioning the cost of the improvement upon such lot.¹⁷ These questions are discussed elsewhere.

§ 562. Land benefited by sidewalk.

The property benefited by the construction of a sidewalk is ordinarily that property which abuts on such walk and to which access is given thereby.¹ Whether a corner lot in front of which a sidewalk has been constructed can receive a benefit from a sidewalk constructed along the side of such lot, so that it can be assessed for the cost thereof, is a question upon which there is but little specific authority. It seems to be assumed that a corner lot, under such circumstances, can receive a benefit from the construction of a sidewalk along its side.²

§ 563. Land benefited by sewer.

In assessments for the construction of sewers, it is usually provided that land benefited by the sewer shall be assessed for the construction thereof. This includes in the assessment district, land which receives an especial benefit from the construction of the sewer,¹ and ordinarily means the land which can be drained by the sewer, for the cost of which the assessment is levied.² It is accordingly improper to add the cost of all the sewers constructed in a city in a given year, and pro rate the same upon

¹⁶ See § 704.

¹⁷ See § 704.

¹ See § 323.

² *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889]; *Morrison v. Hershire*, 32 Ia. 271 [1871]; *City of Lawrence v. Killam*, 11 Kan. 499 [1873]; *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014 [1895]; *Tripp v. City of Yankton*, 10 S. D. 516, 74 N. W. 447 [1898]; *Sands v. City of Richmond*, 72 Va. (31 Grattan) 571, 31 Am. Rep. 742 [1879].

¹ *Hungerford v. City of Hartford*, 39 Conn. 279 [1872]; *Clapp v. City of Hartford*, 35 Conn. 66 [1868]; *City of Chicago v. Adeock*, 168 Ill. 221, 48 N. E. 155 [1897]; *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171 [1898]; *Appeal of*

Wheeler, 80 N. Y. S. 204, 39 Misc. Rep. 484 [1902].

² *Walker v. City of Chicago*, 202 Ill. 531, 67 N. E. 369 [1903]; *Duane v. City of Chicago*, 198 Ill. 471, 64 N. E. 1033 [1902]; *Mason v. City of Chicago*, 178 Ill. 499, 53 N. E. 354 [1899]; *Taylor v. City of Haverhill*, 192 Mass. 287, 78 N. E. 475 [1906]; *Atkins v. City of Boston*, 188 Mass. 77, 74 N. E. 292 [1905]; *Butler v. City of Worcester*, 112 Mass. 541 [1873]; *Warren v. City of Grand Haven*, 30 Mich. 24 [1874]. "A lot derives special benefit from a sewer, whether main or lateral, when it is so situated and constructed (as) that connection can be made therewith." *Bennett v. City of Emmetsburg*. — Ia. —, 115 N. W. 582, 589 [1908].

all the land fronting upon said sewer.³ Land is benefited by a sewer in the contemplation of the law, when such land may be drained thereby.⁴ Land which is drained by a sewer may be assessed, even if the city water works system has not yet been extended to such land.⁵ The claim that the property assessed it not benefited by the sewer is usually based upon one of two grounds. It may be claimed that such property is not and cannot be drained by the sewer in question; or it may be claimed that the property which it is sought to assess, is already supplied with sufficient drainage. Land which is not and cannot be drained by a sewer cannot be assessed therefor.⁶ If certain land is not permitted under the existing law to drain into a sewer, such land cannot be assessed for the cost thereof.⁷ Thus, if only land in a drainage district, or sewer district, can drain into a given sewer, land outside of such district cannot be assessed.⁸ It is proper to exclude from a sewer district, land which the owner thereof is not permitted by law to connect with such sewer.⁹ The slope of the ground and the location of the sewer may be such that certain land cannot drain into it. It is ordinarily held that such land cannot be assessed for such sewer.¹⁰ Land which it is sought to assess, may be so situated that the owner can connect it with the sewer, but the sewer may be constructed at such level that such land will not drain into the sewer at its present elevation. It is, of course, possible for the owner of such land at greater or less expense to grade it so that it will so drain. Under such facts it is held in some jurisdictions, that the owner of such land is liable for an assessment for the construction of such sewer.¹¹ It

³ *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175 [1901].

⁴ *Mason v. City of Chicago*, 178 Ill. 499, 53 N. E. 354 [1899].

⁵ *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893].

⁶ *Edwards v. City of Chicago*, 140 Ill. 440, 30 N. E. 350 [1893]; *Gilmore County Clerk v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1883]; *City of St. Joseph ex rel. Danaher v. Dillon*, 61 Mo. App. 317 [1895]; *Wewell v. City of Cincinnati*, 45 O. S. 407, 15 N. E. 196 [1887].

⁷ *Clark v. City of Chicago*, 214 Ill. 318, 73 N. E. 358 [1905]; *Duane v. City of Chicago*, 198 Ill. 471, 64 N.

E. 1033 [1902]; *City of Chicago v. Adeock*, 168 Ill. 221, 48 N. E. 155 [1897].

⁸ *Clark v. City of Chicago*, 214 Ill. 318, 73 N. E. 358 [1905]; *Duane v. City of Chicago*, 198 Ill. 471, 64 N. E. 1033 [1902]; *City of Chicago v. Adeock*, 168 Ill. 221, 48 N. E. 155 [1897].

⁹ *Duane v. City of Chicago*, 198 Ill. 471, 64 N. E. 1033 [1902].

¹⁰ *Hanscom v. City of Omaha*, 11 Neb. 37, 7 N. W. 739 [1881].

¹¹ *Hildebrand v. Toledo*, 27 Ohio C. C. R. 427 [1905]; *City of Toledo v. Ford*, 20 Ohio C. C. 290 [1900]; *City of Toledo for the use of Gates v.*

has been suggested that if he has any remedy, it is an action at law for damages for the change of the grade.¹² In other jurisdictions, it is held that land which is situated below the level of the sewer so that it cannot drain into it cannot be assessed.¹³ Land which it is sought to assess may be separated from the sewer by intervening private property, through which a lateral sewer cannot be carried without the consent of the owner thereof. Such property cannot be assessed for such sewer.¹⁴ The fact that certain property is situated three-fourths of a mile from the sewer, does not establish as a matter of law that such property is not benefited thereby.¹⁵ Land which could be drained by a sewer according to the recorded plat existing when the assessment was made, is subject to assessment as an entirety, although the owner has sold the part abutting the sewer so that his land cannot be drained without passing over the property of his grantee.¹⁶ It has, however, been held that land so situated that it cannot be connected with the sewer except by a drain passing through private ground belonging to another person, may be assessed for the cost of such sewer.¹⁷ However, the owner of the land which can drain into such sewer cannot complain because other land, which cannot drain into such sewer, is included in the assessment.¹⁸ A property owner who connects his land with a sewer by means of a drain is benefited thereby, if he has a fixed license to make such connection,¹⁹ but not if he has merely a revocable license to connect with the private drain of another, by means of which his land connects with the sewer.²⁰ Conversely, a property owner who has been assessed for a sewer has a right to connect his land therewith.²¹ It is sometimes sought to assess land which may be drain-

Kohn, 2 Ohio N. P. 47 [1895]; Robinson v. City of Milwaukee, 61 Wis. 585, 21 N. W. 610 [1884].

¹² Robinson v. City of Milwaukee, 61 Wis. 585, 21 N. W. 610 [1884].

¹³ People ex rel. Locke v. Common Council of the City of Rochester, 5 Lansing (N. Y.) 11 [1871].

¹⁴ State ex rel. McKune v. District Court of Ramsey County, 90 Minn. 540, 97 N. W. 425 [1903]; State, New Jersey Railroad and Transportation Co., Pros. v. City of Elizabeth, 37 N. J. L. (8 Vr.) 330; People ex rel. Marvin v. City of Brooklyn, 23 Barb. (N. Y.) 166 [1856].

¹⁵ Kelly v. City of Chicago, 148 Ill. 90, 35 N. E. 752 [1894].

¹⁶ City of Atchison v. Price, 45 Kan. 296, 25 Pac. 605.

¹⁷ Heman v. Schulte, 166 Mo. 409, 66 S. W. 163 [1901]. At least in a collateral proceeding.

¹⁸ Johnson v. Duer, 115 Mo. 366, 21 S. W. 800 [1892].

¹⁹ Butler v. City of Worcester, 112 Mass. 541 [1873].

²⁰ Fairbanks v. Mayor and Aldermen of Fitchburg, 132 Mass. 42 [1882].

²¹ Miller v. City of Toledo, 12 Ohio C. C. 706 [1894].

ed by a given sewer if the public authorities shall subsequently construct branch sewers so as to drain such land. If the construction of such branch sewers is optional with the public authorities, the owner of such land has no certain right to the use of such sewer. Accordingly, such land cannot be assessed therefor.²² It is often held that if land is properly drained by an existing sewer, it receives no benefit from the construction of another sewer, and therefore cannot be assessed for such new sewer.²³ This result is often reached through statutory provisions which provide for the exemption of property which is already drained.²⁴ Under such theory of the law the question of what is existing sufficient drainage becomes material. Whether land is supplied with drainage or not is a question of fact.²⁵ An existing sewer, without a proper outlet, cannot be said to be sufficient drainage.²⁶ A pipe intended to drain a pond of water is not sufficient drainage as a sewer, although it is of sufficient size.²⁷ The fact that the land in question has a sufficient surface drainage and is at the time unimproved, does not constitute sufficient drainage for sewer purposes, within the meaning of the statute.²⁸ Land

²² *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096 [1900]; *Title Guarantee and Trust Co. v. City of Chicago*, 162 Ill. 505, 44 N. E. 832 [1896]; *Edwards v. City of Chicago*, 140 Ill. 440, 30 N. E. 350 [1893]; *Vreeland v. Mayor, etc., of Bayonne*, 58 N. J. L. (29 Vr.) 126, 32 Atl. 68 [1895]; *State, King, Pros. v. Reed*, 43 N. J. L. (14 Vr.) 180 [1881]. That such land can be assessed: *Coates v. Nugent*, — Kan. —, 92 Pac. 597.

²³ *State, Fiaere, Pros. v. Mayor and Common Council of Jersey City*, 34 N. J. L. (5 Vr.) 277 [1870]; At least it cannot be assessed at the same rate per front foot as land not already drained by a sewer: *People ex rel. Keim v. Desmond*, 186 N. Y. 232, 78 N. E. 857 [1906]; (*reversing*, 97 N. Y. S. 795 [1906]); In the *Matter of the Petition of the Rector, Church Wardens and Vestrymen of the Church of the Holy Sepulcher, to vacate an assessment*, 61 Howard (N. Y.) 315 [1880];

Potter v. Village of Norwood, 21 Ohio C. C. 461 [1901]; *Toledo v. Potter*, 19 Ohio C. C. 661 [1893]; *Miller v. City of Toledo*, 12 Ohio C. C. 706 [1894]; *Miller v. Toledo*, 7 Ohio N. P. 477 [1900]; *Philadelphia v. Meighan*, 27 Pa. Super. Ct. 160 [1905].

²⁴ *City of Cincinnati for use of Ashman v. Bickett*, 26 O. S. 49 [1875]; *Miller v. City of Cincinnati*, 18 Ohio C. C. 869 [1898]; *City of Toledo for Use v. Beaumont*, 3 Ohio N. P. 287 [1895].

²⁵ *Miller v. City of Cincinnati*, 18 Ohio C. C. 869 [1898].

²⁶ *Sargent and Company v. City of New Haven*, 62 Conn. 510, 26 Atl. 1057 [1893]; *Wilson v. City of Cincinnati*, 5 Ohio N. P. 68 [1897].

²⁷ *City of Toledo for the use of Gates v. Brown*, 2 Ohio N. P. 45 [1895].

²⁸ *Ford v. City of Toledo*, 64 O. S. 92, 59 N. E. 779 [1901]; *City of Cincinnati for use of Jonte v. Fasselmann*, 23 W. L. B. (Ohio) 392

drained by a sewer to whose use the owner of such land has a revocable license is not supplied with drainage within the meaning of such provisions.²⁹ If land is drained by a private sewer, which has a proper outlet, some jurisdictions hold that such land is sufficiently drained, and cannot be assessed for the cost of a public sewer.³⁰ This result is usually reached under statutes which provide for the exemption of land which is properly drained. In other jurisdictions, it is held that land drained by a private sewer is not sufficiently drained, so as to exempt such property from assessment for a sewer constructed by the city.³¹ This result is generally reached under statutes which provide for assessing property benefited, without specifically exempting property which is already sufficiently drained. The owner of land, who voluntarily connects a private drain with a public sewer, cannot raise the question of want of notice or lack of benefits.³² A public sewer intersected a private sewer and connection between the two was made at the point of intersection. Before such public sewer was constructed, the private sewer had an outlet upon mud flats, about eight hundred feet from low-water mark. The public sewer had an outlet in deep water. It was held that the land drained by such private sewer might be assessed for the cost of the public sewer if the assessment did not exceed the amount of actual benefit conferred by such public sewer.³³ In the absence of a statute, excepting from assessment, land which is already drained by a sewer or making some specific provision for the assessment of corner lots for sewer improvements, it is held that a corner lot which has been assessed for constructing a sewer along one street may also be assessed for constructing a sewer along the

[1890]; *contra*, City for use of Wilson v. Hess, 19 Ohio C. C. 252 [1900]; State, King, v. Reed, 43 N. J. L. (14 Vr.) 186 [1881].

²⁹ Fairbanks v. Mayor and Aldermen of Fitchburg, 132 Mass. 42 [1882].

³⁰ Wewell v. City of Cincinnati, 45 O. S. 407, 15 N. E. 196 [1887]; City of Toledo for use of Gates v. Lake Shore and Michigan Southern Railway Company, 4 Ohio C. C. 113 [1889].

³¹ City of Atchison v. Price, 45 Kan. 296, 25 Pac. 605 [1891]; City of St. Joseph v. Owen, 110 Mo. 445, 19 S. W. 713 [1892]; Johnson v. Village of Avondale, 1 Ohio C. C. 229 [1885]; Philadelphia to use of Yost v. Odd Fellows Hall Association, 168 Pa. St. 105, 31 Atl. 917 [1895].

³² Butler v. City of Worcester, 112 Mass. 541 [1873].

³³ Sargent and Company v. City of New Haven, 62 Conn. 510, 26 Atl. 1057 [1893].

other street.³⁴ However, under a statute providing for assessing property for a sewer improvement according to the lineal measure of the land along the sewer, it was held that where a sewer ran nearly across a tract of land and then turned at right angles and ran across the tract at right angles to its former course, such tract was double assessed for such improvement and the statute was unconstitutional with reference thereto.³⁵ Under a statute authorizing the council to exempt from special assessment such portion of the frontage of either lot which had a greater frontage than its average depth and so much of the corner lots as seemed equitable, such exemptions might be made in the case of sewer improvements and the property owners assessed could not complain that such assessment was not uniform.³⁶ If a sewer has already been constructed and the land which it is sought to assess is thus drained, it is held in some jurisdictions that such land may nevertheless be assessed for the cost of a new sewer if it can be shown that it is benefited thereby.³⁷ It has been suggested that the fact of existing drainage is to be considered in determining the amount of the assessment.³⁸ Under some statutes the cost of a main sewer which is intended to connect with lateral sewers and thus drain a wide area, must be assessed upon all the property drained by such laterals.³⁹ Under such statute it is improper to assess the cost of the main sewer solely upon the abutting property.⁴⁰ Further, property which does not abut the main sewer may be assessed in part for the cost thereof as well as for the cost

³⁴ *Coburn v. Bossert*, 13 Ind. App. 359, 40 N. E. 281 [1895]; *Rich v. Woods*, 118 Ky. 865, 82 S. W. 578, 26 Ky. Law Rep. 799 [1904].

³⁵ *Dexter v. City of Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379 [1900].

³⁶ *Cleneay v. Norwood*, 137 Fed. 962 [1905].

³⁷ *Park Ecclesiastical Society v. Hartford*, 47 Conn. 89 [1879]; *Byram v. Foley*, 17 Ind. App. 629, 47 N. E. 351 [1897]; *Grunewald v. City of Cedar Rapids*, 118 Iowa 222, 91 N. W. 1059; *Coates v. Nugent*, — Kan. —, 92 Pac. 597 [1907]; *Rich v. Woods*, 118 Ky. 865, 26 Ky. Law Rep. 799, 82 S. W. 578 [1904].

The court refused to disturb a finding that such property was benefited but said that it was hard to see how any benefit could, in fact, exist: In the Matter of the Contract for the Fifth Avenue Sewer in the City of Pittsburg, 4 Brewster (Pa.) 364 [1870]. See also *Clapp v. City of Hartford*, 35 Conn. 66 [1868].

³⁸ *Clapp v. City of Hartford*, 35 Conn. 66 [1868].

³⁹ *State, Schlapfer, Pros. v. Town of Union, in the County of Hudson*, 53 N. J. L. (24 Vr.) 67, 20 Atl. 894 [1890].

⁴⁰ *State, Schlapfer, Pros. v. Town of Union, in the County of Hudson*, 53 N. J. L. (24 Vr.) 67, 20 Atl. 894 [1890].

of laterals.⁴¹ It has been held proper to assess the cost of a main sewer upon the property abutting thereon, as long as such cost does not exceed the benefits conferred by such improvement.⁴² Under such statutes property drained by lateral sewers, but not abutting on the main sewer, need not be assessed for the cost of such main sewer.⁴³ It has, however, been held that the amount which can be assessed upon abutting property can not exceed the cost of a sewer which would have furnished sufficient drainage for the property assessed, without including the increased cost arising because the sewer had been constructed of a larger size to provide for draining other property.⁴⁴ If the statute so provides, land which does not abut upon the sewer but which is connected therewith by laterals may be assessed for the cost of such sewer.⁴⁵ On the other hand, it has been held that that property which does not abut upon a sewer cannot be assessed for its cost.⁴⁶ The new sewer which is constructed may be connected with the old sewer. If such new sewer is built to prolong the old sewer, as to procure a proper outlet therefor, land drained by the old sewer may be assessed for the cost of the new one.⁴⁷ The new sewer may be a prolongation of the old sewer so as to afford drainage to other land. It has been held that the land already drained by the old sewer cannot be assessed for the cost of the new sewer.⁴⁸ In other jurisdictions, it has been held that such land is to be assessed for the prolongation of the old sewer, but that credit must be given in levying an assessment for the entire system for the amount paid upon the old sewer.⁴⁹ A sewer may be constructed

⁴¹ *Mason v. City of Chicago*, 178 Ill. 499, 53 N. E. 354 [1899]; *DeWitt v. City of Elizabeth*, 56 N. J. L. (27 Vroom) 119, 27 Atl. 801 [1893].

⁴² *Hungerford v. City of Hartford*, 39 Conn. 279 [1872]; *Ayer v. Mayor and Aldermen of Somerville*, 143 Mass. 585, 10 N. E. 457 [1887].

⁴³ *Ayer v. Mayor and Aldermen of Somerville*, 143 Mass. 585, 10 N. E. 457 [1887].

⁴⁴ *Park Avenue Sewers, Appeal of Parker*, 169 Pa. St. 433, 32 Atl. 574 [1895].

⁴⁵ *Byram v. Foley*, 17 Ind. App. 629, 47 N. E. 351 [1897]; *State, Henderson, Pros. v. Mayor, etc., of Jersey City*, 41 N. J. L. (12 Vroom) 489 [1879].

⁴⁶ *Beechwood Avenue Sewer, Pittsburgh's Appeal*, 179 Pa. St. 490, 36 Atl. 209 [1897]; *Park Avenue Sewers, Appeal of Parker*, 169 Pa. St. 433, 32 Atl. 574 [1895].

⁴⁷ *Sargent and Company v. City of New Haven*, 62 Conn. 510, 26 Atl. 1057 [1893]; *State, Green, Pros. v. Hotaling*, 44 N. J. L. (15 Vr.) 347 [1882].

⁴⁸ *Boyden v. Village of Brattleboro*, 65 Vt. 504, 27 Atl. 164 [1893].

⁴⁹ *Mayor and Council of the City of Bayonne v. Morris*, 61 N. J. L. (32 Vr.) 127, 38 Atl. 819 [1897]; *State, Vanderbeck, Pros. v. Mayor and Common Council of Jersey City*, 29 N. J. L. (5 Dutch.) 441 [1861].

to connect certain land with a sewer already constructed. Land drained by such new sewer may be assessed therefor.⁵⁰ Land, the market value of which is increased by the construction of such improvement, is benefited thereby.⁵¹ The fact that land which cannot be drained by a sewer receives a benefit from the increase in general health in the neighborhood due to the construction of a sewer, does not render such land liable to assessment as such benefit is a general and not a special one.⁵²

§ 564. Land benefited by ditch or drain.

In assessments for purposes of drainage, it is generally provided that the district shall consist of lands benefited by the improvement.¹ Land which merely receives the benefits from a system of drainage which are general to a whole community, cannot be assessed for the cost thereof.² Increase of general healthfulness of a community is not an especial benefit within the meaning of this rule.³ It has been held, however, that any benefit which makes land more valuable for tillage, more desirable as a place of residence, or more valuable in the general market, is a benefit

⁵⁰ *Snydacker v. Village of West Hammond*, 225 Ill. 154, 80 N. E. 93 [1907].

⁵¹ *Warren v. City of Grand Haven*, 30 Mich. 24 [1874].

⁵² *Beechwood Avenue Sewer, Pittsburgh's Appeal*, 179 Pa. St. 490, 36 Atl. 209 [1897].

¹ *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707 [1897]; *Drainage Commissioners of Drainage District No. 2 v. Drainage Commissioners of Union Drain Dist. No. 3*, 211 Ill. 328, 71 N. E. 1007 [1904]; (affirming, 113 Ill. App. 114); *Gauen v. Moredock and Ivy Landing Drainage District*, No. 1, 131 Ill. 446, 23 N. E. 633 [1890]; *People ex rel. Miller v. Scott*, 132 Ill. 427, 23 N. E. 1119 [1891]; *Bodman v. Lake Fork Special Drainage Dist.*, 132 Ill. 439, 24 N. E. 630 [1891]; *People ex rel. Pollard v. Swigert*, 130 Ill. 608, 22 N. E. 787 [1890]; *Klinger v. The People ex rel. Conkle*, 130 Ill. 509, 22 N. E. 600 [1890]; *Kankakee Drainage District v. Commissioners of Lake Fork Special Drainage District*, 130 Ill.

261, 22 N. E. 607 [1890]; *Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District*, 127 Ill. 581, 21 N. E. 206 [1890]; *Streuter v. Willow Creek Drainage District*, 72 Ill. App. 561 [1897]; *Roundenbush v. Mitchell*, 154 Ind. 616, 57 N. E. 510 [1900]; *Culbertson v. Knight*, 152 Ind. 121, 52 N. E. 700 [1898]; *Drake v. Schoenstedt*, 149 Ind. 90, 48 N. E. 629 [1897]; *Oliver v. Monona County*, 117 Iowa 43, 90 N. W. 510 [1902]; *Fraser v. Mulany*, 129 Wis. 377, 109 N. W. 139 [1906].

² *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160 [1885]; *State, Skinkle, Pros. v. Inhabitants of the Township of Clinton in the County of Essex*, 39 N. J. L. (10 Vroom) 656 [1877]; *Tillman v. Kircher*, 64 Ind. 104 [1878].

³ *State, Skinkle, Pros. v. Inhabitants of the Township of Clinton in the County of Essex*, 39 N. J. L. (10 Vroom) 656 [1877].

which renders such land liable to assessment, whether it is actually drained by a ditch or not.⁴ In some jurisdictions, it has been held that increase in general healthfulness,⁵ especially if coupled with increased facility of access, due to the improvement in the condition of the highways caused by drainage,⁶ may be regarded as a benefit for which an assessment may be levied. Land which is especially benefited by a system of drainage may be assessed for the cost thereof under these statutes.⁷ The benefit accruing from this sort of improvement is usually the drainage of the lands benefited.⁸ Land which is drained by the construction of a system of ditches and drains is so benefited thereby that it may be assessed therefor.⁹ If land which does not immediately join a drain or ditch is nevertheless drained thereby, such land may be assessed for the cost of such improvement.¹⁰ The drainage of land is a benefit in improvements of this sort, no matter from what reason the land is in need of drainage.¹¹ By statute it is provided in some jurisdictions that if drains on land outside of a drainage district are connected with the drains and ditches of such district, such land thus drained may be annexed to such drainage district.¹² This statute does not, however, apply to a

⁴ *Culbertson v. Knight*, 152 Ind. 121, 52 N. E. 700 [1898].

⁵ *Beals v. Inhabitants of Brookline*, 174 Mass. 1, 54 N. E. 339 [1899].

⁶ *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902].

⁷ *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160 [1885].

⁸ *Richard v. Cypremort Drainage District*, 107 La. 567, 32 So. 27 [1901-1902].

⁹ *Reclamation District No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945 [1884]; *Bixler v. Board of Supervisors of the County of Sacramento*, 59 Cal. 698 [1881]; *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222 [1874]; *People ex rel. Davidson v. Cole*, 128 Ill. 158, 21 N. E. 6 [1890]; *Osborn v. Maxinkuckee Lake Ice Company*, 154 Ind. 101, 56 N. E. 33 [1899]; *Zigler v. Menges*, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782 [1889]; *State, Skinkle, Pros. v. Inhabitants of the Township of Clinton*

in the County of Essex, 39 N. J. L. (10 Vroom) 656 [1877].

¹⁰ *Goodrich v. City of Minonk*, 62 Ill. 121 [1871]; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902].

¹¹ *Streuter v. Willow Creek Drainage District*, 72 Ill. App. 561 [1897].

¹² *Shanley v. People ex rel. Goedtnier*, 225 Ill. 579, 80 N. E. 277 [1907]; *Drainage Commissioners of Drainage District No. 2 v. Drainage Commissioners of Union Drain Dist. No. 3*, 211 Ill. 328, 71 N. E. 1007 [1904]; (affirming, 113 Ill. App. 114); *Trigger v. Drainage District, No. 1, etc.*, 193 Ill. 230, 61 N. E. 1114 [1901]; *The People ex rel. Herman v. Bug River Special Drainage District*, 189 Ill. 55, 59 N. E. 605; *Drainage District No. 3 v. The People ex rel. Baron*, 147 Ill. 404, 35 N. E. 238 [1894]; *People ex rel. etc., v. Drainage Comrs. District No. 1 of Town of Young America*, 143 Ill. 417, 32 N. E. 688 [1893]; *Commissioners*

drainage district formed under an independent statute. It is limited to districts formed under the act of which it is a part, and the amendment thereof.¹³ The fact that lands thus voluntarily connected lie in an adjoining town does not prevent them from becoming a part of the drainage district.¹⁴ The drainage commissioners may be compelled by mandamus to assess lands thus voluntarily connected.¹⁵ The amount to be paid is generally the amount which such land would have had to pay had it been originally included in the district. This rule applies to an entire drainage district where one district connects its drains with the drains of another.¹⁶ The determination of the commissioners of the district which annexed such land, that the land which is thus connected is benefited by such connection and is accordingly subject to such assessment, is final in a suit upon the assessment.¹⁷ If the correctness of such judgment is to be attacked and the question of benefits tried as a fact, it must be in a proceeding in *quo warranto*.¹⁸ If a land owner deepens ditches on his own land so as to connect with the drains in a drainage district, he thereby in fact annexes his own land to such drainage district,¹⁹ but he does not thereby annex the lands of other

of Lake Fork Special Drainage District v. The People ex rel. Bodman, 138 Ill. 87, 27 N. E. 857 [1892]; Commissioners of Mason and Tazewell Special Drainage District v. Griffin, 134 Ill. 330, 25 N. E. 995 [1891]; Bodman v. Lake Fork Special Drainage, 132 Ill. 439, 24 N. E. 630 [1891]; Kankakee Drainage District v. Commissioners of Lake Fork Special Drainage District, 130 Ill. 261, 22 N. E. 607 [1890].

¹³ Kankakee Drainage District v. Commissioners of Lake Fork Special Drainage District, 130 Ill. 261, 22 N. E. 607 [1890].

¹⁴ People ex rel., etc. v. Drainage Comrs. District No. 1 of Town of Young America, 143 Ill. 417, 32 N. E. 688 [1893].

¹⁵ Commissioners of Lake Fork Special Drainage District v. The People ex rel. Bodman, 138 Ill. 87, 27 N. E. 857 [1892].

¹⁶ Drainage Commissioners of Drainage District No. 2 of Town of

Murdock v. Drainage Commissioners of Union Drain Dist. No. 3, 211 Ill. 328, 71 N. E. 1007; (affirming, 113 Ill. App. 114 [1904]); People ex rel. Samuel v. Cooper, 139 Ill. 461, 29 N. E. 872 [1893].

¹⁷ Shanley v. People ex rel. Goedter, 225 Ill. 579, 80 N. E. 277 [1907]; Trigger v. Drainage District No. 1, etc., 193 Ill. 230, 61 N. E. 1114 [1901].

¹⁸ Shanley v. People ex rel. Goedter, 225 Ill. 579, 80 N. E. 277 [1907]; People ex rel. Wood v. Jones, 137 Ill. 35, 27 N. E. 294 [1892]; Bodman v. Lake Fork Special Drainage District, 132 Ill. 439, 24 N. E. 630 [1891]; Evans v. Lewis, 121 Ill. 478, 13 N. E. 246 [1889]; Osborn v. People, 103 Ill. 228.

¹⁹ People ex rel. Phillips v. Drainage District No. 5, 191 Ill. 623, 61 N. E. 381 [1901]; Dayton v. Drainage Commissioners, 128 Ill. 271, 21 N. E. 198 [1890].

owners which drain through such deepened ditches.²⁰ Other land owners whose land is not thus annexed to the district have no right to the drainage of their lands by such system of ditches.²¹ The fact that a land owner has merely exercised reasonable and proper care of his ditches, does not prevent his land from being annexed to the drainage district, if such reasonable and proper care results in fact in his making use of the ditches of such drainage district.²² It is not necessary that the owners of land to be benefited by connection with the ditches of a drainage district should make any formal application for annexation.²³ In some jurisdictions it is said that a land owner whose land has not been assessed for a ditch, may be prevented from constructing drains so as to discharge water from his land into the drainage system.²⁴ A land owner who has paid an assessment for constructing a drainage system may prevent the owner of land not assessed from constructing ditches to drain his land into such drainage system where such additional water cannot be carried by the drainage system without damage to the other land owners whose lands are drained by such ditch.²⁵ In other jurisdictions, it is held that such land owner cannot enjoin the use of such drainage system by land owners whose lands have not been assessed.²⁶ His remedy seems to be to have such lands annexed to the drainage district and thus made to bear a proportionate part of the cost of constructing the system of drainage in question.²⁷ One ground of objecting to a drainage assessment from the standpoint of benefits is that the land assessed is not in fact drained by the ditch for the construction of which the assessment is levied. Land which is not drained by a system of drainage cannot ordinarily be assessed for the cost of such system,²⁸ although land which is not itself subject to overflow, but is subject to damage by reason of the overflow of other

²⁰ *People ex rel. Phillips v. Drainage District*, No. 5, 191 Ill. 623, 61 N. E. 381 [1901].

²¹ *Dayton v. Drainage Commissioners*, 128 Ill. 271, 21 N. E. 198 [1890].

²² *People ex rel. Baron v. Drainage District*, No. 3 of Martinton Township, 155 Ill. 45, 39 N. E. 613 [1894].

²³ *Streuter v. Willow Creek Drainage District*, 72 Ill. App. 561 [1897].

²⁴ *Young v. Gentis*, 7 Ind. App. 199, 32 N. E. 796 [1893].

²⁵ *Drake v. Schoenstedt*, 149 Ind. 90, 48 N. E. 629 [1897]; *Young v. Gentis*, 7 Ind. App. 199, 32 N. E. 796 [1893].

²⁶ *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761 [1893].

²⁷ *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761 [1893].

²⁸ *Klinger v. People ex rel. Conkle*, 130 Ill. 509, 22 N. E. 600 [1890].

land, may be assessed for a ditch whereby such other land is drained.²⁹ Such objections must, however, be made at the time and in the manner provided for by statute. If such objection is not made in the proper way, it will ordinarily be regarded as waived.³⁰ Land which is so located that by reason of the slope of the ground it cannot drain into the ditch in question, is not benefited thereby.³¹ Another ground for objecting to the levy of an assessment upon land which it is claimed is drained by a system of drainage is, that such land is already drained and needs no further drainage. Where the question of benefits is to be determined as a fact it is held that such land cannot be assessed.³² If such land drains into another basin and the surface water therefrom does not reach the ditch in question, the right of such land to be free from such assessment is clear.³³ Where it is held that the owner of higher ground has a property right in the established and regular course of surface drainage from his higher ground to the lower ground of adjoining land owners, it is held that such higher land cannot be assessed for the cost of a ditch constructed to drain such lower land, although the drainage of such lower land is to a considerable degree necessary because of the surface water which flows upon it from such higher land.³⁴ The owner of the higher land has, however, no right to change the natural course of surface drained, by cutting ditches so as to collect the water in a channel and thus discharging it in a body upon the lower land. Where the upper owner has done this, he may be enjoined by the lower one from permitting such conditions to continue. Accordingly, his land may be included in the drainage district, if the water thus discharged in a body is col-

²⁹ *Roby v. Shunganunga Drainage District*, — Kan. —, 95 Pac. 399 [1908].

³⁰ *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902]; *Commissioners of Putnam County v. Krauss*, 53 O. S. 628, 42 N. E. 831 [1895].

³¹ *Klinger v. People ex rel. Conkle*, 130 Ill. 509, 22 N. E. 600 [1890]; *In the Matter of the Petition of Van Buren to Vacate an Assessment*, 79 N. Y. 384 [1880].

³² *Anselm v. Barnard*, 2 Keb. 675; *Beals v. James*, 173 Mass. 591, 54 N. E. 245 [1899]; *State, King, Pros.*

v. Reed, 43 N. J. L. (14 Vr.) 186 [1881]; *In the Matter of the Petition of Cheesbrough to Vacate an Assessment*, 78 N. Y. 232 [1879]; *Blue v. Wentz*, 54 O. S. 247, 43 N. E. 493 [1896].

³³ *Anselm v. Barnard*, 2 Keb. 675.

³⁴ *Zinn v. Board of Supervisors of Buena Vista County*, — Ia. —, 114 N. W. 51 [1907]; *Beals v. James*, 173 Mass. 591, 54 N. E. 245 [1899]; *Blue v. Wentz*, 54 O. S. 247, 43 N. E. 493 [1896]; *Buckley v. Commissioners of Lorain Co.*, 1 Ohio C. C. 251 [1885].

lected and carried off by the drainage of such district.³⁵ Where land is already drained by artificial drainage, the question of its liability to assessment turns on the fact of benefit inuring to such land from the new system of drainage for which it is sought to levy such assessment. If the previous artificial drainage does not drain such land completely, such land may be assessed for a system of ditches which will complete such drainage.³⁶ If such land is already completely drained, it cannot be assessed further for drainage.³⁷ However, if a drainage improvement has been constructed in part so as to drain certain land and subsequently is extended so as to drain other land, the owners of lands drained by the ditch as originally constructed, cannot resist an assessment for the extension on the ground that such original ditch was sufficient for the drainage of their own lands.³⁸ The assessment which such owners are called upon to pay is no greater than it would have been had the entire improvement been made at once and all the land drained been assessed by one assessment. If a drain affords drainage to certain land, but does not pass through it, such land is benefited.³⁹ The benefit accruing from drainage need not be for agricultural or sanitary purposes alone.⁴⁰ If land is improved for purposes of travel, or for residence, or for the growth of timber, it is to be regarded as benefited.⁴¹ If a special proceeding is provided for by which the question of existence of benefits is to be determined, a land owner who does not take advantage of such proceeding has no right to raise such question of benefits subsequently in resisting the assessment levied.⁴² Under some statutes which provide for the formation of draining associations, assessments can be levied only upon the lands of the members thereof. Accordingly, under such statutes, land belonging to a married woman cannot be assessed, if under the law in force such married woman cannot, by reason of her coverture,

³⁵ *Culbertson v. Knight*, 152 Ind. 121, 52 N. E. 700 [1898].

³⁶ *Commissioners of Spoon River Drainage District in Champaign County v. Conner*, 121 Ill. App. 450 [1905].

³⁷ *Bow v. Smith*, 9 Mod. 94, 95.

³⁸ *Briegs v. Union Drainage District*, No. 1, 140 Ill. 53, 29 N. E. 721 [1893].

³⁹ *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707 [1897].

⁴⁰ *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761 [1893].

⁴¹ *Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District*, 127 Ill. 581, 21 N. E. 206 [1890].

⁴² *Oliver v. Monona County*, 117 Iowa 43, 90 N. W. 510 [1902].

enter into a contract or become a member of such association.⁴³ An assessment for repairing a ditch can be levied upon land benefited by such repairs. Land benefited by the original ditch, but not benefited by such repairs, cannot be assessed therefor.⁴⁴

§ 565. Land benefited by water pipes.

Property to which water is carried by water pipes may be assessed for the cost of constructing such pipes. If, however, a tract of property is already supplied by water through a system of pipes, it seems to be held in some jurisdictions that such property cannot be assessed unless a special benefit from such additional system of pipes can in fact be shown.¹ Thus, where a lot had been assessed for water pipes laid along the front thereof, and it was subsequently sought to assess such property for water pipes laid along the side thereof, such assessment was held to be invalid.² In other jurisdictions, it seems to be held that property may be assessed for water pipes laid on three sides thereof, under a statute apportioning the cost to the amount of pipe laid. In this case, however, the fact that the pipes were laid on three sides of the property may have conferred a greater benefit than would have been conferred had the pipes been laid on one side of the property.³

§ 566. Land benefited by levees.

Land which is subject to overflow in the absence of a system of levees, and which is protected from overflow by the construction of a system of levees, is undoubtedly benefited by such system so that it may be assessed for the cost thereof.¹ If land is not subject to overflow, it cannot be said as a matter of law that such land cannot be benefited by a system of levees.² Increased

⁴³ *Liberty Township Draining Association v. Watkins*, 72 Ind. 459 [1880].

⁴⁴ *Goodrich v. City of Minonk*, 62 Ill. 121 [1871]; *Parke County Coal Company v. Campbell*, 140 Ind. 28, 39 N. E. 149 [1894].

¹ *McChesney v. City of Chicago*, 213 Ill. 592, 73 N. E. 368 [1905]; *Baker v. Gartside*, 86 (5 Norris) Pa. St. 498.

² *Baker v. Gartside*, 86 Pa. St. (5 Norris) 498.

³ *State v. Trustees of Macalester College*, 87 Minn. 165, 91 N. W. 484 [1902].

¹ *Streuter v. Willow Creek Drainage District*, 72 Ill. App. 561 [1897]; *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475 [1894]; *State ex rel. Ashby v. Three States Lumber Co.*, 198 Mo. 430, 95 S. W. 333 [1906].

² *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894]; *McDermott v. Mathis*, 21 Ark. 60 [1860].

access to such land and improved drainage thereon may constitute benefits accruing from a system of levees for which such land may be assessed.³ Land which is at so low a level that it is not protected in any way from overflow, cannot be assessed for the cost of a levee which protects higher land from overflow.⁴ Land which lies between the river and the levee and is not in any way protected by such levee cannot be assessed therefor.⁵ The fact that the land in question is wet during the time of the winter and summer rains after the construction of the levee, does not prevent it from being benefited by such construction.⁶ Legislative or constitutional determination of the fact of benefit may be conclusive.⁷ Land within a drainage district as recognized by the constitution and not lying between the levee and the river is said to be subject to assessment, even if in fact it is damaged rather than benefited by such levee.⁸ Where the statute so provides, the determination of the engineer as to what land is incapable of protection by levees is final.⁹ A drainage district may construct a levee outside of its territorial boundaries, if such levee is necessary to prevent land within the district from overflow.¹⁰ In determining what property may be assessed for the construction of a levee, the statute may describe such property as alluvial land.¹¹ Such description seems to be regarded as sufficient. It is necessary under such description to determine as a fact what property is alluvial.¹²

§ 567. Land benefited by other improvements.

Property which is included in a fencing district may be assessed for the cost of such fence.¹ It has been held, however, that terri-

³ Carson v. St. Francis Levee District, 59 Ark. 513, 27 S. W. 590 [1894]; McDermott v. Mathis, 21 Ark. 60 [1860].

⁴ Hill v. Fontenot, 46 La. Ann. 1563, 16 So. 475 [1894]; Yeatman v. Crandall, 11 La. Ann. 220 [1856].

⁵ Owens v. Yazoo & Mississippi Valley Railroad Co., 74 Miss. 821, 21 So. 244 [1897].

⁶ Memphis Land & Timber Company v. St. Francis Levee District, 64 Ark. 258, 42 S. W. 763 [1897].

⁷ Hill v. Fontenot, 46 La. Ann. 1563, 16 So. 475 [1894].

⁸ Smith v. Willis, 78 Miss. 243, 28 So. 878 [1900].

⁹ Hill v. Fontenot, 46 La. Ann. 1563, 16 So. 475 [1894].

¹⁰ Hosmer v. Hunt Drainage District, 134 Ill. 360, 26 N. E. 584 [1891].

¹¹ Hollingsworth v. Tax Collector, 45 La. Ann. 222, 40 Am. St. Rep. 220, 12 So. 1 [1893].

¹² Hollingsworth v. Tax Collector, 45 La. Ann. 222, 40 Am. St. Rep. 220, 12 So. 1 [1893].

¹ Busbee v. Commissioners of Wake County, 93 N. C. 143 [1885]; Cain v. Commissioners of Davie County, 86 N. C. 8 [1882].

tory which has been fenced out of a fencing district is not benefited by such fencing district and therefore cannot be assessed for the cost of such fences.² Land on a private ship canal, which is connected with a public canal, is benefited by the dredging and improvement of the public canal.³

§ 568. Land benefited by combination of improvements.

Whether different tracts of land may be assessed for a combination of improvements upon the theory that it receives a benefit from some part of the combination, is a question which depends for its solution in part upon the nature of the improvement, and in part upon the powers of the public corporation and upon the restrictions thereon. With reference to this question improvements are of two general classes. (1) The city or other public corporation may seek to combine in one improvement different improvements which in their nature are parts of one united whole. The city or other corporation may, in the absence of some specific statutory provision preventing the same, combine improvements of this class.¹ (2) The city or other public corporation may attempt to combine two or more improvements which are not in their nature parts of one united whole; but which may be constructed together in a very efficient and economical manner. No objection can be made to the act of the city in constructing improvements together as long as no injustice results and no statute is violated.² No objection can be made to constructing two or more improvements under one resolution,³ or ordinance,⁴ or under one contract,⁵ if the assessment is so apportioned that only the land benefited by each improvement is assessed there-

² *Harper v. Commissioners of New Hanover County*, 133 N. C. 106, 45 S. E. 526 [1903].

³ *People v. City of Buffalo*, 107 N. Y. S. 689 [1907].

¹ *Stoddard v. Johnson*, 75 Ind. 20 [1881].

² *Prout v. People ex rel. Miller*, 83 Ill. 154 [1876]; *Bye v. Atlantic City*, — N. J. Sup. —, 64 Atl. 1056 [1906].

³ *Bates v. Twist*, 138 Cal. 52, 70 Pac. 1023 [1902]; *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071 [1899].

⁴ *Mayor and Aldermen of Savan-*

nah v. Weed, 96 Ga. 670, 23 S. E. 900 [1895]; *Haley v. City of Alton*, 152 Ill. 113, 38 N. E. 750 [1894]; *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]; *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889].

⁵ *Alameda Macadamizing Company v. Williams*, 70 Cal. 534, 12 Pac. 530 [1886]; *Fairbanks v. Mayor and Aldermen of Fitchburg*, 132 Mass. 42 [1882]; *State of Minnesota ex rel. Powell v. District Court of Ramsey County*, 47 Minn. 406, 50 N. W. 476 [1891].

for. The apportionment of the cost of each improvement to the property benefited thereby and to no other property may be secured by having separate estimates made for each improvement.⁶ It may be secured where the contract is let at a gross price for all the improvements, by the action of the Board of Public Works, or other similar body, in determining what amount is necessary for the cost of each separate improvement, the aggregate amount thus raised for each of the improvements being equal to the gross amount of the contract price.⁷ If an assessment is levied upon the property fronting and abutting on each street for the cost of such street, the fact that the city officials have purchased under one contract a quantity of stone intended for a number of distinct improvements does not invalidate such assessment.⁸ A city cannot, however, assess a part of the cost of an improvement upon property which is in no way benefited thereby. If, by statute, it is provided that certain improvements can be made only if the property owners affected thereby, or a certain percentage of them, petition for such improvement, the city cannot combine two distinct improvements so as to construct either of them upon the petition of a smaller number of property owners affected by each than is provided for by statute.⁹

§ 569. Combination of streets.

Two or more streets, or parts of streets, which naturally form one connected and entire whole, may be combined. The two parts of a street separated by a parkway form an entire improvement.¹ The two parts of a street, which are separated by a tract of land which is dedicated to free and unobstructed public use, except for wheeled vehicles, are parts of an entire improvement.² If two or more streets really form one continuous improvement, they may be improved together and one assessment levied there-

⁶ *Haley v. City of Alton*, 152 Ill. 113, 38 N. E. 750 [1894].

⁷ *State of Minnesota ex rel. Powell v. District Court of Ramsey County*, 47 Minn. 406, 50 N. W. 476 [1891].

⁸ *Alberger v. Mayor and City Council of Baltimore*, 64 Md. 1, 20 Atl. 988 [1885].

⁹ *Hutchinson v. City of Omaha*, 52 Neb. 345, 72 N. W. 218 [1897]; *Hersee v. City of Buffalo*, 1 Sheldon (N. Y.) 445 [1874].

¹ *Cummings v. West Chicago Park Com'rs.*, 181 Ill. 136, 54 N. E. 941. So with branches of a street surrounding an open space in a street and forming with the street, one continuous thoroughfare; *Cuming v. City of Grand Rapids*, 46 Mich. 150, 9 N. W. 141 [1881].

² *Alvey v. City of Asheville*, — N. C. —, 59 S. E. 999 [1907].

for.³ The same rule applies to different sections of the same street, though paved with different material and under different contracts.⁴ The same principle applies to two county roads which form one continuous road.⁵ Thus, where for any reason a section of a street is left unimproved, the rest of such street, even if separated by such section, may be improved as one improvement,⁶ at least in the absence of any showing that property on one section of the street was not benefited by the improvement of the other section.⁷ So where a street as laid out is really continuous, but contains a jog, such street may be improved as one improvement,⁸ even if the part of the street beyond the jog is known by a different name.⁹ The attempt is sometimes made to group together a number of streets which do not constitute one continuous street in reality, and to assess the aggregate cost of such improvement equally upon all the property benefited by any of such streets. An assessment of this sort is usually held invalid, as it results in assessing for the improvement of one street, property which is in no material way benefited thereby.¹⁰ Under a statute authorizing a city to grade "any street," it was held that a city could not grade nine distinct streets and levy one assessment for

³ *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902]. "The nature, character and extent of an improvement must rest within the discretion of the city council. The law fixes no metes or bounds in this respect beyond which it cannot go, further than that it may not permit a gross abuse of such discretion. Whether, therefore, the work as ordered and performed consists of disconnected portions or of a continuous portion of a street, or whether it consists of work done upon different streets, furnishes no ground of complaint to the individual property holder so long as the work confers a benefit upon his property and he is not charged with a cost exceeding such benefit." *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902].

⁴ *In re Shady Avenue*, 34 Pa. Super. Ct. 327 [1907].

⁵ *Commissioners of Putnam County v. Young*, 36 O. S. 288 [1880].

⁶ *Wilder v. City of Cincinnati*, 26 O. S. 284 [1875].

⁷ *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902].

⁸ *Culver v. City of Chicago*, 171 Ill. 399, 49 N. E. 573 [1898]; *Lynch v. City of Kansas City*, 44 Kan. 452, 24 Pac. 973 [1890].

⁹ *Lynch v. City of Kansas City*, 44 Kan. 452, 24 Pac. 973 [1890].

¹⁰ *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 228 [1890]; *Willard v. Albertson*, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403 [1899]; *Nevin v. Allen*, (Ky.) 26 S. W. 180, 15 Ky. Law Rep. 836 [1894]; *Kansas City Grading Company v. Holden*, 32 Mo. App. 490 [1888]; *Kinealy v. Gay*, 7 Mo. App. 203 [1879]; *Hutchinson v. City of Omaha*, 52 Neb. 345, 72 N. W. 218 [1897]; *State, Kerrigan, Pros. v. Township of West Hoboken*, 37 N. J. L. (8 Vroom) 77 [1874]; *City to use of Brooks v. Lea*, 9 Phila. (Pa.) 106 [1872].

all upon the property benefited by such improvements.¹¹ If the work is let as one contract and there is no competitive bidding as to each street, separately, as required by statute, the assessment is invalid under a statute providing for assessing "property immediately benefited" by the improvement.¹² If material excavated from one street can be used to fill up others, and separate contracts are let, the expense of the work may be estimated under the principal contract with reference to the existence of the other contracts.¹³ A statute authorizing the grading of two or more streets as one improvement, when in the proper prosecution of the work the material taken from one street may be used in filling the others, does not authorize an assessment for improving two or more streets together under any other circumstances.¹⁴ A city or village may provide for extending the improvement of a street a few feet into cross streets, if lateral extensions are to be paid for by general taxation and not by the owners of property abutting on the street improved.¹⁵ If an ordinance is passed for the improvement of two streets and only one of such streets is improved, the cost of such improvement cannot be assessed upon the land abutting on both streets.¹⁶ If a petition signed by a certain percentage of the abutting property owners is necessary for the construction of a street improvement on the assessment plan, the city cannot improve two or more separate streets upon a petition signed merely by the proper percentage of the aggregate number of owners of property on all of such streets. The petition must be signed by the proper number of property owners on each of such separate streets.¹⁷ If the petition is signed for the construction of a continuous pavement on two streets which intersect at a right angle and the petition is insufficient as to one of such streets because it is not signed by a majority of the owners of each contiguous block thereon, the improvement of the other street cannot be undertaken unless the petition shows

¹¹ *Hutchinson v. City of Omaha*, 52 Neb. 345, 72 N. W. 218 [1897].

¹² *People v. Common Council of City of Kingston*, 189 N. Y. 66, 81 N. E. 557 [1907]; (reversing, 96 N. Y. S. 657, 114 App. Div. 320 [1906]).

¹³ *Sehleney v. Commonwealth* for use, 36 Pa. St. 64.

¹⁴ *Mavall v. City of St. Paul*, 30 Minn. 294, 15 N. W. 170 [1883].

¹⁵ *White v. City of Alton*, 149 Ill. 626, 37 N. E. 66 [1894].

¹⁶ *Willard v. Albertson*, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403 [1899].

¹⁷ *Hutchinson v. City of Omaha*, 52 Neb. 345, 72 N. W. 218 [1897]; *Lathrop v. City of Buffalo*, 3 Abb. Ct. App. (N. Y.) 30 [1861].

on its face that it is in legal effect a separate petition for each street.¹⁸ If the construction of two or more streets as one improvement results in assessing for the construction of any one of the streets, property not benefited thereby, such assessment is invalid.¹⁹ Thus, where two streets of materially different widths are improved, the city cannot divide the total cost by the entire frontage on both streets and regard such amount as the assessment per front foot.²⁰ Assessments were levied for eight distinct improvements as to some of which there was a surplus and as to others a deficit. In such a case the city cannot appropriate any part of such surplus to apply to such deficit.²¹

§ 570. Combination of parts of entire street improvement.

The opening of a street or road by condemning or otherwise acquiring a fee or easement in the realty necessary therefor is often conducted as a separate and distinct improvement without any relation to the surface improvement thereof. Improvement of the other forms of surface improvement are naturally and most economically made together. If they are all parts of one and the same improvement, affecting adjoining property owners in similar ways, there is no constitutional objection to combining them in one general improvement for which one assessment is levied. Accordingly, assessments for opening and widening a street,¹ opening, widening and grading a street,² opening and extending a street,³ opening, extending and grading a street,⁴ opening, grading and paving a street,⁵ widening and extending a street,⁶ or acquiring land on the ocean front for a street and

¹⁸ *City of Bloomington v. Reeves*, 177 Ill. 161, 52 N. E. 278 [1898].

¹⁹ *Nevin v. Allen*, (Ky.) 15 Ky. Law Rep. 836, 26 S. W. 180 [1894]; *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 228 [1890]; *Kansas City Grading Company v. Holden*, 32 Mo. App. 490 [1888]; *State, Kerrigan, Pros. v. Township of West Hoboken*, 37 N. J. L. (8 Vroom) 77 [1874].

²⁰ *Nevin v. Allen*, (Ky.), 26 S. W. 180, 15 Ky. Law Rep. 836 [1894].

²¹ *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 228 [1890].

¹ *Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771 [1890]; *Dorgan v. City of Boston*, 94 Mass. (12 All.)

223 [1866]; *Astor v. Mayor, Aldermen and Commonalty of the City of New York*, 62 N. Y. 580 [1875]; *In the Matter of the Petition of Arnold to Vacate an Assessment*, 60 N. Y. 26 [1875].

² *Wilmington Avenue*, 213 Pa. 238, 62 Atl. 848 [1906].

³ *Fagan v. City of Chicago*, 84 Ill. 227 [1876].

⁴ *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866 [1900].

⁵ *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming, *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]).

⁶ *Cohn v. Parcels*, 72 Cal. 367, 14 Pac. 26 [1887]; *New England Hos-*

erecting an elevated walk thereon⁷ have each been upheld as valid exercise of the power of levying local assessments. As would naturally follow from the nature of the improvement, grading is usually effected in connecting with other forms of surface improvements. Accordingly, assessments are frequently made for grading and paving undertaken together as part of the same improvement, and such assessments are held to be valid as an exercise of the power to provide for a local assessment.⁸ So are assessments for grading, paving and curbing,⁹ grading, pav-

pital for Women and Children v. Street Commissioners of the City of Boston, 188 Mass. 88, 74 N. E. 294 [1905].

⁷ *Murphy v. City of Long Branch*, — N. J. Sup. —, 61 Atl. 593 [1905].

⁸ *Schaefer v. Werling*, 188 U. S. 516, 47 L. 570, 23 S. 449 [1903]; (affirming *Schaefer v. Werling*, 156 Ind. 704, 60 N. E. 149; following without opinion *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]); *Webster v. City of Fargo*, 181 U. S. 394, 45 L. 912, 21 S. 623, 645 [1901]; (affirming, *Webster v. City of Fargo*, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]); *Tonawanda v. Lyon*, 181 U. S. 389, 45 L. 908, 21 S. 609 [1901]; (reversing, *Lyon v. Town of Tonawanda*, 98 Fed. 361 [1899]); *City of Gladstone v. Throop*, 71 Fed. 341, 18 C. C. A. 61, 37 U. S. App. 481 [1895]; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904]; *German Savings and Loan Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902]; *Dyer v. Hudson*, 65 Cal. 374, 4 Pac. 231 [1884]; (following *Emery v. San Francisco Gas Co.*, 28 Cal. 346 [1865]); *Emery v. San Francisco Gas Co.*, 28 Cal. 346 [1865]; *City of Atlanta v. First Presbyterian Church*, 86 Ga. 730, 12 L. R. A. 852, 13 S. E. 252 [1890]; *Bacon v. Mayor and Aldermen of Savannah*, 86 Ga. 301, 12 S. E. 580 [1890]; *Hayden v. City of Atlanta*, 70 Ga. 817 [1883]; *Lanphere v. City of Chicago*, 212 Ill. 440, 72 N. E. 426 [1904]; *McChes-*

ney v. City of Chicago, 201 Ill. 344, 66 N. E. 217 [1903]; *Field v. City of Chicago*, 198 Ill. 224, 64 N. E. 840 [1902]; *Lehmers v. City of Chicago*, 178 Ill. 530, 53 N. E. 394 [1899]; *Holt v. City of East St. Louis*, 150 Ill. 530, 37 N. E. 927 [1894]; *Woods v. City of Chicago*, 135 Ill. 582, 26 N. E. 608 [1892]; *Holmes v. Village of Hyde Park*, 121 Ill. 128, 13 N. E. 540 [1889]; *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468 [1861]; *City of Burlington v. Gilbert*, 31 Ia. 356, 7 Am. Rep. 143 [1871]; *Motz v. City of Detroit*, 18 Mich. 494 [1869]; *People ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; *Hurford v. City of Omaha*, 4 Neb. 336 [1876]; *Haegle v. Mallinekrodt*, 3 Mo. App. 329 [1877]; *People ex rel. Ackerly v. City of Brooklyn*, 8 Hun. 56 [1876]; *Jessing v. City of Columbus*, 1 Ohio C. C. 90; (affirmed, 22 W. L. B. 453 [1885]); *Beaumont v. Wilkes-Barre City*, 142 Pa. St. 198, 21 Atl. 888 [1891]; *McGonigle v. City of Allegheny*, 44 Pa. St. 118 [1862].

⁹ *Louisville and Nashville R. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 25 S. 466 [1905]; (affirming, 116 Ky. 856, 76 S. W. 1097, 25 Ky. L. R. 1024 [1903]); *Oakland Paving Company v. Hilton*, 69 Cal. 479, 11 Pac. 3 [1886]; *McChesney v. City of Chicago*, 205 Ill. 611, 69 N. E. 82 [1903]; *Gage v. City of Chicago*, 201 Ill. 93, 66 N. E. 374 [1903]; *City of Chicago v. Sherwood*, 104 Ill. 549 [1882]; *City of Chicago v. People of the State of Illinois*, 56

ing, curbing and guttering,¹⁰ grading, planking and constructing sidewalks,¹¹ grading, paving and draining,¹² grading and the construction of sidewalks.¹³ grading, curbing, paving, guttering and constructing sidewalks.¹⁴ and grading and the construction of sewers.¹⁵ Paving is an improvement which is generally effected in connection with other improvements. In addition to the illustrations already given, grading and repaving,¹⁶ filling, grading, flagging and draining,¹⁷ and filling, paving, curbing, guttering and constructing sidewalks,¹⁸ have all been treated as proper exercises of the power to levy a local assessment. Assessments for paving and curbing,¹⁹ paving, curbing and guttering,²⁰ pav-

Ill. 327 [1870]; *Richardson v. Mehler*, 111 Ky. 408, 63 S. W. 957, 23 Ky. L. R. 917 [1901]; *Gleason v. Barnett*, 106 Ky. 125, 50 S. W. 67 [1899]; *Moale v. Mayor and City Council of Baltimore*, 61 Md. 224 [1883]; *Ulman v. Mayor and City Council of Baltimore*, 72 Md. 587, 11 L. R. A. 224, 32 Am. & Eng. Corp. Cas. 228, 20 Atl. 141, 21 Atl. 709 [1890]; *Lewis v. City of Elizabeth*, 25 N. J. Eq. (10 C. E. Gr.) 298 [1874]; *Fifty Fourth Street, Pittsburg's Appeal*, 165 Pa. St. 8, 30 Atl. 503 [1894]; *Allegheny City v. Blair*, 74 Pa. St. (24 P. F. Smith) 225 [1873].

¹⁰ *City of St. Louis to use of McGrath v. Clemens*, 36 Mo. 467 [1865].

¹¹ *Bellingham Bay and British Columbia Railroad v. New Whatcom*, 172 U. S. 314, 43 L. 460, 19 S. 205 [1899]; (affirming *City of New Whatcom v. Bellingham Bay Improvement Company*, 16 Wash. 131, 47 Pac. 236 [1896]).

¹² *Brewer v. Incorporated Village of Bowling Green, Ohio*, 7 Ohio C. C. 489 [1893].

¹³ *First National Bank of Kansas City v. Nelson*, 64 Mo. 418 [1877].

¹⁴ *State, Provident Institution for Savings in Jersey City, Pros. v. Mayor, etc., of Jersey City*, 52 N. J. L. (23 Vr.) 490, 19 Atl. 1096 [1890].

¹⁵ *State, Provident Institution for Savings in Jersey City, Pros. v. Mayor, etc., of Jersey City*, 52 N. J. L. (23 Vr.) 490, 19 Atl. 1096 [1890]; *Marshall v. Commonwealth to use of*

Mayor, etc., of Allegheny City, 59 Pa. St. 455 [1868].

¹⁶ *In the Matter of the Petition of Buhler*, 32 Barb. (N. Y.) 79 [1859].

¹⁷ *State, Moran, Pros. v. Mayor and Aldermen of Jersey City*, 58 N. J. L. (29 Vr.) 144, 35 Atl. 284 [1895].

¹⁸ *State, Malone, Pros. v. Mayor and Common Council of Jersey City*, 28 N. J. L. (4 Dutch.) 500 [1860].

¹⁹ *Dowling v. Hibernia Loan and Savings Society*, 143 Cal. 425, 77 Pac. 141 [1904]; *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262 [1901]; *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877 [1897]; *Dorland v. Bergson*, 78 Cal. 637, 21 Pac. 537 [1889]; *Mead v. City of Chicago*, 186 Ill. 54, 57 N. E. 824 [1900]; *Claffin v. City of Chicago*, 178 Ill. 549, 53 N. E. 339 [1899]; *Chicago & Northern Pacific Railroad Company v. City of Chicago*, 172 Ill. 66, 49 N. E. 1006 [1898]; *People ex rel. Koehersperger v. Markley*, 166 Ill. 48, 46 N. E. 742 [1897]; *Kimble v. City of Peoria*, 140 Ill. 157, 29 N. E. 723 [1893]; *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1899]; *City of Topeka v. Gage*, 44 Kan. 87, 24 Pac. 82 [1890]; *Olsson v. City of Topeka*, 42 Kan. 709, 21 Pac. 219 [1889]; *Blair v. City of Atchison*, 40 Kan. 353, 19 Pac. 815 [1888]; *Steckert v. East Saginaw*, 22 Mich. 104 [1870]; *Howell v. City of Philadelphia*, 36 Pa. St. 471 [1861]; *Green v. Ward*, 82 Va. 324 [1886].

²⁰ *Le Veine v. City of Kansas City*, 67 Kan. 239, 72 Pac. 774 [1903];

ing and guttering,²¹ for paving and the construction of a sewer,²² for grading and paving a street and filling and adjusting sewers, catch-basins and man-holes,²³ and for grading a street, sodding the center thereof and graveling the sides and constructing a sewer thereunder,²⁴ have been upheld. So curbing and guttering,²⁵ or curbing and the construction of sidewalks,²⁶ or curbing, guttering and the construction of sidewalks²⁷ are improvements which may be made together and for which one assessment may be levied.

§ 571. Sidewalks.

Sidewalks on each side of the same street may be regarded as one improvement and an assessment for the aggregate cost thereof may be levied upon the property on both sides of the street.¹ It has been held that an assessment for sidewalks on two or more streets is *prima facie* valid in the absence of a showing that such streets are so separate that a sidewalk on one does not benefit property on the other.² A property owner whose assessment is less where two or more sidewalk improvements are grouped together than it would have been had a separate assessment been levied for each improvement, cannot complain because such improvements are grouped.³ It has been held

City of Emporia v. Norton, 13 Kan. 569 [1874]; Strasshein v. Jerman, 56 Mo. 104 [1874].

²¹ Burk v. Altschul, 66 Cal. 533, 6 Pac. 393 [1885]; Warren v. Henly, 31 Ia. 31 [1870].

²² Cincinnati for use, etc., v. Jung, 7 Ohio N. P. 665 [1900]; Megett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566 [1892].

²³ Sawyer v. City of Chicago, 183 Ill. 57, 55 N. E. 645 [1899].

²⁴ Murphy v. City of Peoria, 119 Ill. 509, 9 N. E. 895 [1888].

²⁵ Arnold v. City of Fort Dodge, Iowa, 111 Ia. 152, 82 N. W. 495 [1900]; Rooney v. Brown, 21 La. Ann. 51 [1869]; City of Omaha v. Gsanter, 4 Neb. Unoff. 52, 93 N. W. 407 [1903]; State, Ward, Pros. v. Commissioners of Streets and Sewers of New Brunswick, 49 N. J. L. (20 Vr.) 552, 10 Atl. 109 [1887]; City of

Nevada to the use of Gilfillan v. Morris, 43 Mo. App. 586 [1891]; In the Matter of the Petition of Auchmuty to Vacate an Assessment, 11 Hun. 76 [1877].

²⁶ Mayor and Board of Trustees of the Town of New Iberia v. Fontelieu, 108 La. 460, 32 So. 369 [1901].

²⁷ Lyon v. Alley, 130 U. S. 177, 32 L. 899, 9 S. 480 [1889]; (affirming Alley v. Lyon, 14 D. C. (3 Mackey) 457 [1885]); Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339 [1894].

¹ Davis v. City of Litchfield, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; Watson v. City of Chicago, 115 Ill. 78, 3 N. E. 430 [1886].

² Storrs v. City of Chicago, 208 Ill. 364, 70 N. E. 347 [1904].

³ City of Marionville to the use of Grubaugh v. Henson, 65 Mo. App. 397 [1895].

that under a statute authorizing the same, sidewalks may be constructed on different streets and the entire cost of such sidewalks assessed upon all property abutting any of such streets.⁴ This procedure, however, will result in injustice except where the benefits are substantially the same to all the property assessed. It is, on principle, wrong, except where the sidewalks are of substantially the same cost and confer substantially the same benefit to the property in front of which they are laid. Two or more sidewalks on different streets not forming a continuous or connected improvement cannot be constructed as one improvement and the cost thereof levied upon all the property fronting each one of said sidewalks in proportion to the frontage thereof.⁵ Such an assessment would charge one tract of property with a part of the cost of an improvement which did not in any way benefit it. The construction of a sidewalk as an entirety, including sidewalk intersections, is proper.⁶ A title drain to carry surface water away from a street is regarded as so essentially a part of a street improvement that it is properly constructed under a petition of property owners praying for the improvement of the street without specific reference to such drain.⁷

§ 572. Sewers.

If two sewers are connected so as to form in fact one continuous improvement, an assessment may be levied for the aggregate cost of the construction thereof upon the property benefited thereby,¹ even if such sewer runs along two or more different streets.² A sewer which is bisected by another sewer, with an outlet at the point of bisection, is to be regarded as one improvement and not as two different sewers running from the outlet in

⁴ *Parker v. Challiss*, 9 Kan. 155 [1872].

⁵ *People ex rel. Hanberg v. Stearns*, 213 Ill. 184, 72 N. E. 728 [1904]; *Arnold v. City of Cambridge*, 106 Mass. 352 [1871]; *Cist v. City of Cincinnati*, 8 Ohio N. P. 559 [1901].

⁶ *Hyman v. City of Chicago*, 188 Ill. 462, 59 N. E. 10 [1900].

⁷ *Taylor v. Wapakoneta*, 26 Ohio C. C. 285 [1904].

¹ *Church v. People ex rel. Koehersperger*, 179 Ill. 205; 53 N. E. 554 [1899]; *Grimmell v. City of Des*

Moines, 57 Ia. 144, 10 N. W. 330 [1881]; *Mayor and Council of the City of Bayonne v. Morris*, 61 N. J. L. (32 Vr.) 127, 38 Atl. 819 [1897]; *In the Matter of the Petition of Ingraham to Vacate an Assessment*, 64 N. Y. 310 [1876]; (affirming *In the Matter of the Petition of Ingraham to Vacate an Assessment on Eighty-eighth and Ninety-first Streets*, 4 Hun. (N. Y.) 495 [1875].

² *Grimmell v. City of Des Moines*, 57 Ia. 144, 10 N. W. 330 [1881].

each direction.³ A sewer with the branches thereof is to be regarded as one improvement for this purpose.⁴ The construction of a drain and the construction of man-holes thereto amount to one improvement.⁵ The construction of sewers and connections therewith and the establishing of building lines may be regarded as one improvement.⁶ If a pumping station is necessary to secure the flow of sewage, such pumping station and the system of sewers may be constructed together as one improvement.⁷ Ordinarily the construction of a bridge and the construction of a sewer would constitute two different improvements for which it would be improper to levy one assessment covering the aggregate cost. However, if the sewer is designed to drain the surface water from the street and to prevent such water overflowing the bridge, the two may be regarded as one improvement.⁸ If only property abutting on a sewer can be assessed, it has been held to be improper to levy an entire assessment for the cost of a connected system of sewers.⁹ Two or more sewers draining different tracts of property cannot be regarded as one improvement, if they do not naturally form one continuous improvement.¹⁰ Accordingly, a statute which provided for estimating the aggregate cost of all sewers constructed, relaid or extended in any one season and for apportioning the aggregate cost thereof upon the property abutting on any of such sewers at a certain rate per front foot is regarded as unconstitutional as assessing for an improvement, property which is not benefited thereby.¹¹ A number of city blocks requiring different kinds of drainage cannot be grouped together and subjected to an assessment for the entire cost of draining such property by improvements, a part of which confer no benefit upon some of the prop-

³ *Church v. People ex rel. Kochersperger*, 179 Ill. 205, 53 N. E. 554 [1899].

⁴ *Payne v. Village of South Springfield*, 161 Ill. 285, 44 N. E. 105 [1896]; *Lincoln v. Street Commissioners of the City of Boston*, 176 Mass. 210, 57 N. E. 356 [1900].

⁵ *Steele v. Village of River Forest*, 141 Ill. 302, 30 N. E. 1034 [1893].

⁶ *Lincoln v. Board of Street Commissioners of the City of Boston*, 176 Mass. 210, 57 N. E. 356 [1900].

⁷ *Drexel v. Town of Lake*, 127 Ill. 54, 20 N. E. 38 [1890].

⁸ *People ex rel. Knox v. Village of Yonkers*, 39 Barb. 266 [1863].

⁹ *Witman v. City of Reading*, 169 Pa. St. 375, 32 Atl. 576 [1895].

¹⁰ *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175 [1901]; *In the Matter of the Petition of Van Buren to Vacate an Assessment*, 79 N. Y. 384 [1880].

¹¹ *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175 [1901].

erty thus assessed.¹² If to add together the cost of different sewers laid on different streets and to apportion the aggregate cost upon the property fronting on any of such sewers, results in assessment which is not materially in excess of the benefits conferred upon any tract of property, such assessment is not invalid.¹³

§ 573. Other improvements.

The construction of a terminal station and the changes in streets leading thereto, necessary as essential parts of the general plan of such construction, may be made together and one assessment may be levied for the aggregate cost of such improvement upon any property benefited thereby.¹ The laying out of a public park and the sanitary improvement of the neighborhood thereof may be regarded as one improvement and the aggregate cost thereof paid for by one assessment.² Two alleys in the same block, one running north and south and the other running east and west, cannot be treated as one improvement. The aggregate cost thereof cannot be assessed upon all the property in the rear of which each alley is constructed.³ A connected system of water works may be regarded as one improvement and an assessment levied upon all the property benefited thereby.⁴ If the proceedings are distinct, by statute, the improvements cannot be combined even if parts of an entire whole.⁵ Under such statutes widening cannot be combined with grading and graveling.⁶ It has been held that where gutters have been constructed on two or more streets under different resolutions, assessments may be levied for the aggregate cost thereof.⁷ Lands in different water sheds, requiring different ditches for their drainage, cannot be assessed by one assessment for a ditch which can drain but one

¹² In the Matter of the Petition of Van Buren to Vacate an Assessment, 79 N. Y. 384 [1880].

¹³ Village of Hinsdale v. Shannon, 182 Ill. 312, 52 N. E. 327 [1899]; Beach v. People ex rel. Kern, 157 Ill. 659, 41 N. E. 1117 [1895]; Johnson v. Village of Avondale, 1 Ohio C. C. 229 [1885].

¹ Wells v. Street Commissioners of City of Boston, 187 Mass. 451, 73 N. E. 554 [1905]; Sears v. Street Commissioners of the City of Boston, 180

Mass. 274, 62 L. R. A. 144, 62 N. E. 397 [1902].

² Briggs v. Whitney, 159 Mass. 97, 34 N. E. 179 [1893].

³ Weckler v. City of Chicago, 61 Ill. 142 [1871].

⁴ People ex rel. Miller v. Sherman, 83 Ill. 165 [1876].

⁵ Mendenhall v. Clugish, 84 Ind. 94.

⁶ Mendenhall v. Clugish, 84 Ind. 94.

⁷ Fendig v. Knight, 60 Ia. 29, 14 N. W. 78 [1882].

of such water sheds.⁸ A water pipe was laid on one street and then turned at a right angle and ran along another street to its terminus. It was held that this constituted one improvement.⁹

§ 574. Separation of improvements.

Whether improvements which in their nature are connected parts of an united whole may be constructed separately, is ordinarily within the discretion of the city, in the absence of a statute which either expressly or in effect requires the construction of such improvements together.¹ Thus, the planking and grading of a street,² or the macadamizing and grading of a street,³ may be constructed separately. The grading and macadamizing of a street may be constructed without providing for curbing and gutters.⁴ An assessment for widening a street does not exhaust the power of the city, but it may assess subsequently for grading and paving.⁵ If the statute in force provides for the construction of a given kind of improvement only as auxiliary to another kind of improvement, the city or other public corporation has no power to undertake such auxiliary improvement apart from the kind of improvement which it was intended to aid.⁶ Thus, if a drainage statute permits the construction of a levee as a part of a system of drainage for agricultural and sanitary purposes, a levee cannot be constructed as an independent improvement apart from any system of drains and ditches.⁷ Statutes are sometimes found restricting the amount of assessments to a certain percentage of the value of the land assessed.⁸ Occasionally an attempt is made to evade the provisions of such statute by separating the improvement into a group of improvements, the assessment for each of which will be below the statutory limit. If the improvements thus separated are really constituent parts of one general improvement, such separation can-

⁸ *Klinger v. People ex rel. Conkle*, 130 Ill. 509, 22 N. E. 600 [1890].

⁹ *Ricketts v. Village of Hyde Park*, 85 Ill. 110 [1877].

¹ For a division of an improvement to evade the requirements as to the formalities of letting the contract see § 523.

² *Knowles v. Seale*, 64 Cal. 377, 1 Pac. 159 [1883].

³ *Dyer v. Hudson*, 65 Cal. 374, 4 Pac. 231 [1884].

⁴ *Fox v. Middlesborough Town Co.*, 96 Ky. 262, 28 S. W. 776 [1894].

⁵ *Krumberg v. Cincinnati*, 29 O. S. 69.

⁶ *Updike v. Wright*, 81 Ill. 49 [1876].

⁷ *Updike v. Wright*, 81 Ill. 49 [1876].

⁸ See § 679 *et seq.*

not be made.⁹ Thus, a street improvement was divided into two parts, one for grading said curbing stones and flagging and the other for paving a roadway. It was held that the assessments for each of these improvements must be added together to determine whether the statutory limit had been exceeded.¹⁰ If, by the separation of an improvement into two or more distinct improvements, a property owner is obliged to pay less than if the improvement had been made as an entirety, he cannot complain of such action of the public corporation.¹¹ A city has, ordinarily, in the absence of some statutory provisions showing the contrary intention of the legislature, the power to divide a street or similar improvement into sections and improve each section separately.¹² Such improvement may be made, as to each section, at the cost of the property abutting that particular section,¹³ without assessing property abutting on any other part of the street.¹⁴ Such section may terminate in the middle of a block.¹⁵ If certain property is so nearly valueless that an assessment thereon would be unavailing, the city may provide for paying the improvement opposite such property out of the general funds of the city and may assess the rest of the work against the other property abutting.¹⁶

⁹ In the Matter of the Petition of Walter to Vacate Certain Assessments, 75 N. Y. 354 [1878].

¹⁰ In the Matter of the Petition of Walter to Vacate Certain Assessments, 75 N. Y. 354 [1878].

¹¹ Magee v. Commonwealth for the use of the City of Pittsburg, 46 Pa. St. 358 [1863].

¹² Bates v. Twist, 138 Cal. 52, 70 Pac. 1023 [1902]; Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081 [1894]; Ede v. Cogswell, 79 Cal. 278, 21 Pac. 767 [1889]; Dougherty v. Hitchcock, 35 Cal. 512 [1868]; Bradford v. City of Pontiac, 165 Ill. 612, 46 N. E. 794 [1897]; Lightner v. City of Peoria, 150 Ill. 80; 37 N. E. 69 [1894]; Bigelow v. City of Chicago, 90 Ill. 49 [1878]; Bozarth v. McGilliendy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042 [1897]; Fendig v. Knight, 60 Ia. 29, 14 N. W. 78 [1882]; Neff v. Covington

Stone & Sand Co., 108 Ky. 457, 55 S. W. 697, 56 S. W. 723 [1900]; State of Minnesota ex rel. Benz v. District Court of Ramsey County, 32 Minn. 181, 19 N. W. 732 [1884]; Eyerman v. Blakesley, 13 Mo. App. 407 [1883]; Creighton v. Scott, 14 O. S. 438 [1863]; Commonwealth to use of Allegheny City v. Marshall, 69 Pa. St. (19 P. F. Smith) 328 [1871]; Wabash Avenue, 26 Pa. Super. Ct. 305 [1904].

¹³ Kendig v. Knight, 60 Ia. 29, 14 N. W. 78 [1882]; Creighton v. Scott, 14 O. S. 438 [1863]; Wabash Avenue, 26 Pa. Super. Ct. 305 [1904].

¹⁴ Creighton v. Scott, 14 O. S. 438 [1863]; Wabash Avenue, 26 Pa. Super. Ct. 305 [1904].

¹⁵ Brevoort v. City of Detroit, 24 Mich. 322 [1872].

¹⁶ Ottumwa Brick & Construction Co. v. Ainley, 109 Ia. 386, 80 N. W. 510 [1899].

Under a statute providing that all or part of a street may be paved and that, when such action will allow the just proportion of the entire cost to be assessed uniformly to each abutting front foot, the cost of the whole or any part of the improvement may be levied at one time and under one plat and notice, it is held that different amounts may be levied upon different front feet abutting on different parts of such improvement, if a just proportion of the entire cost is thereby assessed uniformly.¹⁷ A street cannot, however, be arbitrarily broken up into sections so as to produce an unequal distribution of the assessment.¹⁸ The legislature may intend that each street or similar improvement is to be regarded as an entirety. If such is the legislative intent, the city cannot divide such improvement into sections.¹⁹ Thus, under a statute providing that the improvement of each street or a part thereof shall be under a separate proceeding, a city cannot divide a street into separate parts in the same proceeding, each part of which is to be improved with different classes of improvements.²⁰ A statute which provides for the consent of a certain number of the owners of lots fronting on a given street or road is held to require the improvement of such street or road as an entirety, since otherwise it would be impossible to obtain the necessary proportion of all of the abutting property owners.²¹ Where an improvement has been constructed in front of certain property and such improvement is adopted by the city or is made by the owner under a statute which provides for exempting the property in front of which an improvement is voluntarily made, it is proper for the city to divide an improvement into sections so as to omit that part of the work which has been done already by the property owners.²² The same rule applies where a part of an improve-

¹⁷ *Gilcrest v. McCartney*, 97 Ia. 138, 66 N. W. 103 [1896].

¹⁸ *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894].

¹⁹ *Eyerman v. Hardy*, 8 Mo. App. 311 [1880]; *Elliot v. Berry*, 41 O. S. 110 [1884]; *Oregon Transfer Co. v. Portland*, 47 Or. 1, 81 Pac. 575, 82 Pac. 16 [1905].

²⁰ *Oregon Transfer Co. v. Portland*, 47 Or. 1, 81 Pac. 575, 82 Pac. 16 [1905].

²¹ *Town of Bowling Green v. Hobson*, 42 Ky. (3 B. Mon.) 478 [1843]; *Elliot v. Berry*, 41 O. S. 110 [1884].

²² *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373 [1888]; *San Francisco Paving Company v. Dubois*, 2 Cal. App. 42, 83 Pac. 72 [1905]; *Dumesnil v. Louisville Artificial Stone Co.*, 109 Ky. 1, 58 S. W. 371 [1900]; *Beck v. Obst*, 75 Ky. (12 Bush.) 268 [1876].

ment has been constructed under a contract since abandoned.²³ If a street railway company is bound to pave a part of the streets upon which its tracks are laid, it is proper for the city in providing for an improvement of such street to omit the part which such street railway company is bound to improve at its own cost.²⁴ So the contractor may be bound by an agreement to look to the street railroad company and not to the abutting property owners for that part of the cost of such improvement.²⁵ In an improvement consisting of constructing a roadway, curbing and constructing a sidewalk, one assessment was levied for the roadway and curbing and another for the sidewalk. It was held that one assessment should have been levied for all of such improvements considered together as in legal effect one improvement; but that if a separate assessment were required for each kind of work, the assessment was invalid, because in one of such assessments the cost of curbing and paving the roadway was included.²⁶

§ 575. Lateral division of improvement.

A city or other public corporation has ordinarily a wide range of discretion and may improve a part only of the width of the entire street.¹ A question of this sort is "a matter within the discretion of the city officials."² If a street is improved, the land on both sides thereof is benefited, and may, accordingly, be assessed for such improvement.³ This is true even if the improvement is confined to a part of the width of the street improved, on one side of the middle line thereof.⁴ If there is a grass plot in the middle of a street, and the roadway on one

²³ *Kemper v. King*, 11 Mo. App. 116 [1881].

²⁴ *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731 [1897]; *Chicago & Northern Pacific Railroad Company v. City of Chicago*, 172 Ill. 66, 49 N. E. 1006 [1898].

²⁵ *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893].

²⁶ *Dyer v. Harrison*, 63 Cal. 447 [1883].

¹ *Helm v. Witz*, 35 Ind. App. 131, 73 N. E. 846 [1904]; *Morrison v. Hershire*, 32 Ia. 271 [1871]; *McGrew v. City of Kansas City*, 64 Kan. 61, 67 Pac. 438 [1902].

² *McGrew v. City of Kansas City*, 64 Kan. 61, 62, 67 Pac. 438 [1902].

³ *Klein v. Nugent Gravel Company*, 162 Ind. 509, 70 N. E. 801 [1903]; (reversing *Klein v. Nugent Gravel Co.*, 66 N. E. 486 [1903]); *Drake v. Grout*, 21 Ind. App. 534, 52 N. E. 775 [1898].

⁴ *Klein v. Nugent Gravel Company*, 162 Ind. 509, 70 N. E. 801 [1903]; (reversing *Klein v. Nugent Gravel Co.*, Ind. App. 66 N. E. 486 [1903]); *McGrew v. City of Kansas City*, 64 Kan. 61, 67 Pac. 438 [1902]; *In re Phelps*, 96 N. Y. S. 862, 110 App. Div. 69 [1905].

side only of such street has been improved, land on the other side of the street may be assessed therefor.⁵ If a street is widened by appropriating land on one side of the street, the cost thereof must be levied upon the land upon both sides of the street, even if owners of land on the side not assessed had voluntarily dedicated a strip of land for the street half the width of the street appropriated.⁶ An assessment for a sewer upon one side of the street only has been regarded as valid, unless it is shown that the land not assessed is not supplied with drainage and is in need of drainage, and is therefore subject to assessment.⁷ By statute, however, provision may be made for assessing against the property on one side of the street the cost of the improvement of that half of the street divided lengthwise.⁸ If, however, the statute authorizes an assessment upon land on one side of the street only if the work for which such assessment is levied is opposite work of the same class already done, an assessment cannot be levied upon the land upon one side of the street only, except in strict compliance with the conditions of such statute.⁹ Where one-half of a street divided lengthwise has been improved at the cost of the owners of the land upon that side of the street, the other half of said street may subsequently be improved at the cost of the owners of the land upon that side of the street.¹⁰ If the middle of a street divided lengthwise is the dividing line between two public corporations, each corporation may improve its half of the street at the cost of the owners of property on that side of the street.¹¹ Under a statute authorizing the city

⁵ *In re Phelps*, 96 N. Y. S. 862, 110 App. Div. 69 [1905].

⁶ *Huntington v. City of Cincinnati*, 2 Ohio N. P. 35 [1895]. For a similar case see *City of Cincinnati v. Batsche*, 52 O. S. 324, 27 L. R. A. 536, 40 N. E. 21 [1895].

⁷ *People v. Desmond*, 186 N. Y. 232, 78 N. E. 857 [1906]; (reversing *People v. Desmond*, 97 N. Y. S. 795 [1906]); *City of Toledo for use v. Beaumont*, 3 Ohio N. P. 287 [1895].

⁸ *Perine v. Erzgraber*, 102 Cal. 234, 36 Pac. 585 [1894]; *Ryan v. Altschul*, 103 Cal. 174, 37 Pac. 339 [1894]; *Shirk v. Hupp*, 167 Ind. 509, 78 N. E. 242 [1906]; *Indianapolis & Vincennes Railway Company v. Capitol Paving & Construction Com-*

pany, 24 Ind. App. 114, 54 N. E. 1076 [1899]; *First National Bank v. Nelson*, 64 Mo. 418 [1877]; *Lindenberger Land Co. v. R. R. Park & Co.*, (Ky.) 27 Ky. L. Rep. 437, 85 S. W. 213 [1905]; *O'Brien v. Markland*, (Ky.) 9 Ky. L. Rep. 773, 6 S. W. 713 [1888].

⁹ *San Diego Investment Company v. Shaw*, 129 Cal. 273, 61 Pac. 1082 [1900].

¹⁰ *Shirk v. Hupp*, 167 Ind. 509, 78 N. E. 242 [1906]; *O'Brien v. Markland*, 9 Ky. L. Rep. 773, 6 S. W. 713 [1888]; *Scully v. City of Cincinnati*, 1 Cin. Sup. Ct. Rep. 183 [1871].

¹¹ *Scully v. City of Cincinnati*, 1 Cin. Sup. Ct. Rep. 183 [1871].

to require property owners to pave one-half of the width of the street contiguous to their respective lots, the city cannot pave a part in width of the street upon one side of the middle line thereof, and assess the entire cost of such improvement upon the property upon that side of the street.¹² After an improvement was ordered, and before the contract was let and the assessment made, the statute, which had previously provided that work done on one side should be assessed on that side only, except curbing and grading, was modified so as to provide that curbing and grading, too, should be assessed against the land on the side of which such work was done, but such change was not to apply to work or proceedings commenced. Under such statute it was held improper to assess against the property on one side of the street, the entire expense of such curbing and grading.¹³ If land is appropriated in widening a street, the special benefit from such widening to that part of the land not taken, may be deducted from damages sustained from such owner, although land on the opposite side of the street, none of which is taken, is also benefited.¹⁴ Under a statute providing that the expense of the paving to the middle of a street opposite public grounds of a city shall be paid from the ward fund, the owner of property along a part of a street in which the city has constructed a park forty-two feet wide in the center with a roadway fifty-eight feet wide on each side of it, cannot be charged with the cost of improving more than one-half of the roadway on his side of the street.¹⁵ The owners of property across the street from county property used as a court house, which is exempt from local assessment, cannot be compelled to pay for the improvement of the entire width of the street.¹⁶ The city may, in the exercise of its discretion, construct sidewalks on both sides of the street.¹⁷ In some jurisdictions it has been said that if the city exercises its discretion to build a sidewalk only upon one side of the street, such act is unreasonable and oppressive to

¹² *City of Muscatine v. Chicago, Rock Island & Pacific Railway Company*, 88 Ia. 291, 55 N. W. 100 [1893].

¹³ *Ryan v. Altshul*, 103 Cal. 174, 37 Pac. 339 [1894].

¹⁴ *Abbott v. Inhabitants of Cottage City*, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325 [1887].

¹⁵ *Boyd v. City of Milwaukee*, 92 Wis. 456, 66 N. W. 603 [1896].

¹⁶ *Thornton v. City of Clinton*, 148 Mo. 648, 50 S. W. 295.

¹⁷ *Langan v. Bitzer*, — Ky. —, 26 Ky. Law Rep. 579, 82 S. W. 280 [1904].

owners of land upon the side of street which is denied a sidewalk.¹⁸

§ 576. Property on part of improvement for which assessment is not levied.

If a street is opened or improved, property which fronts on such street, but is beyond the part which is improved and does not abut thereon, may be benefited by such improvement. If it is so benefited a statute authorizing the assessment of such property is valid and enforceable.¹ Property a thousand feet beyond the termination of planking, but on the same street, may be assessed therefor.² Property abutting on a stream above the point of termination of the widening and deepening of such stream may be assessed therefor, at least, if, at slight expense, the stream may be rendered navigable up to said land.³ A statute providing for an assessment for opening a street against owners of land on the line of such street is held to include owners of property upon the part of the street already opened and not merely the owners of property upon that part of the street which is opened.⁴ A similar rule is applied to assessments for widening a street.⁵ Where, by such statute, the expense of grading a street is to be charged upon the lots on both sides of such street throughout its entire length, while paving is to be charged merely upon the lots contiguous to such paving, grading which is merely accessory to the work of paving may properly be charged upon the contiguous lots alone.⁶ In the absence of a statute providing for assessing land upon a street as originally constructed, for the extension thereof, land upon the original portion of such street cannot be assessed for the extension

¹⁸ *Mills v. Village of Norwood*, 6 Ohio C. C. 305 [1892]. See § 296.

¹ *City of Seattle v. Kelleher*, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904]; *Kulms v. City of Omaha*, 55 Neb. 183, 75 N. W. 562 [1898]; *McCor-mick v. City of Omaha*, 37 Neb. 829, 56 N. W. 626 [1893]; *People of the State of New York ex rel. Lehigh Valley Railway Company v. City of Buffalo*, 147 N. Y. 675, 42 N. E. 344 [1895]; *Main Street, Big Run Borough*, 137 Pa. St. 590, 29 Atl. 711

[1890]; *Chestnut Avenue*, 68 Pa. St. (18 P. F. Smith) 81 [1871].

² *City of Seattle v. Kelleher*, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904].

³ *People of the State of New York ex rel. Lehigh Valley Railway Company v. City of Buffalo*, 147 N. Y. 675, 42 N. E. 344 [1895].

⁴ *Chestnut Avenue*, 68 Pa. St. (18 P. F. Smith) 81 [1871].

⁵ *Main Street, Big Run Borough*, 137 Pa. St. 590, 29 Atl. 711 [1890].

⁶ *Ploumt v. City of Janesville*, 31 Wis. 648 [1872].

thereof.⁷ This is true even if such street as originally constructed terminated in a cul de sac and the extension gives a new outlet to the land on the original portion of the street.⁸ Under such statutes only land abutting on the part of the street which is extended can be assessed for the cost of improvement.⁹ If the property beyond the improvement is not benefited, or if the statute does not authorize the assessment of such property, it cannot be assessed for the cost of an improvement, which does not extend to such property.¹⁰ The owner of land abutting on such improvement cannot complain because the owners of land beyond such improvement are assessed.¹¹ Thus, land which is beyond a sewer and which is not shown to be benefited thereby cannot be assessed therefor.¹² Land beyond the point to which a street is extended cannot be assessed for such improvement.¹³ Land beyond the point to which a street is widened is not subject to assessment for such widening.¹⁴ The reason given for such rule is that such land is liable to assessment when the street is widened opposite such land.¹⁵ The question, however, is primarily one of statutory construction. If such land is benefited and the statute authorizes its assessment, the fact that it may be assessed subsequently for further widening of the street is no defense, since in the latter case the land in that part of the street first widened would be subject to assessment for widening the second portion of such street.

§ 577. Improvement of varying width and cost.

A street which is improved may be of different widths at different points in its length. Whether such an improvement shall

⁷ State, Schulting, Pros. v. City of Passaic, 47 N. J. L. (18 Vroom) 273 [1885]; Smith v. City of Toledo, 24 O. S. 126 [1873]; In the Matter of the Opening of Orkney Street, Appeal of the City of Philadelphia, 194 Pa. St. 425, 48 L. R. A. 274, 45 Atl. 314 [1900].

⁸ In the Matter of the Opening of Orkney Street, Appeal of the City of Philadelphia, 194 Pa. St. 425, 48 L. R. A. 274, 45 Atl. 314 [1900].

⁹ Creighton v. Scott, 14 O. S. 438 [1863].

¹⁰ Saxton National Bank v. Hay-

wood, 62 Mo. App. 550 [1895]; Ryan v. Sumner, 17 Wash. 228, 49 Pac. 487 [1897].

¹¹ Ridenour v. Sadlin, 1 Handy (Ohio) 464 [1855].

¹² Edwards v. City of Chicago, 140 Ill. 440, 30 N. E. 350 [1893].

¹³ Ryan v. Sumner, 17 Wash. 228, 49 Pac. 487 [1897].

¹⁴ Bigelow v. City of Chicago, 90 Ill. 49 [1878].

¹⁵ Bigelow v. City of Chicago, 90 Ill. 49 [1878]. A similar question was raised but not decided in Wright v. City of Chicago, 48 Ill. 285 [1868].

be regarded as an entirety or shall be divided into sections, each section of the same width throughout, rests within the discretion of the public authorities.¹ It is proper to regard the improvement of such street as an entirety and to levy an assessment upon the abutting or adjoining property without reference to that part of the street opposite such property.² On the other hand such street may be divided into sections, each of the same width throughout and the lots abutting each section assessed for the cost of such section.³ It has, indeed, been said that if such street is improved as an entire improvement, it is improper to divide it for assessment purposes into sections of equal width, but that the entire cost must be computed and assessed upon the property benefited, irrespective of the width of that portion of the street in front of such property.⁴ This view has been expressed, however, in cases in which the attempt was made to apportion the assessment according to the amount of work done in front of each lot.⁵

§ 578. Peculiar use of land as affecting benefits.

Cases are not infrequently presented in which the improvement for which it is sought to levy an assessment would confer an especial benefit upon the land assessed if such land were used for ordinary purposes, or for any one of a variety of purposes to which it might be put, but in which the land is used by the owner thereof for a special and peculiar use, and the improve-

¹ *Bacon v. Mayor and Aldermen of Savannah*, 86 Ga. 301, 12 S. E. 580 [1890]; *Dunker v. Stiefel*, 57 Mo. App. 379 [1894]; *Smith v. City of Cincinnati*, 6 Ohio N. P. 175 [1898].

² *Dunker v. Stiefel*, 57 Mo. App. 379 [1894]; *Smith v. City of Cincinnati*, 6 Ohio N. P. 175 [1898].

³ *Bacon v. Mayor and Aldermen of Savannah*, 86 Ga. 301, 12 S. E. 580 [1890]; *Findlay v. Frey*, 51 O. S. 390, 38 N. E. 114 [1894]; (reversing *Frey v. City of Findlay*, 7 Ohio C. C. 311 [1893]). "It is also objected that the assessment on Sandusky Street is not uniform. The street was improved in sections, because not of uniform width. Each section is, however, of uniform width, and the

assessment thereon the same. The method adopted was a just one. Each section pays for the improvement on it. The same result could have been attained by separate proceedings. This, however, would have added to the expense, without any compensation to the property holders. No good reason is shown why it could not all be done in one, as well as in many, different proceedings." *Findlay v. Frey*, 51 O. S. 390, 403, 38 N. E. 114 [1894]; (reversing *Frey v. City of Findlay*, 7 Ohio C. C. 311 [1893]).

⁴ *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893].

⁵ See § 713.

ment in question does not confer any benefit or any substantial benefit upon the land in question while devoted to such special use. In cases of this sort, the question which is presented is whether such land is to be considered as benefited by the improvement on the theory that benefit is a question of the use which might be made of the land, or whether such land is to be considered as not benefited on the theory that the present and actual use of the land controls the question of benefit. On this question we find a conflict of authority. Land which is owned by the public and used for some public or governmental purpose may be said with some propriety to be devoted to that use.¹ The right to assess land owned by the public and occupied for a public use is discussed in detail hereafter.² If the land is owned by a private person or corporation, and is devoted to a special private use by reason of which it is not benefited by the public improvement, the true rule would seem to be that the right to assess such land is not restricted by the fact of such special and peculiar use. Private owners ought not to be free at their pleasure to withdraw land from the operation of the taxing power and to throw a corresponding burden either upon the other property owners or upon the general taxpayers. If the appropriation to the peculiar use in question is purely voluntary, the owner may change such use at his pleasure and thus obtain the benefit accruing from the improvement. In other cases the owner is restricted either by specific provisions in the conveyance of property to him or by the means whereby he acquired title to the same, from making general and unrestricted use of such property. Even in such cases, however, the co-operation of the former and present owners of such property could free such land from such restrictions as to use and make it available for general use. Accordingly, it seems contrary to the general policy of the law of assessments to permit a special private use of land to withdraw it from the operation of assessment laws and this view is expressed in some cases.³ It must be admitted that this expression of opinion is chiefly obiter, as the use in question

¹ People ex rel. Doyle v. Austin, 47 Cal. 353 [1874]; Fagan v. City of Chicago, 84 Ill. 227 [1876]; City of Frankfort v. State ex rel. Ross, 128 Ind. 438, 27 N. E. 1115 [1891].

² See § 579 *et seq.*

³ Memphis Land and Timber Company v. St. Francis Levee District, 64 Ark. 258, 42 S. W. 763 [1897]; Powers v. City of Grand Rapids, 93 Mich. 393, 57 N. W. 250 [1894].

was a voluntary private use. Where the use is voluntary and private it seems clear that the owner of the land cannot by such conduct prevent the legislature from levying an assessment thereon.⁴ Land which is used voluntarily by the owner thereof for a given business may be assessed for a local improvement which benefits such land generally, even though such improvement does not benefit such land for the purposes for which it is actually used.⁵ Thus, lots owned by a sanitary district on which offices are built, which are to be used temporarily, pending the construction of a drainage canal, may be assessed for the construction of a sewer, even though such improvement may not benefit such land with reference to such temporary use.⁶ Property used as a wharf may be assessed for the construction of a sewer.⁷ It has been said that property used as a coal mine should not be assessed for the expense of constructing a fence around a fencing district, in which such mine is situated.⁸ However, if such property can also be used for agricultural purposes it may be included in such assessment.⁹ The use of property for a slaughter house was considered and permitted to increase the amount of benefit conferred upon such property by the construction of a sewer along a strip of land which had been used as a way through the property thus employed.¹⁰ The deci-

⁴ *Memphis Land and Timber Company v. St. Francis Levee District*, 64 Ark. 258, 42 S. W. 763 [1897]; *Chicago Union Traction Company v. City of Chicago*, 215 Ill. 410, 74 N. E. 449 [1905]; *Chicago Union Traction Company v. City of Chicago*, 207 Ill. 544, 69 N. E. 849 [1904]; *Chicago Union Traction Company v. City of Chicago*, 204 Ill. 363, 68 N. E. 519 [1903]; (distinguishing *Illinois Central Railroad Company v. City of Chicago*, 141 Ill. 509, 30 N. E. 1036 [1893] where the use was one fixed by Federal Statute); *Chicago Union Traction Company v. City of Chicago*, 202 Ill. 576, 67 N. E. 383 [1903]; *Sanitary District of Chicago v. City of Joliet*, 189 Ill. 270, 59 N. E. 566 [1901]; *Clark v. City of Chicago*, 166 Ill. 84, 46 N. E. 730 [1897]; *Powers v. City of Grand Rapids*, 98 Mich. 393, 57 N. W. 250 [1894]; *State, Protestant Foster Home Society, Pros. v. City of New-*

ark, 35 N. J. L. (6 Vr.) 157, 10 Am. Rep. 223; *Dasey v. Skinner*, 33 N. Y. S. R. 15, 11 N. Y. Supp. 821; *Ford v. City of Toledo*, 64 O. S. 92, 59 N. E. 779 [1901]; *Boeres v. Strader*, 1 Cin. Sup. Ct. Rep. 57 [1870].

⁵ *Sanitary District of Chicago v. City of Joliet*, 189 Ill. 270, 59 N. E. 566 [1901].

⁶ *Sanitary District of Chicago v. City of Joliet*, 189 Ill. 270, 59 N. E. 566 [1901].

⁷ *Boeres v. Strader*, 1 Cin. Sup. Ct. Rep. 57 [1870].

⁸ *Stiewel v. Fencing District, No. 6 of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1902].

⁹ *Stiewel v. Fencing District, No. 6 of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1902].

¹⁰ *Butchers' Slaughtering & Melting Association v. Commonwealth*, 169 Mass. 103, 47 N. E. 599 [1897].

sions of the courts upon this question depend so largely, however, upon the nature of the use and upon the special statutory provisions applicable thereto, that the subject must be considered in detail in the following sections.¹¹ If the use for which the property is taken is a quasi public use, as where property is appropriated by a railroad company under statutes which permit of its being used only for the purpose for which it was appropriated, there is some authority for holding that such compulsory use prevents such property from being subject to local assessment.¹² Upon this question there is a conflict of authority and the subject is discussed in detail subsequently.¹³ Where the existence of a special use of the property is said not to prevent the property from being assessed on the theory of special benefits, it is nevertheless said in some jurisdictions that the nature of such use and the probability of its continuance are to be considered in determining the amount of benefits which are to be assessed against such property. If the use in question is such that no benefit inures to the property while such use exists, and if the circumstances are such as to make it probable that such use will be permanent, it has been said that the assessment should be for a nominal amount.¹⁴ This principle is applied especially to land held by quasi public corporations, such as corporations formed for general transportation, and devoted to use in transportation.¹⁵ While such property is not regarded as exempt in the strict sense of the term, the practical operation of such theory often is to reduce the assessment upon such property to a purely nominal amount. If the use is a voluntary one and the owner is free at any time to make such use of the property as he may see fit, justification for this theory seems to be lacking in the law of local assessments. By the operation of

¹¹ See § 579 *et seq.*

¹² *Chicago and Alton Railroad Company v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077 [1894]; *Allegheny City v. West Penna. R. Co.*, 138 Pa. 375, 21 Atl. 763 [1890].

¹³ See §§ 594-598.

¹⁴ *Chicago & Alton Railroad Company v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077 [1894]; *State, Morris and Essex Railroad Company, Pros. v. Jersey City*, 36 N. J. L. (7 Vr.) 56 [1872]; *Owners of Ground v.*

Mayor of Albany, 15 Wend. (N. Y.) 374; *In the Matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York for the enlarging and improving a part of Nassau Street in the said city*, 11 Johns (N. Y.) 77 [1814]; *In the Matter of Westlake Avenue, Seattle*, 40 Wash. 144, 82 Pac. 279 [1905].

¹⁵ *State, Morris and Essex Railroad Company, Pros. v. Jersey City*, 36 N. J. L. (7 Vr.) 56 [1872].

this theory, the property owner is for practical purposes as free to withdraw his property from the operation of local assessment statutes as if such use rendered the property entirely exempt. Questions of a different character are of course presented where the legislature has provided that certain classes of property shall be exempt from local assessment.¹⁶

§ 579. Land belonging to United States.

The power of the legislature to levy assessments on land depends in part on the ownership thereof, and on the use to which it is devoted. The United States is a government distinct from that of each state, beyond the control of individual states, in no way amenable to their authority, and possessing the right to own land for governmental purposes. The United States cannot be sued without its own consent, and no personal liability can therefore be enforced against it. Its land cannot be taken away from it by process issued by state courts, and therefore no lien for local assessments can be enforced against it. The action of United States officials cannot be controlled by the state courts by the writ of mandamus. For these reasons, property owned by the United States is not subject to local assessments.¹ This principle applies not only to land owned and used by the United States for governmental purposes, but also to its public lands, which it has not yet conveyed to individuals.² Thus, public lands belonging to the United States cannot be subjected to assessments for drainage³ or for irrigation.⁴ Accordingly, a grantee of such lands does not take subject to any assessment levied upon them while the United States was the owner thereof.⁵

§ 580. Public property not belonging to United States.

Public property other than that owned by the United States may be taxed or exempted at the discretion of the State Leg-

¹⁶ See § 618.

¹ Nevada National Bank of San Francisco v. Poso Irrigation District, 140 Cal. 344, 73 Pac. 1056 [1903]; People ex rel. Doyle v. Austin, 47 Cal. 353 [1874]; Fagan v. City of Chicago, 84 Ill. 227 [1876]; Edgerton v. Huntington School Township, 126 Ind. 261, 26 N. E. 156 [1890]; Corey v. City of Ft. Dodge, 133 Iowa 666, 111 N. W. 6 [1907].

² Nevada National Bank of San Francisco v. Poso Irrigation District,

140 Cal. 344, 73 Pac. 1056 [1903]; Edgerton v. Huntington School Township, 126 Ind. 261, 26 N. E. 156 [1890].

³ Edgerton v. Huntington School Township, 126 Ind. 261, 26 N. E. 156 [1890].

⁴ Nevada National Bank of San Francisco v. Poso Irrigation District, 140 Cal. 344, 72 Pac. 1056 [1903].

⁵ Nevada National Bank of San Francisco v. Poso Irrigation District, 140 Cal. 344, 73 Pac. 1056 [1903].

islature, since the legislature has full power over the property of the state and of the public corporations and quasi corporations existing in the state as far as questions of taxation are concerned.¹ The effect of including state property in a local assessment is really to transfer a proportionate part of the burden from the property owners benefited by such improvement, or from the general taxpayers of the city, to the general taxpayers of the state. The effect of including property belonging to a city or other public corporation in an assessment is to transfer the burden of taxation from the owners of property benefited by such assessment to the general taxpayers of the public corporation. Questions as to whether public improvements shall be paid for by general taxation or by local assessment are especially within the discretion of the legislature where not restrained by specific constitutional provisions. The question upon which there is a conflict of judicial authority is as to the effect of a general statute granting power to levy assessments upon property benefited, but not specifically providing for the assessment of public property, together with the absence of a statute specifically providing for the exemption of public property from the operation of local assessment. According to some authorities, it is to be presumed, under such statutes, that the legislature intended to assess all the property which it had the power to assess, including public property.² On the other hand some authorities hold that the intention of the legislature to shift a part of the burden to the general taxpayer cannot be presumed in the absence of some specific provision to that effect, and accordingly public property will be regarded as exempt in the absence of some specific provision authorizing its assessment.³

¹ *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894]; *County of McLean v. City of Bloomington*, 106 Ill. 209 [1883].

² *New Orleans v. Warner*, 175 U. S. 120, 44 L. 96, 20 S. 44 [1899]; *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894]; *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]; *County of McLean v. City of Bloomington*, 106 Ill. 209 [1883]; *City of*

Sioux City v. Independent School District of Sioux City, 55 Ia. 150 [1880]; *Board of Commissioners of Franklin County v. City of Ottawa*, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788 [1892]; *St. Louis Public Schools v. City of St. Louis*, 26 Mo. 468 [1858]; *Hassan v. City of Rochester*, 67 N. Y. 528 [1876]; *Vacation of Howard Street*, Philadelphia, 142 Pa. St. 601, 21 Atl. 974 [1891].

³ *Ahern v. Board of Improvement District No. 3 of Texarkana*, 69 Ark.

This intention is often deduced from a comparison of the statutory provisions with reference to the enforcement of the assessment. If such statutes provide for enforcing the assessment either by sale of the property assessed or by the enforcement of personal liability and make no further provisions on this subject, it has been held that since such methods of enforcing the assessment are inapplicable to state properties, the intention of the state legislature must have been to exempt such property.⁴ Under such statutes the legislature seems to contemplate the assessment only of property which can be subject to ordinary legal process.⁵ Questions of this sort depend in part upon the ownership of the property which it is sought to assess and are discussed in detail in the following sections.⁶

68, 61 S. W. 575 [1901]; Board of Improvement v. School District, 56 Ark. 354, 35 Am. Rep. 108, 16 L. R. A. 418, 19 S. W. 969 [1892]; Witter v. Mission School District, 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905 [1898]; State of Connecticut v. City of Hartford, 50 Conn. 89, 47 Am. Rep. 622 [1882]; City of Hartford v. West Middle District, 45 Conn. 462, 29 Am. Rep. 687 [1878]; Edgerton v. Huntington School Township, 126 Ind. 261, 26 N. E. 155 [1890]; Lowe v. Board of Commissioners of Howard County, 94 Ind. 553 [1883]; Edwards & Walsh Construction Company v. Jasper County, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902]; City of Leavenworth v. Laing, 6 Kan. 274 [1870]; City of Camden v. Camden Village Corporation, 77 Me. 530, 1 Atl. 689; County Commissioners of Baltimore County v. Board of Managers of the Maryland Hospital for the Insane, 62 Md. 127 [1884]; Worcester Agricultural Society v. Mayor of City of Worcester, 116 Mass. 193, 17 Am. Rep. 159; City of Big Rapids v. Board of Supervisors of Mecosta County, 99 Mich. 351, 58 N. W. 358 [1894]; City of St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298 [1899]; City of Clinton to Use of

Thornton v. Henry County, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893]; State, Green, Pros. v. Hotaling, 44 N. J. L. (15 Vr.) 347 [1882]; Leonard v. City of Brooklyn, 71 N. Y. 498, 27 Am. Rep. 80; City of Toledo v. Board of Education, 48 O. S. 83, 26 N. E. 403 [1891]; City of Spokane v. Security Savings Society. — Wash. —, 89 Pac. 466 [1907].

⁴City of St. Louis v. Brown, 155 Mo. 545, 46 S. W. 298 [1899].

⁵"Public property used for governmental purposes will not ordinarily be deemed within the words of a statute delegating in general terms authority to levy local assessments; . . . Statutes conferring general authority to assess should be construed as operating upon property subject to legal process, and not upon property held for governmental purposes by the state or any of the local instrumentalities of government; and without a statute granting the right to make such assessments either expressly or by necessary implication that right does not exist." *Edwards & Walsh Construction Co. v. Jasper County*, 117 Ia. 365, 373, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902].

⁶See § 581 *et seq.*

§ 581. Property belonging to state

There is no question but that the legislature has the power to authorize land belonging to the state to be assessed for local improvements.¹ The method of collecting such assessment necessarily differs from that for collecting assessments against lands of individuals and is discussed elsewhere.² If no specific provision is made either for including or excluding land belonging to the state, we find the same difference of authority that exists in the case of public property generally. According to some authorities, a statute which confers the power of levying local assessments and which does not provide for the exemption of property belonging to the state from the operation of such assessment, authorizes the assessment of the state's property.³ Where this view prevails, the fact that the state's property is exempt from general taxation does not operate to exempt it from local assessment.⁴ Other legislative provisions may serve to render clearer the intention of the legislature to assess state property.⁵ Thus, a provision in the charter of a state to the effect that property which is exempt from taxation by the general law of the state may be assessed and taxed for local improvements, has been held to show the intention of the legislature to assess state property where such property was one of the classes exempt by statute from general taxation.⁶ Lands held by trustees of a canal, of which the state is the beneficial owner, are subject to assessment.⁷ Real property, the legal title to which is in the chancellor of the state in trust for private individuals, may be subject to assessment.⁸ In other jurisdictions it is held

¹ *State of Connecticut v. City of Hartford*, 50 Conn. 89, 47 Am. Rep. 622 [1882]; *Higgins v. City of Chicago*, 18 Ill. 276 [1857]; *Trustees of the Illinois and Michigan Canal v. City of Chicago*, 12 Ill. 403 [1851]; *Hassan v. City of Rochester*, 67 N. Y. 528 [1876].

² See § 1162.

³ *Whitley v. Fawcett*, Styles 12 (23 Car. 1); *Hager v. Gast*, 119 Ky. 502, 27 Ky. Law Rep. 129, 84 S. W. 556 [1905], *Hassan v. City of Rochester*, 67 N. Y. 528 [1876]; (former appeal *Hassen v. City of Rochester*, 65 N. Y. 516 [1875]); *Webber v. Common Council of the City of Lockport*, 43 Howard (N. Y.) 368 [1872].

⁴ *Hager v. Gast*, 119 Ky. 502, 27 Ky. Law Rep. 129, 84 S. W. 556 [1905]; *Hassan v. City of Rochester*, 67 N. Y. 528 [1876]; (former appeal, *Hassen v. City of Rochester*, 65 N. Y. 516 [1875]).

⁵ *Hassan v. City of Rochester*, 67 N. Y. 528 [1876].

⁶ *Hassan v. City of Rochester*, 67 N. Y. 528 [1876].

⁷ *Trustees of the Illinois and Michigan Canal v. City of Chicago*, 12 Ill. 403 [1851].

⁸ *Chancellor of the State of New Jersey v. City of Elizabeth*, 66 N. J. L. (37 Vr.) 688, 52 Atl. 1130 [1901]; (affirming *Chancellor of State v. City of Elizabeth*, 65 N. J.

that unless the legislature clearly manifests the intention of including property belonging to the state in the operation of the local assessment, such property must be excluded.⁹ In some jurisdictions this view is entertained because of the fact that the state cannot be a party defendant in either law or equity and no means is provided for collecting such assessment other than by such suit.¹⁰ Property on which is situated a hospital for the insane, which belongs to the state and which is under the direction and control of a board of managers is, under this theory, not subject to local assessment.¹¹ Even where the property of the state has been held to be generally subject to special assessment, it has been held that a constitutional provision which prohibits the state of New York from selling, leasing or otherwise disposing of the Erie Canal prevents the levy of local assessment upon the lands of such canal, since the state legislature has no power to authorize the imposition of such assessment whereby such land might be sold.¹² This reason omits consideration of

L. (36 Vr.) 483, 47 Atl. 455 [1900]]. (In this case the statute provided that lands owned by an officer in his official capacity in trust should be subject to taxation, and that taxation should be a lien thereon as in the case of other persons.)

⁹ *People ex rel. Dyle v. Austin*, 47 Cal. 353 [1874]; *State v. Kilburn*, — Conn. —, 69 Atl. 1028 [1908]; *State of Connecticut v. City of Hartford*, 50 Conn. 89, 47 Am. Rep. 622 [1882]; *In re Petition of City of Mt. Vernon to assess cost of local improvements, etc.*, 147 Ill. 359, 23 L. R. A. 807, 35 N. E. 533 [1894]; *Williams v. Little White Lick Gravel Road Company*, Wilson's Sup. Ct. Rep. (Ind.) 7 [1871]; *Ottumwa Brick & Construction Co. v. Ainley*, 109 Ia. 386, 80 N. W. 510 [1899]; *Polk County Savings Bank v. State of Iowa*, 69 Ia. 24, 28 N. W. 416 [1886]; *Von Steen v. Beatrice*, 36 Neb. 421, 54 N. W. 677 [1893]. In *Polk County Savings Bank v. State of Iowa*, 69 Ia. 24, 28 N. W. 416 [1886] an assessment was in fact levied against state property, and the state volun-

tarily entered its appearance but as no judgment against the state could be enforced, none was rendered. See explanation in *Edwards & Walsh Construction Co. v. Jasper County*, 117 Ia. 365, 94 Am. St. Rep. 301 90 N. W. 1006 [1902]. In England property bought for a volunteer corps and so held for the use of the crown, is not liable to assessment under a statute in which the crown property is not named. *Hornsey Urban District Council v. Hennell*, [1902], 2 K. B. 73, 71 L. J. (K. B.) 479, 86 L. T. 423, 50 Weekly Rep. 521, 66 J. P. 613.

¹⁰ *In re Petition of City of Mt. Vernon to assess cost of local improvements, etc.*, 147 Ill. 359, 23 L. R. A. 807, 35 N. E. 533 [1894]; *Williams v. Little White Lick Gravel Road Company*, Wilson's Sup. Ct. Rep. (Ind.) 7 [1871].

¹¹ *County Commissioners of Baltimore County v. Board of Managers of the Maryland Hospital for the Insane*, 62 Md. 127 [1884].

¹² *Elwood v. City of Rochester*, 43 Hun. 102 [1887].

the fact that the state might provide for an assessment and require payment of the same out of the canal funds. The question has been raised, but not decided, whether purchasers of state lands upon which ditch taxes have been assessed can have such taxes set aside.¹³

§ 582. Property belonging to county.

The legislature has undoubted power to authorize a city or other similar corporation to assess property within its limits belonging to a county, when such property is especially benefited by a local improvement. It is also clear, that if the legislature specifically exempts such property from local assessment, it has the power to do so. As in the case of other forms of public property the difficult question is found where the legislature has given to the city a general power to levy local assessments upon the property benefited by the improvement, without either specifically excepting or including county property. Here again we find the same conflict of authority. According to the views entertained in some jurisdictions, the city may under such statutes, assess county property on the theory that such property is exempt only if there is some specific provision for its exemption.¹ Under such statutes it is proper to assess a court house,² or a court house square,³ for the expense of constructing a street adjacent thereto. County property may be assessed for a water tax.⁴ The fact that county property is exempt from general taxation, does not prevent the city from assessing it on the theory of benefits.⁵ Indeed,

¹³ *Brownell v. Board of Supervisors of Gratiot County*, 49 Mich. 414, 13 N. W. 798 [1882].

¹ *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]; *County of McLean v. City of Bloomington*, 106 Ill. 209 [1883] *Cook County v. City of Chicago*, 103 Ill. 646 [1882]; *Trustees of the Illinois and Michigan Canal v. City of Chicago*, 12 Ill. 403 [1851]; *Edwards & Walsh Construction Co. v. Jasper County*, 117 Iowa 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902]; *Board of Commissioners of Franklin County v. City of Ottawa*, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788 [1892].

² *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890].

³ *Board of Commissioners of Franklin County v. City of Ottawa*, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788 [1892].

⁴ *Cook County v. City of Chicago*, 103 Ill. 646 [1882].

⁵ *Cook County v. City of Chicago*, 103 Ill. 646 [1882]; *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]; *Edwards & Walsh Construction Co. v. Jasper County*, 117 Iowa 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902].

a constitutional provision that the property of counties may be exempt from taxation by general law has been held to imply that such property is liable to taxation and assessment in the absence of some law specifically exempting it.⁶ Real property belonging to a county and used for governmental purposes cannot, of course, be sold to satisfy the lien of a street assessment.⁷ Where the assessment of county property is permitted, the county is compelled to pay the amount of the assessment.⁸ According to the theory in force in other jurisdictions, a city or other similar public corporation cannot assess property unless the power to levy such assessment is clearly given. Failure on the part of the legislature either to exempt such property specifically or to provide for its assessment, is regarded as exempting it from the operation of local assessments.⁹ Different reasons are given in support of this theory. One reason which is applicable to all classes of statutes is that to permit a city to levy assessment upon county property is to permit it to invade the power and authority of the county and interfere with its governmental operations; a result which will never be presumed but must be specifically provided by the legislature.¹⁰ Another reason applicable only to certain classes of statutes is that no means is provided for the collection of local assessments, which is applicable to public property. Such property cannot be sold and if the only remedy for collecting a local assessment is the sale of the property assessed, it is held by some courts that such provision shows the intention of the legislature not to assess county property.¹¹ Under this theory

⁶ *Cook County v. City of Chicago*, 103 Ill. 646 [1882].

⁷ *County of McLean v. City of Bloomington*, 106 Ill. 209 [1883]; *Lowe v. Board of Commissioners of Howard County*, 94 Ind. 553 [1883].

⁸ *County of McLean v. City of Bloomington*, 106 Ill. 209 [1883].

⁹ *Stiwell v. Fencing District No. 6 of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1903]; *City of Big Rapids v. Board of Supervisors of Mecosta County*, 99 Mich. 351, 58 N. W. 358 [1894]; (citing *Worcester County v. Worcester*, 116 Mass. 193, 17 Am. Rep. 159 [1874]); *City of St. Louis v. Brown*, 155 Mo.

545, 56 S. W. 298 [1899]; *Thornton v. City of Clinton*, 48 Mo. 648, 50 S. W. 295 [1898]; *City of Clinton to use of Thornton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893]; *Von Steen v. Beatrice*, 36 Neb. 421, 54 N. W. 677 [1893]; *County of Harris v. Boyd*, 70 Tex. 237, 7 S. W. 713 [1888].

¹⁰ *County of Harris v. Boyd*, 70 Tex. 237, 7 S. W. 713 [1888].

¹¹ *City of St. Louis v. Brown*, 155 Mo. 545, 56 S. W. 298 [1899]; *City of Clinton to use of Thornton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893].

a city cannot levy an assessment against a court house for the cost of constructing an adjoining street.¹² A poor farm belonging to a county cannot be assessed as a part of a fencing district.¹³ Even where this theory is entertained, a provision exempting county property from taxation does not apply to local assessment.¹⁴

§ 583. Property belonging to township.

If the statute specifically provides therefor, property belonging to a township may be assessed for benefits.¹ Thus, by statutory authority an assessment for drainage may be levied upon a highway and the township by which said highway is constructed may be charged with the cost thereof.² An individual land owner cannot complain because township property has been assessed.³

§ 584. Property belonging to city.

The cost of a public improvement, which confers a local benefit may be charged against a city or town on three different theories. Such assessment may be levied against the city or town as a property owner, treating the city or town for such purpose as any private individual is treated.¹ Such assessment may be levied against the city or town for benefits accruing to the city or town as a whole.² The third case is not, correctly speaking, one of assessment. After the individual property owners have been assessed to the full amount of the benefits conferred upon them by the improvement for which the assessment is levied, the excess, if any, may and should be charged upon the town, not on any theory of special benefits, but because it is the duty of the city or town to pay by general taxation for the cost of the improvement over and above the amount of special benefits to the property owners.³ The legislature has undoubtedly power to provide that

¹² *Thornton v. City of Clinton*, 148 Mo. 648, 50 S. W. 295 [1898]; *County of Harris v. Boyd*, 70 Tex. 237, 7 S. W. 713 [1888].

¹³ *Stiewel v. Fencing District No. 6 of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1903].

¹⁴ *City of Clinton to use of Thornton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893].

¹ *Zumbro v. Parnin*, 141 Ind. 430,

40 N. E. 1085 [1895]; *State ex rel. Horrall v. Thompson*, 109 Ind. 533, 10 N. E. 305 [1886].

² *State ex rel. Horrall v. Thompson*, 109 Ind. 533, 10 N. E. 305 [1886]; *Pleasant Township v. Cook*, 160 Ind. 533, 67 N. E. 262 [1902].

³ *Grimes v. Coe*, 102 Ind. 406, 1 N. E. 735 [1885].

¹ See *post*; this section.

² See § 585.

³ See § 663.

property belonging to a city shall be assessed for local improvements in the same way as the property of private individuals.⁴ In the absence of a statute which either specifically exempts or includes city property, it is held in some jurisdictions that city property should be included.⁵ One reason which is assigned for this theory is that to include city property will tend to equality of assessment in proportion to benefits.⁶ Since the question involved is whether a city has power to assess its own property, the objections which may be urged against allowing a city to assess other forms of property, are in part absent, since there can be no question of interference by the city with the operation of any other corporation. The fact that city property is exempt from general taxation does not operate to exempt it from local assessment. The constitution of Missouri provides: "The general assembly shall not impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes"⁷ This provision does not prevent the legislature from authorizing a general judgment against a city for its proportion of a street assessment, based on its ownership of realty abutting the street for the improvement of which such assessment is levied.⁸ Under this theory, a street improvement may be paid for in part

⁴ *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894]; *Higgins v. City of Chicago*, 18 Ill. 276 [1857]; *Trustees of the Illinois and Michigan Canal v. City of Chicago*, 12 Ill. 403 [1851]; *Barber Asphalt Paving Company v. City of St. Joseph*, 183 Mo. 451, 82 S. W. 64 [1904]; *City of St. Louis v. Brown*, 155 Mo. 545, 56 S. W. 298 [1899]; *In the Matter of the Petition of Livingston to vacate an assessment*, 121 N. Y. 94, 24 N. E. 290 [1890]; *In re City of New York*, 38 Misc. Rep. 600, 78 N. Y. S. 51 [1902]; *People ex rel. Connelly v. Reis*, 96 N. Y. S. 597, 109 App. Div. 748 [1905]; *People ex rel. Tietjen*, 96 N. Y. S. 601, 109 App. Div. 919 [1905]; *Turtler's Case*, 19 Abb. Pr. (N. Y.) 140 [1865].

⁵ *Seammon v. City of Chicago*, 42 Ill. 192 [1866]; *Bennett v. Seibert*, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071 [1894]; *Matter of the Extension of Church Street from Fulton Street to Morris Street in the City of New York*, 49 Barb. 455 [1867]; *In the Matter of the Petition of Turtler to vacate an assessment for paving the Eighth Avenue in the City of New York*, 44 Barb. (N. Y.) 46 [1865]; *Dick v. City of Toledo*, 11 Ohio C. C. 349 [1896].

⁶ *Seammon v. City of Chicago*, 42 Ill. 192 [1866].

⁷ Article X., § 10, Constitution of Missouri [1875].

⁸ *Barber Asphalt Paving Company v. City of St. Joseph*, 183 Mo. 451, 82 S. W. 64 [1904].

by assessments levied on public parks,⁹ or markets,¹⁰ or on a work house.¹¹ Land owned by the city may be assessed for sewer purposes.¹² A public square is subject to assessment.¹³ As in the case of assessments against other forms of public property, such assessment cannot be collected by sale of the public property, but some means must be provided whereby the city can be compelled to pay the amount which is assessed against its property.¹⁴ However, a want of power to sell the property does not necessarily mean that the property cannot be assessed. Thus, in Illinois, it was once held that city property should be assessed in the same manner as property belonging to individuals.¹⁵ Subsequently, it was held that a sale by a city of its own property was unauthorized and absolutely void.¹⁶ While the decision in this case was based in part upon the want of power in the city to assess its own property, these two cases were subsequently explained as not inconsistent, the true point of decision of the second case being said to be that the city had no power to sell its own property which it had assessed.¹⁷ In other jurisdictions, it seems to be held that a city cannot assess its own property for local improvements in the absence of a statute expressly authorizing such assessment.¹⁸ Under this theory land held by a city

⁹ *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894]; *Seammon v. City of Chicago*, 42 Ill. 192 [1866]; *Bennett v. Seibert*, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071 [1894]; *Matter of the Extension of Church Street from Fulton Street to Morris Street in the City of New York*, 49 Barb. 455 [1867]; *In re City of New York*, 38 Misc. Rep. 600, 78 N. Y. 51 [1902].

¹⁰ *Matter of the Extension of Church Street from Fulton Street to Morris Street in the City of New York*, 49 Barb. (N. Y.) 455 [1867]; *Dick v. City of Toledo*, 11 Ohio C. C. 349 [1896].

¹¹ *Barber Asphalt Paving Company v. City of St. Joseph*, 183 Mo. 451, 82 S. W. 64 [1904].

¹² *People ex rel. Connelly v. Reis*, 96 N. Y. S. 597, 109 App. Div. 748 [1905]; *People ex rel. Tietjen*, 96 N. Y. S. 601, 109 App. Div. 919 [1905].

¹³ *In the Matter of the Petition of Turtler to vacate an assessment for paving the Eighth Avenue in the City of New York*, 44 Barb. (N. Y.) 46 [1865].

¹⁴ *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894]; *Barber Asphalt Paving Company v. City of St. Joseph*, 183 Mo. 451, 82 S. W. 64 [1904]; *Bennett v. Seibert*, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071 [1894]; *In the Matter of the Petition of Livingston to vacate an assessment*, 121 N. Y. 94, 24 N. E. 290 [1890].

¹⁵ *Seammon v. City of Chicago*, 42 Ill. 192 [1866].

¹⁶ *Taylor v. The People ex rel. Reed*, 66 Ill. 322 [1872].

¹⁷ See explanation of earlier cases found in *County of McLean v. City of Bloomington*, 106 Ill. 209 [1883].

¹⁸ *People ex rel. Doyle v. Austin*, 47 Cal. 353 [1874]; *State v. Several Parcels of Land*, — Neb. —, 113 N. W. 248 [1907]; *City of St. Louis*

as a public park cannot be assessed for benefits by reason of the construction of a boulevard.¹⁹ Accordingly, since property used exclusively for city purposes cannot be assessed, it should not be counted in determining whether the owners of one-half of the frontage abutting upon a street to be improved have objected to such improvement.²⁰ Where a city made a contract for the street improvement by which it was expressly stipulated that the city should be under no expense for such improvement except for intersections, it was held that the contractor could not charge the city on the ground that the city owned a market place in the center of the street which was improved under such a contract.²¹

§ 585. Assessment of city for benefits received as a whole.

Under statutory authority, it is proper to charge a city or town with the amount of benefits which the improvement for which the assessment is levied confers upon such city or town as a whole.¹ Thus, such a charge may be levied for benefits received from drainage.² A city or town may be assessed for the benefit which it receives by reason of the improvement in the condition of its highways caused by the local improvement for which such charge is exacted.³ Such a charge is not a lien upon the property of the town nor can such property be sold therefor.⁴ The city or town must be compelled by proper proceedings to pay the amount of such charge. In the absence of statutory authority empowering drainage commissioners to attach to their drainage district the streets and alleys of a village which have connected their drains with those of the district, such drainage

v. Brown, 155 Mo. 545, 56 S. W. 298 [1899]; *Armstrong v. Ogden City*, 12 Utah 476, 43 Pac. 119 [1895].

¹⁹ *State v. Several Parcels of Land*, — Neb. —, 113 N. W. 248 [1907].

²⁰ *Armstrong v. Ogden City*, 12 Utah 476, 43 Pac. 119 [1895].

²¹ *Howell v. City of Philadelphia*, 38 Pa. (12 Casey) 471 [1861].

¹ *Commissioners of Highways of Town of Dix v. Big Four Drainage District of Ford County*, 207 Ill. 17, 69 N. E. 576 [1904]; *State, King, Pros. v. Reed*, 43 N. J. L. (14 Vr.) 186 [1881]; *Town of Muskego v. Drainage Commissioners*, 78 Wis. 40, 47 N. W. 11 [1890].

² *Commissioners of Highways of Town of Dix v. Big Four Drainage District of Ford County*, 207 Ill. 17, 69 N. E. 576 [1904]; *State, King, Pros. v. Reed*, 43 N. J. L. (14 Vr.) 186 [1881]; *Town of Muskego v. Drainage Commissioners*, 78 Wis. 40, 47 N. W. 11 [1890].

³ *Town of Muskego v. Drainage Commissioners*, 78 Wis. 40, 47 N. W. 11 [1890].

⁴ *Commissioners of Highways of Town of Dix v. Big Four Drainage District of Ford County*, 207 Ill. 17, 69 N. E. 576 [1904].

commissioners have no power to cause the assessment of such village for benefits.⁵

§ 586. Public school property.

Whether land belonging to a school board or district can be assessed for local improvements, is another question upon which the same conflict of authority exists. In some jurisdictions, it is held that unless such property is specifically exempt, school property other than that which is given in trust for school purposes, can be assessed.¹ Under this theory school property can be assessed for the cost of abutting streets.² Where, by statute, property which is benefited is to be assessed, and the question of determining what property is benefited is left to a jury, it is held that the court cannot say as a matter of law that school property is either benefited or not benefited, but that such question must be passed upon by the jury.³ The rule that school property given in trust for school purposes is subject to local assessments, is said to apply equally to property occupied for school purposes, to vacant lots and to property occupied by buildings from which the school district receives rent.⁴ Its application to property belonging to a school district, but not used for school purposes is especially clear.⁵ The fact that the legal title to the school property is in the city in trust for the school district, does not prevent the levy of assessment upon such district.⁶ Such property cannot be sold. The proper method of enforcing such assessment is to compel the school district to pay the amount of its assessment out of its

⁵ Drainage Commissioners of District No. 1 v. Village of Cerro Gordo, 217 Ill. 488, 75 N. E. 516 [1905]; (accordingly the village is not liable even if it fails to make objections or to appeal.)

¹ School District of Fort Smith v. Board of Improvement, 65 Ark. 343, 46 S. W. 418 [1898]; City of Chicago in trust for use of Schools v. City of Chicago, 207 Ill. 37, 69 N. E. 580 [1904]; Board of Education of City of Chicago v. People, ex rel. Commissioners of Lincoln Park, 219 Ill. 83, 76 N. E. 75 [1905]; City of Sioux City v. Independent School District of Sioux City, 55 Iowa 150 [1880]; Kansas City v. Bacon, 157 Mo. 450, 57 S. W. 1045 [1900]; Web-

ber v. Common Council of the City of Lockport, 43 Howard (N. Y.) 368 [1872]; *In re* Howard Avenue, North, in City of Seattle, 44 Wash. 62, 86 Pac. 1117 [1906].

² *In re* Howard Avenue, North, in City of Seattle, 44 Wash. 62, 86 Pac. 1117 [1906].

³ Kansas City v. Bacon, 157 Mo. 450, 57 S. W. 1045 [1900].

⁴ City of Chicago in trust for use of Schools v. City of Chicago, 207 Ill. 37, 69 N. E. 580 [1904].

⁵ School District v. Board of Improvement, 65 Ark. 343, 46 S. W. 418 [1898].

⁶ City of Chicago in trust for use of Schools v. City of Chicago, 207 Ill. 37, 69 N. E. 580 [1904].

funds.⁷ It has been held, however, that property belonging to a school district, but not used exclusively for school purposes may be sold to satisfy a local assessment.⁸ If property has been conveyed by the United States to a state for school purposes, it is held in some jurisdictions that it can be assessed like other school property.⁹ In other jurisdictions, it is held that such property cannot be assessed,¹⁰ and this rule has been applied even in jurisdictions where other school property is held liable to assessment. Under this theory lands given by the United States in trust for school purposes, cannot be assessed for the cost of drainage.¹¹ In other jurisdictions, school property is regarded as devoted to a special use, inconsistent with the diversion of part of its funds to pay local assessments. Under this theory school lands which are used for school purposes cannot be assessed for the cost of local improvements.¹² Thus, school property cannot under this theory be assessed for the cost of streets,¹³ sidewalks,¹⁴ drainage.¹⁵

⁷ *City of Sioux City v. Independent School District of Sioux City*, 55 Iowa 150 [1880].

⁸ *School District of Fort Smith v. Board of Improvement*, 65 Ark. 343, 46 S. W. 418 [1898].

⁹ *St. Louis Public Schools v. City of St. Louis*, 26 Mo. 468 [1858].

¹⁰ *The People ex rel. Little v. Trustees of Schools*, 118 Ill. 52, 7 N. E. 262 [1887]; *Edgerton v. Huntington School Township*, 126 Ind. 261, 26 N. E. 156 [1890]; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902]; *City of Spokane v. Security Savings Society*, — Wash. —, 89 Pac. 466 [1907].

¹¹ *Edgerton v. Huntington School Township*, 126 Ind. 261, 26 N. E. 156 [1890].

¹² *Board of Improvement v. School District*, 56 Ark. 354, 35 Am. St. Rep. 108, 16 L. R. A. 418, 19 S. W. 969 [1892]; *City of Hartford v. West Middle District*, 45 Conn. 462, 29 Am. Rep. 687 [1878]; *Witter v. Mission School District*, 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905 [1898]; *Sutton v. School City of Montpelier*, 28 Ind. App. 315, 62 N. E. 710

[1902]; *City of Butte v. School District No. 1*, 29 Mont. 336, 74 Pac. 869 [1904]; *Von Steen v. City of Beatrice*, 36 Neb. 421, 54 N. W. 677 [1893]; *City of Toledo v. Board of Education*, 48 O. S. 83, 26 N. E. 403 [1891]; *Board of Education v. City of Toledo*, 48 O. S. 87, 26 N. E. 404 [1891]; *Assessment of School Property*, 7 Ohio N. P. 568 [1900]; *Pittsburgh v. Sterrett Sub-district School*, 204 Pa. St. 635, 61 L. R. A. 183, 54 Atl. 463 [1903].

¹³ *Witter v. Mission School District*, 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905 [1898]; *City of Hartford v. West Middle District*, 45 Conn. 462, 29 Am. Rep. 687 [1878]; *Sutton v. School City of Montpelier*, 28 Ind. App. 315, 62 N. E. 710 [1902]; *Assessment of School Property*, 7 Ohio N. P. 568 [1900]; *Pittsburgh v. Sterrett Subdistrict School*, 204 Pa. St. 635, 61 L. R. A. 183, 54 Atl. 463 [1903].

¹⁴ *City of Toledo v. Board of Education*, 48 O. S. 83, 26 N. E. 403 [1891].

¹⁵ *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902].

sewers,¹⁶ or sprinkling.¹⁷ A school property held by a school board for the use of the state to carry on a system of common schools is said to be exempt from local assessment, because it is not subject to execution, or levy, or sale under decree of court to satisfy the lien of street improvement.¹⁸ The intention of the legislature to exempt school property from local assessment, has been deduced in some cases from the general wording of statutes which do not contain any such specific provision. Thus, an act which provided for levying an assessment for fencing upon all real estate in the district which was taxable by the state and county was held not to include school lands which were generally not taxable.¹⁹ It seems to be held in some of these jurisdictions that if land is owned by a school district, but is not used for school purposes, it can be assessed.²⁰ The reason sometimes given for exempting school property from local assessment is, that from the nature of its use, it can not receive a benefit from the improvement for which it is sought to levy the assessment.²¹ In other cases the reason for exempting such property from local assessment is said to be that no means is provided for enforcing the collection of the same.²²

§ 587. Streets and roads.

In the absence of specific statutory authority for assessing a street, no assessment can be levied against it.¹ This principle applies even though such street is in fact benefited by the con-

¹⁶ *Assessment of School Property*, 7 Ohio N. P. 568 [1900].

¹⁷ *City of Butte v. School District*, No. 1, 29 Mont. 336, 74 Pac. 869 [1904].

¹⁸ *City of Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625 [1896].

¹⁹ *Bradshaw v. Board of Commissioners of Guilford County*, 92 N. C. 278 [1885].

²⁰ *Witter v. Mission School District*, 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905 [1898].

²¹ *City of Hartford v. West Middle District*, 45 Conn. 462, 29 Am. Rep. 687 [1878]; *City of Butte v. School District*, No. 1, 29 Mont. 336, 74 Pac. 869 [1904].

²² *Pittsburgh v. Sterrett Subdistrict*

School, 204 Pa. St. 635, 61 L. R. A. 183, 54 Atl. 463 [1903].

¹ *Bacon v. Mayor and Aldermen of Savannah*, 105 Ga. 62, 31 S. E. 127 [1898]; *Cunningham v. City of Peoria*, 157 Ill. 499, 41 N. E. 1014 [1895]; *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894]; *Holt v. City of East St. Louis*, 150 Ill. 530, 37 N. E. 927 [1894]; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894]; *Leman v. City of Lake View*, 131 Ill. 388, 23 N. E. 346 [1890]; *DeKoven v. City of Lake View*, 129 Ill. 399, 21 N. E. 813 [1890]; (followed in *Waggeman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895]); *City of Frankfort v. State ex rel. Ross*, 128

struction of another street.² This principle depends in part upon the fact that streets are public highways. The city may have the legal title to them, but it holds such title solely for the benefit of the general public and subject to their use. Such property is therefore devoted to a public use, even more than the other property belonging to a city. Another reason for holding such property not subject to assessment is found under statutes which provide for collecting an assessment by sale of the property assessed. A street cannot, of course, be sold and therefore it cannot be the intention of the legislature by such a statute, to provide for assessing a street.³ Special stress is sometimes laid upon the statutory description of the property to be assessed as indicating an intention not to assess streets. Thus, if the statute provides for the assessment of "lots, blocks, tracts and parcels of land contiguous to such improvement," such description does not include streets which cross the improvement.⁴ So, if the statute provides for assessing abutting lots, such description does not include the street which crosses the improvement.⁵ Streets and highways cannot be assessed, even if the description of the land to be assessed might seem *prima facie* to include them. Thus, under a statute authorizing an assessment of land one hundred and fifty feet back from the line of the improvement, a public highway within that distance cannot be assessed.⁶ If the city has merely acquired an easement in the street and the former owner retains the fee, it is said that such fee is of so little value that the former owner should not be expected to pay the cost of such assessment.⁷

Ind. 438, 27 N. E. 1115 [1891]; *Whiting v. Mayor and Aldermen of the City of Boston*, 106 Mass. 89 [1870]; *Smith v. City of Buffalo*, 159 N. Y. 427, 54 N. E. 62 [1899]; (affirming, *Smith v. City of Buffalo*, 90 Hun. 118, 35 N. Y. S. 635 [1895]); *City of Schenectady v. Trustees of Union College*, 144 N. Y. 241, 26 L. R. A. 614, 39 N. E. 67 [1894]; (reversing, 66 Hun. 179, 21 N. Y. S. 147); *In the Matter of the Application of Churchill to vacate an assessment*, 82 N. Y. 288 [1880]; *State ex rel. City of Columbus v. Mitchell*, 31 O. S. 592 [1877].

² *Bacon v. Mayor and Aldermen of*

Savannah, 105 Ga. 62, 31 S. E. 127 [1898].

³ *State ex rel. City of Columbus v. Mitchell*, 31 O. S. 592 [1877].

⁴ *Cunningham v. City of Peoria*, 157 Ill. 499, 41 N. E. 1014 [1895]; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894].

⁵ *Holt v. City of East St. Louis*, 150 Ill. 530, 37 N. E. 927 [1894].

⁶ *City of Frankfort v. State ex rel. Ross*, 128 Ind. 438, 27 N. E. 1115 [1891].

⁷ *City of Schenectady v. Trustees of Union College*, 144 N. Y. 241, 26 L. R. A. 614, 39 N. E. 67 [1894]; (reversing, 66 Hun. 179, 21 N. Y. S. 147).

In this case, the statute described the property to be assessed as "the lots and buildings lying upon" the improvement and this description did not include streets crossing the improvement. A street which has been closed and accordingly reverts to the property owners is not subject to assessment until such a strip of land is placed upon the tax assessment rolls.⁸ There is some authority for holding that a statute authorizing an assessment upon a certain area authorizes an assessment upon the streets within that area. Under a statute authorizing the assessment of benefits according to the area of the land drained by the improvement it is held that an assessment may be levied upon city streets. The street is not to be sold for such assessment, but the city must pay the amount of the assessment thus levied against it. One of the most celebrated cases on this proposition arose out of the drainage improvement which was constructed in and about the city of New Orleans. When this case first came before the United States Supreme Court, it was held that the city was probably liable for the amount of benefits conferred by such improvement upon the streets of said city, but that as the city had issued bonds, the proceeds of which had gone into such fund in excess of the amount of benefit to the streets, equity would regard this as in effect a full payment of such liability.⁹ When the case came before the United States Supreme Court again, that court answered one question certified by the Circuit Court of Appeals and declined to answer the other and sent the case back for hearing.¹⁰ When it next came before the Supreme Court of the United States, that court held that the city of New Orleans had voluntarily rendered the collection of drainage assessments impossible by abandoning the improvement,¹¹ and thus destroyed the drainage fund. By reason of these facts, the city was held liable and it was also held liable for the amount of benefits conferred upon the streets and squares of the city.¹² By the specific provisions of the statute, an assessment may be levied upon streets to be paid by the city, or what

⁸ In the Matter of Churchill to vacate an assessment, 82 N. Y. 288 [1880].

⁹ *Peake v. New Orleans*, 139 U. S. 342, 35 L. 131, 11 S. 541 [1891]; (affirming, *Peake v. City of New Orleans*, 38 Fed. 779 [1891]).

¹⁰ *Warner v. New Orleans*, 167 U. S. 467, 42 L. 239, 17 S. 892 [1897].

¹¹ So held in *Davidson v. New Orleans*, 34 La. Ann. 170, and see *Warner v. New Orleans*, 167 U. S. 467, 42 L. 239, 17 S. 892 [1897].

¹² *New Orleans v. Warner*, 175 U. S. 120, 44 L. 96, 20 S. 44 [1899]; (modified on rehearing: 176 U. S. 92, 44 L. 385, 20 S. 280 [1900]).

is in effect the same thing, it may be provided that the city shall pay a part of the cost of the improvement consisting usually of the cost of intersections.¹³ However, a statute which provides for apportioning a part of the cost of drainage against any "public or corporate road," and providing specifically for the payment of assessments against a county, state or free turnpike road or township road, is held not to empower the drainage district to assess benefits to public streets in the city without the consent of the city.¹⁴ Other statutes have provided in specific terms for assessing highways for the amount of benefits which they may receive by reason of drainage and imposing the cost of such assessments upon the respective public corporations or quasi corporations.¹⁵ Under such statutes, such assessments may be levied and must be paid by the respective public corporations. A public corporation upon which such liability is sought to be imposed may show, however, that no such highway exists.¹⁶ A gravel road has been held to be benefited by a drainage improvement and subject to assessment therefor.¹⁷ Since the condition of the property at the time that proceedings are instituted and the assessment is levied, controls as to questions of assessment¹⁸ the fact that a part of an abutting lot is dedicated for street purposes after the assessment is levied, does not entitle the property owner to a reduction in the assessment.¹⁹ A plank road may be improved by the city within which it is situated, if it has become a city street and the plank road company may be assessed therefor, on account solely of its ownership of such road.²⁰

¹³ *Dick v. City of Toledo*, 11 Ohio C. C. 349 [1896].

¹⁴ *City of Joliet v. Spring Creek Drainage District*, 222 Ill. 441, 78 N. E. 836 [1906].

¹⁵ *Commissioners of Big Lake Special Drainage Dist. v. Commissioners of Highways of Sand Ridge*, 199 Ill. 132, 64 N. E. 1094 [1902]; *Illinois Central Railroad Company v. Commissioners of East Lake Fork Special Drainage District*, 129 Ill. 417, 21 N. E. 925 [1890]; *Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District*, 127 Ill. 581, 21 N. E. 206 [1890]; *Pleasant Township v. Cook*, 160 Ind.

533, 67 N. E. 262 [1902]; *State ex rel. Horrall v. Thompson*, 109 Ind. 533, 10 N. E. 305 [1886].

¹⁶ *Commissioners of Big Lake Fork Special Drainage Dist. v. Commissioners of Highways of Sand Ridge*, 199 Ill. 132, 64 N. E. 1094 [1902].

¹⁷ *Indianapolis and Cumberland Gravel Road Co. v. State ex rel. Flack*, 105 Ind. 37, 4 N. E. 316 [1885].

¹⁸ See § 635.

¹⁹ *Wilson v. City of Cincinnati*, 5 Ohio N. P. 68.

²⁰ *People ex rel. Cayadutta Plank Road Co. v. Cummings*, 166 N. Y. 110, 59 N. E. 703.

§ 588. Property owned by religious bodies.

Property belonging to a church, even if used entirely for religious purposes is subject to assessment for the benefits conferred upon such property by a local improvement, in the absence of a statute specifically exempting such property from local assessment.¹ In some jurisdictions it is said to be a question of fact whether property used for church purposes is benefited by the improvement for which the assessment is levied.² In some jurisdictions it is said that church property is subject to local assessment, but that the test of the amount of benefit is not the increase in the market value of the property.³ The question of benefit is said to depend upon the probability that such property will con-

¹ *Ahern v. Board of Improvement District No. 3 of Texarkana*, 69 Ark. 68, 61 S. W. 575 [1901]; *City of Atlanta v. First Presbyterian Church*, 86 Ga. 730, 12 L. R. A. 852, 13 S. E. 252 [1890]; (*overruling Trustees v. Atlanta*, 76 Ga. 181); *City of Ottawa v. Trustees of the Free Church*, 20 Ill. 424 [1858]; *Broadway Baptist Church v. McAtee and Cassidy*, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871]; *Lefevre v. Mayor, etc., of Detroit*, 2 Mich. 586 [1853]; *Lockwood v. City St. Louis*, 24 Mo. 20 [1856]; *City of Beatrice v. Brethren Church of Beatrice*, 41 Neb. 358, 59 N. W. 932 [1894]; *People ex rel. Howlett v. Mayor and Common Council of the City of Syracuse*, 63 N. Y. 291 [1875]; *In the Matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York for the Enlarging and Improving a part of Nassau Street, in the Said City*, 11 John Sup. Ct. 77 [1814]; *People of the State of New York ex rel. Rector, etc., of St. Ann's Church of Morrisania v. Fitch*, 87 Hun. (N. Y.) 391, 34 N. Y. S. 368 [1895]; *Webber v. Common Council of the City of Lockport*, 43 Howard 368 [1872]; *Broad Street, Sewickley Methodist Episcopal Church's Appeal*, 165 Pa. St. 475, 30 Atl. 1007 [1895]; *The Northern Liberties v. St. John's Church*, 15 Pa. St. 104;

Northern Liberties v. St. John's Church, 13 Pa. 103 [1850]; *Second Universalist Society in Providence v. City of Providence*, 6 R. I. 235 [1859]; *Thompson v. Love*, 42 O. S. 61 [1884] is not contra. While church property was omitted from assessment in this case and was also omitted in determining whether a majority of the property owners desired such improvement and had petitioned therefor and such omission was held not to invalidate the petition, it was apparently regarded as erroneous to omit such property from assessment. The theory on which this point was decided was that the commissioners might have referred the report back to the viewers for correction, but for the purpose of passing on the sufficiency of the petition they had a right to accept it as it was made.

² *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045 [1900].

³ *Clapp v. City of Hartford*, 35 Conn. 66 [1868]; *People ex rel. Howlett v. Mayor and Common Council of the City of Syracuse*, 63 N. Y. 291 [1875]; *In the Matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York for the Enlarging and Improving a part of Nassau Street in the said city*, 11 John Sup. Ct. 77 [1814].

tinue to be used for religious purposes. If such continuance is likely, it is said that the benefit to the property, if devoted to such use, will be small in comparison with business and residence property and that the amount of the assessment ought to be proportionately small.⁴ This principle has been applied in cases of street assessments⁵ and sewer assessments.⁶ Even if property used for religious purposes is by statute exempt from general taxation, such exemption does not prevent such property from being assessed for local improvements.⁷ A constitutional provision exempting property used for religious purposes from taxation is regarded as applicable solely to general taxation. Such provision does not exempt such property from local assessment.⁸ If a church join in a petition for a street improvement and the frontage of such church property must be included in order to secure a sufficient number of signers to such petition, it seems likely that such church thereby estops itself claiming an exemption from such assessment.⁹ By some statutes the amount of the local assessment to be levied depends upon the valuation of the property assessed upon the general tax duplicate. In some states it is held that under such a statute property which is exempt from general taxation and has not been placed on the general duplicate at any valuation, cannot be assessed for a local assessment,

⁴ *People ex rel. Howlett v. Mayor and Common Council of the City of Syracuse*, 63 N. Y. 291 [1875]; *In the Matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York for the Enlarging and Improving a part of Nassau Street in the said city*, 11 John Sup. Ct. 77 [1814].

⁵ *In the Matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York for the Enlarging and Improving a part of Nassau Street in the said city*, 11 John Sup. Ct. 77 [1814].

⁶ *Clapp v. City of Hartford*, 35 Conn. 66 [1868].

⁷ *Ahern v. Board of Improvement Dist. No. 3 of Texarkana*, 69 Ark. 68, 61 S. W. 575 [1901]; *City of Atlanta v. First Presbyterian Church*, 86 Ga. 739, 12 L. R. A. 852, 13 S. E. 252 [1890]; (*overruling* *Trustees v. Atlanta*, 76 Ga. 181); *City of Ot-*

tawa v. Trustees of the Free Church, 20 Ill. 424 [1858]; *Broadway Baptist Church v. McAtee and Cassidy*, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871]; *Lefevre v. Mayor, etc., of Detroit*, 2 Mich. 586 [1853]; *Lockwood v. City of St. Louis*, 24 Mo. 20 [1856]; *City of Beatrice v. Brethren Church of Beatrice*, 41 Neb. 358, 59 N. W. 932 [1894]; *Broad Street, Sewickley Methodist Episcopal Church's Appeal*, 165 Pa. St. 475, 39 Atl. 1007 [1895]; *The Northern Liberties v. St. John's Church*, 15 Pa. St. 104; *Second Universalist Society in Providence v. City of Providence*, 6 R. I. 235 [1859].

⁸ *City of Beatrice v. Brethren Church of Beatrice*, 41 Neb. 358, 59 N. W. 932 [1894].

⁹ *Broad Street, Sewickley Methodist Episcopal Church's Appeal*, 165 Pa. St. 475, 39 Atl. 1007 [1895].

even if not specifically exempted therefrom.¹⁰ The theory underlying such holding is that such an assessment statute applies only to property which is already on the tax duplicate at a valuation. On the other hand, it has been held under a somewhat similar statute that the valuation of such property is to be determined by extrinsic evidence, and that the mere fact that such property is not on the tax duplicate does not prevent its assessment.¹¹ A statute which specifically exempts from local assessment property used for religious purposes is valid and prevents an assessment for benefits against such property.¹² A statute which provides for exempting "churches. . . with the grounds thereunto annexed necessary for the occupancy and enjoyment of the same . . . from all and every county, city. . . tax," is held to exempt from assessment for a local improvement a church and the land upon which it stands.¹³ This rule applies to every form of local improvement for which the assessment is based on the theory of benefits.¹⁴ Such statutes are rather strictly construed. Under a statute exempting property used for religious purposes from assessments for public improvements, which are levied during three years from January 1st, 1906, it has been held that a religious corporation is not exempt from assessments for improvements which were begun during that time but for which the assessments were not levied until after such period.¹⁵ Under a statute exempting "places of religious worship or burial," it is held that a parsonage in which the rector of a church resides is not exempt from local assessment.¹⁶ A religious society had leased land and had erected a building thereon which was occupied by them in part for religious worship and in part was rented for stores and other similar purposes, the proceeds of which rent were appropriated exclusively to religious uses. It was held that such property was

¹⁰ First Presbyterian Church of Fort Wayne v. City of Fort Wayne, 36 Ind. 338, 10 Am. Rep. 35 [1871]; In the Matter of the Petition of the Second Ave. Methodist Church to Vacate an Assessment, 66 N. Y. 395 [1876].

¹¹ Ahern v. Board of Improvement District No. 3, 69 Ark. 68, 61 S. W. 575 [1901].

¹² City of Erie v. First Universalist Church, 105 Pa. St. 278 [1884].

¹³ Philadelphia v. Church of St. James, 134 Pa. St. 207, 19 Atl. 497

[1890]; City of Erie v. First Universalist Church, 105 Pa. St. 278 [1884].

¹⁴ *Assessment for sewers.* City of Erie v. First Universalist Church, 105 Pa. St. 278 [1884]. *Assessment for water pipes.* Philadelphia v. Church of St. James, 134 Pa. St. 207, 19 Atl. 49 [1890].

¹⁵ *In re Opening of East 176th St.*, 83 N. Y. S. 433, 85 App. Div. 347 [1903].

¹⁶ *Wardens, etc., of St. Mark's Church v. Mayor, etc., of Brunswick*, 78 Ga. 541, 3 S. E. 561 [1887].

exempt from general taxation but not from local assessment for special benefits.¹⁷

§ 589. Property owned by charitable organizations.

Property which belongs to a charitable corporation or association and is used for charitable purposes is not, in the absence of a statute specifically exempting it from local assessment, exempt therefrom.¹ In some jurisdictions it is said to be a question of fact to be determined by the assessing body, whether such land is in fact benefited or not.² The fact that property held for such charitable use is exempt from general taxation does not exempt it from local assessment.³ Thus, a provision that property of a charitable corporation shall be "exempted from taxation of every kind,"⁴ or that it shall be exempt "from assessment and taxation under the revenue laws of the commonwealth or under any ordinance, resolution or other act of the city,"⁵ or "from all taxation by state or local laws for any purpose whatever,"⁶ or "from all taxation either by the state, parish or city,"⁷ is held in each case not to exempt such property from local assessment. In some jurisdictions there is a tendency to construe provisions concern-

¹⁷ *Second Universalist Society in Providence v. City of Providence*, 6 R. I. 235 [1859].

¹ *Kilgus v. Trustees of Orphanage of Good Shepherd*, 94 Ky. 439, 22 S. W. 750 [1893]; *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212 [1891]; *City of Lafayette v. The Male Orphans Asylum*, 4 La. Ann. 1 [1849]; *Washburn Memorial Orphan Asylum v. State*, 73 Minn. 343, 76 N. W. 204 [1898]; *Sheehan, Jr. v. Good Samaritan Hospital*, 50 Mo. 155, 11 Am. Rep. 412 [1872]; *Roosevelt Hospital v. Mayor, Aldermen and Commonalty of the City of New York*, 84 N. Y. 108 [1881]; *Roosevelt Hospital v. Mayor, Aldermen and Commonalty of the City of New York*, 18 Hun. 582 [1879].

² *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045 [1900].

³ *Kilgus v. Trustees of Orphanage of Good Shepherd*, 94 Ky. 439, 22 S. W. 750 [1893]; *Zable v. Louisville*

Baptist Orphans' Home, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212 [1891]; *City of Lafayette v. The Male Orphans Asylum*, 4 La. Ann. 1 [1849]; *Washburn Memorial Orphan Asylum v. State*, 73 Minn. 343, 76 N. E. 204 [1898]; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155, 11 Am. Rep. 412 [1872]; *Roosevelt Hospital v. Mayor, Aldermen and Commonalty of the City of New York*, 84 N. Y. 108 [1881]; *Roosevelt Hospital v. Mayor, Aldermen and Commonalty of the City of New York*, 18 Hun. 582 [1879].

⁴ *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155, 11 Am. Rep. 412 [1872].

⁵ *Kilgus v. Trustees of Orphanage of Good Shepherd*, 94 Ky. 439, 22 S. W. 750 [1893].

⁶ *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212 [1891].

⁷ *City of Lafayette v. The Male Orphans Asylum*, 4 La. Ann. 1 [1849].

ing taxation as *prima facie* applicable to local assessment. Thus, a provision exempting property "from taxation except for state purposes" has been held to exempt such property from local assessments levied on the theory of benefits.⁸ This exemption, however, is held not to apply to exactions levied for the non-performance of a legal duty. Accordingly, charges for the construction of side-walks may be levied against property so exempt.⁹ Even where real property which is devoted to charitable purposes is exempt from local assessment, property which has been detached from the building used by such charity by means of the opening of a public street is not regarded as exempt, although it is occasionally used as a place to hitch horses and carriages.¹⁰ Full effect is given to a specific exemption from local assessment.¹¹ A statute providing that property of a charitable corporation "shall not be subject to taxes or assessments," exempts such property from local assessment.¹² The subsequent passage of a general act providing for levying assessments upon real property benefited by the improvement does not operate as a repeal of

⁸ *Olive Cemetery Co. v. Philadelphia*, 93 Pa. St. (12 Norris) 129, 39 Am. Rep. 732.

⁹ *Wilksburg Borough v. Home for Aged Women*, 131 Pa. St. 109, 6 L. R. A. 531, 18 Atl. 937 [1890]; *Philadelphia v. Pennsylvania Hospital*, 143 Pa. St. 367, 22 Atl. 744 [1891]. "The defendant contends that this footwalk comes within the reason of the case cited, [*Olive Cemetery Co. v. Philadelphia*, 93 (12 Norris) Pa. St. 129, 39 Am. Rep. 732], holding that exemption from taxation exempts from assessment for building a sewer and that the charge for its construction is also a species of local taxation. We think there is a marked distinction between the two cases. In the case of borough footwalks, the owners of property are required by law to keep their footways in repair and if necessary, re-lay them. This is a duty imposed directly upon the property owner, and is in the nature of a police regulation. It is no more a tax, or a municipal assessment in the nature of a

tax, than would be the imposition of any other duty by virtue of the police powers of the borough, with a penalty for its violation." *Wilksburg Bor. v. Home for Aged Women*, 131 Pa. St. 109, 117, 6 L. R. A. 531, 18 Atl. 937 [1890].

¹⁰ *Philadelphia to use v. Ladies' United Aid Society*, 1 Penna. Dist. Ct. 249 [1892].

¹¹ *Hudson County Catholic Protector v. Board of Township Committee of the Township of Kearney*, 56 N. J. L. (27 Vr.) 385, 28 Atl. 1043 [1894]; *State ex rel. Benedictine Sisters of Elizabeth v. City of Elizabeth*, 50 N. J. L. (21 Vr.) 347, 13 Atl. 5 [1888].

¹² *State, Protestant Foster Home Society, Pros. v. Mayor and Common Council of the City of Newark*, 36 N. J. L. (7 Vr.) 478, 13 Am. Rep. 464 [1873]; (reversing *State, Protestant Foster Home Society, Pros. v. Mayor and Common Council of the City of Newark*, 35 N. J. L. (6 Vr.) 157, 10 Am. Rep. 223 [1871]);

such statutes specifically exempting charitable property.¹³ Under some statutes the amount for which property can be assessed depends upon its valuation upon the tax duplicate.¹⁴ This provision does not, however, necessarily mean the last tax duplicate. If property has been on the tax duplicate it may be assessed even though in recent years it has been exempt from taxation and has not been valued.¹⁵ Such provisions do not operate to exempt such property except where there has never been any valuation of such property for taxation. A statute exempting from assessment for the supply of water, any social settlement which owns or leases for at least three years a building devoted exclusively to the purpose of such settlement, does not exempt a building which is used in part by a church for its purposes and in part for a social settlement.¹⁶

§ 590. Property belonging to educational institutions.

Educational institutions outside of the public school system, such as colleges are not exempt from local assessment based on the theory of benefits, in the absence of some statute specifically exempting them therefrom.¹ Statutes exempting such institutions from general taxation, do not operate to exempt them from local assessment.² The property of such institutions may be

¹³ *Hudson County Catholic Protector v. Board of Township Committee of the Township of Kearney*, 56 N. J. L. (27 Vr.) 385, 28 Atl. 1043 [1894].

¹⁴ *In the Matter of the Petition of St. Joseph's Asylum in the City of New York to Vacate an Assessment*, 69 N. Y. 353 [1877].

¹⁵ *Roosevelt Hospital v. Mayor, Aldermen and Commonalty of the City of New York*, 84 N. Y. 108 [1881]. *In the Matter of the Petition of the Hebrew Benevolent Orphan Asylum Society to Vacate an Assessment*, 70 N. Y. 476 [1877]; *In the Matter of the Petition of St. Joseph's Asylum in the City of New York to Vacate an Assessment*, 69 N. Y. 353 [1877]; (*distinguishing In the Matter of the Petition of the Second Avenue Methodist Episcopal Church to Vacate an Assessment*, 66 N. Y. 395 [1876], as

a case in which it appeared that such property had never been on the assessment roll.) *Roosevelt Hospital v. Mayor, Aldermen and Commonalty of the City of New York*, 18 Hun. 582 [1879].

¹⁶ *People ex rel. Trustees of Amity Baptist Church v. Monroe*, 81 N. Y. S. 972, 40 Misc. Rep. 286 [1903].

¹ *President and Fellows of Harvard College v. Board of Aldermen of City of Boston*, 104 Mass. 470 [1870]; *State v. Trustees of Macalester College*, 87 Minn. 165, 91 N. W. 484 [1902]; *In the Matter of College Street*, 8 R. I. 474 [1867].

² *President and Fellows of Harvard College v. Board of Aldermen of City of Boston*, 104 Mass. 470 [1870]; *State v. Trustees of Macalester College*, 87 Minn. 165, 91 N. W. 484 [1902]; *In the Matter of College Street*, 8 R. I. 474 [1867].

assessed for street improvements,³ sewers,⁴ and water pipes.⁵ A provision in the charter of a society for the establishment of useful manufactures, exempting its property from "taxes, charges or impositions," does not exempt such property from local assessment.⁶ Under an act of Congress exempting property of incorporated educational institutions, not operated for private gain, from "any and all taxes and assessments, national or municipal, or county," such property is exempt from local assessment.⁷

§ 591. Property used for fairs and exhibitions.

Property belonging to an agricultural and horticultural society and used for fairs and exhibitions is not exempt from local assessment in the absence of a statute specifically providing for such exemption.¹ A statute exempting such property from general taxation does not exempt it from local assessment.² A statute specifically exempting such property from local assessment is strictly construed.³ Thus, a statute providing that the land of a state agricultural society should be "exempt from taxation, and from any and all special taxes and assessments for the year 1891," did not operate retroactively and did not render such property exempt from an assessment for an improvement which had been contracted for and completed during the year 1890. In such case, the contractor has acquired a vested right to compensation to be collected by assessment levied against the land and he cannot be deprived by such right from action of the legislature.⁴

§ 592. Cemetery property.

The property of a cemetery association used for cemetery purposes is subject to local assessment in the absence of a statute specifically exempting it therefrom.¹ A statute exempting such property from general taxation does not operate to exempt it

³ In the Matter of College Street, 8 R. I. 474 [1867].

⁴ Dorgan v. City of Boston, 94 Mass. (12 All.) 223 [1866].

⁵ State v. Trustees of Macalester College, 87 Minn. 165, 91 N. W. 484 [1902].

⁶ President and Council of the City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. L. (4 Zabriskie) 385 [1851].

⁷ District of Columbia v. Sisters of Visitation, 15 App. D. C. 300.

¹ Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 425, 74 S. W. 979 [1903].

² Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 425, 74 S. W. 979 [1903].

³ Yates v. City of Milwaukee, 92 Wis. 352, 66 N. W. 248 [1896].

⁴ Yates v. City of Milwaukee, 92 Wis. 352, 66 N. W. 248 [1896].

⁵ Bloomington Cemetery Association v. People of the State, 139 Ill. 16, 28 N. E. 1076 [1891]; Buffalo

from local assessments levied on the theory of benefits.² Such property may be assessed for paving adjoining streets,³ or for laying water pipe.⁴ Thus, a statute providing that cemetery grounds shall be "exempt from taxation and execution,"⁵ or exempt from "all public taxes, rates and assessments,"⁶ does not exempt such property from local assessments. The fact that such property cannot be sold on execution to satisfy the lien of the assessment does not prevent the levy of the assessment as a personal liability of the cemetery association.⁷ A statute which specifically exempts cemetery property from assessments is valid and is given full effect.⁸ Thus, statutes which exempt such property from "taxation and assessment" are ordinarily held to exempt such property from local assessment.⁹ Such a statute is

City Cemetery Association v. City of Buffalo, 46 N. Y. 506 [1871]; Lima v. Cemetery Association, 42 O. S. 128, 51 Am. Rep. 809 [1884]; City of Philadelphia v. Union Burial Ground Society of the City and County of Philadelphia, 178 Pa. St. 533, 36 L. R. A. 263, 36 Atl. 172 [1897]; Beltzhoover Borough v. Heirs of Beltzhoover, 173 Pa. St. 213, 33 Atl. 1047 [1896]; New Castle City v. Jackson, 172 Pa. St. 86, 33 Atl. 236 [1895].

² Bloomington Cemetery Association v. People of the State, 139 Ill. 16, 28 N. E. 1076 [1893]; Buffalo City Cemetery Association v. City of Buffalo, 46 N. Y. 506 [1871]; Lima v. Cemetery Association, 42 O. S. 128, 51 Am. Rep. 809 [1884]; City of Philadelphia v. Union Burial Ground Society of the City and County of Philadelphia, 178 Pa. St. 533, 36 L. R. A. 263, 36 Atl. 172 [1896]; Beltzhoover Borough v. Heirs of Beltzhoover, 173 Pa. St. 213, 33 Atl. 1047 [1896]; New Castle City v. Stone Church Graveyard and Jackson, 172 Pa. St. 86, 33 Atl. 236 [1895].

³ New Castle City v. Stone Church Graveyard and Jackson, 172 Pa. St. 86, 33 Atl. 236 [1895].

⁴ City of Philadelphia v. Union

Burial Ground Society of the City and County of Philadelphia, 178 Pa. St. 533, 36 L. R. A. 263, 36 Atl. 172 [1896].

⁵ Bloomington Cemetery Association v. People of the State, 139 Ill. 16, 28 N. E. 1076 [1893].

⁶ Buffalo City Cemetery Association v. City of Buffalo, 46 N. Y. 506 [1871].

⁷ Buffalo Cemetery Association v. City of Buffalo, 118 N. Y. 61, 22 N. E. 962 [1889]; Lima v. Cemetery Association, 42 O. S. 128, 51 Am. Rep. 809 [1884].

⁸ People of the State of New York ex rel. Rector, etc., of St. Ann's Church of Morrisania v. Fitch, 87 Hun. (N. Y.) 391, 34 N. Y. S. 368 [1895]. Assessment for street opening. *In re Perry Avenue in City of New York*, 103 N. Y. S. 1069 [1907]. *Sidewalk assessment*. State of Minnesota ex rel. Oakland Cemetery Association v. City of St. Paul, 35 Minn. 529, 32 N. W. 781 [1887]. *Sewer assessment*. Oakland Cemetery v. City of Yonkers, 182 N. Y. 564, 75 N. E. 1132 [1905]; (affirming: 71 N. Y. S. 783, 63 App. Div. 448).

⁹ Oakland Cemetery v. City of Yonkers, 182 N. Y. 564, 75 N. E. 1132 [1905]; (affirming: 71 N. Y. S.

not repealed by subsequent statute providing in general terms for levying assessments upon property benefited.¹¹ In Pennsylvania a statute exempting the property of a cemetery "from taxation, except for state purposes," is held to exempt such property from local assessment.¹¹ The exemption is not limited to that part of the cemetery occupied by graves.¹² An exemption statute is not a contract and may be repealed after its enactment.¹³ After such repeal, property of a cemetery company may be assessed, but land which has in the meantime been sold for burial lots cannot be assessed.¹⁴

§ 593. Property of public service corporations.

Cases are occasionally presented in which the attempt is made to assess the property of public service corporations, such as street railway companies, telephone and telegraph companies, electric light companies, gas companies, water companies and the like. If the attempt is made to assess property, such as telegraph and telephone poles, which are situated in a public street, it is ordinarily held that such property cannot be benefited by the improvement and therefore is not subject to assessment.¹ Like principles apply to the attempt to assess water pipes,² and gas pipes.³ They are not regarded as benefited by the improvement and therefore are not subject to assessment. This result is reached occasionally by reason of the special wording of the statute authorizing the assessment. If the statute provides for assess-

783, 63 App. Div. 448). The same result follows under a statute exempting the property of cemetery associations from "all public taxes and assessments." *State of Minnesota ex rel. Oakland Cemetery Association v. City of St. Paul*, 36 Minn. 529, 32 N. W. 781 [1887].

¹⁰ *Oakland Cemetery v. City of Yonkers*, 182 N. Y. 564, 75 N. E. 1132 [1905]; (affirming: 71 N. Y. S. 783, 63 App. Div. 448).

¹¹ *Wilkesburg Bor. v. Home for Aged Women*, 131 Pa. St. 109, 6 L. R. A. 531, 18 Atl. 937 [1890].

¹² *In re Perry Ave. in City of New York*, 103 N. Y. S. 1069 [1907].

¹³ *State, Mount Pleasant Cemetery Company, Pros. v. Mayor and Common Council of Newark*, 50 N. J. L. (21 Vr.) 66, 11 Atl. 147 [1887].

¹⁴ *State, Mount Pleasant Cemetery Company, Pros. v. Mayor and Common Council of Newark*, 50 N. J. L. (21 Vr.) 66, 11 Atl. 147 [1887].

¹ *Ahern v. Board of Improvement District No. 3, of Texarkana*, 69 Ark. 68, 61 S. W. 575 [1901]; *In re West Farms Road in City of New York*, 95 N. Y. S. 894, 47 Misc. Rep. 216 [1905]; *In re Anthony Avenue*, 95 N. Y. S. 77, 46 Misc. Rep. 525 [1905]; *Elwood v. City of Rochester*, 43 Hun. (N. Y.) 102 [1887].

² *Ahern v. Board of Improvement District No. 3, of Texarkana*, 69 Ark. 68, 61 S. W. 575 [1901]; *Elwood v. City of Rochester*, 43 Hun. (N. Y.) 102 [1887].

³ *In re Anthony Avenue*, 95 N. Y. S. 77, 46 Misc. Rep. 525 [1905].

ment on "lots and parcels of land," it is held that gas and water pipes and poles and wires do not come under the description of lots and parcels of land."⁴ The right of way for pipes and wires, whether overhead or underground, ordinarily receives no benefit from a local improvement and is not subject to assessment.⁵ Where real property owned by a public service corporation is subject to assessment, if not specifically exempt, except so far as it is affected by the peculiar use to which it is put, it has been held that the reservoir of a water works company may be assessed, but that the amount of the assessment must be based upon the probability of the use of such land for building purposes or other purposes, which would render the property susceptible to benefit by the improvement in question.⁶ In this case the court thought that the probability of such change of use was so slight that the assessment should be a nominal one, but the assessor had decided differently and had made a substantial assessment against such property which assessment the court had no power to review.

§ 594. Railroad property.

It seems well settled that the legislature may provide for the assessment of property owned by a railroad corporation and used for railroad purposes.¹ On the other hand, it seems clear that such property may be exempted from local assessment if the legislature sees fit to exempt it. If the legislature has provided for assessing property benefited or property within certain territorial limits, and has provided specifically neither for the exemption, nor the inclusion of railroad property, we find a number of different views expressed by the courts as to the propriety of assessing railroad property. The discrepancy is greater in *obiter dicta* than in the actual adjudications. In some cases the view is expressed that railroad property is in the absence of specific exemption, subject to local assessment in the same way as the property of individuals.² In other cases, the same general idea is expressed in a

⁴ *Elwood v. City of Rochester*, 43 Hun. (N. Y.) 102 [1887].

⁵ *Ahern v. Board of Improvement District No. 3, of Texarkana*, 69 Ark. 68, 61 S. W. 575 [1901].
Anthony Avenue, 95 N. Y. S. 77, 46 Misc. Rep. 525 [1905].

⁶ *Owners of Ground v. Mayor of Albany*, 15 Wend. (N. Y.) 374 [1836].

¹ *The Illinois Central R. R. Co. v. Commissioners of East Lake Fork Special Drainage District*, 129 Ill. 417, 21 N. E. 925.

² *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Company*, 197 U. S. 430, 25 S. 466 [1905]; (affirming 116 Ky. 856, 76 S. W. 1097, 25 Ky. L. R. 1024); *Illinois Central Railroad Company*

more guarded way and it is said to be proper to assess railroad property if the property is benefited by the particular kind of improvement for which the assessment is levied, while in the absence of such benefit, it should not be assessed.³ In cases holding

v. City of Decatur, 147 U. S. 190, 37 L. 132, 13 S. 293 [1892]; (affirming Illinois Central Railroad Co. v. City of Decatur, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315 [1890]); Pittsburg, C. & St. L. Ry. Co. v. Taber, 168 Ind. 419, 77 N. E. 741 [1906]; Peru & Indianapolis Railroad Co. v. Hanna, 68 Ind. 562 [1879]; Indianapolis, Peru & Chicago Railroad Company v. Ross, 47 Ind. 25 [1874]; Pittsburg, Cincinnati, Chicago & St. Louis Railway Company v. Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597 [1896]; Lake Erie & Western Railroad Company v. Bowker, 9 Ind. App. 428, 36 N. E. 864 [1893]; Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Company, 116 Ky. 856, 76 S. W. 1097, 25 Ky. L. R. 1024 [1903]; Figg v. Louisville & Nashville R. R. Co., 116 Ky. 135, 25 Ky. L. R. 350, 75 S. W. 269 [1903]; City of Ludlow v. Trustees of Cincinnati Southern Railway Co., 78 Ky. 357 [1880]; The Lake Shore & Michigan Southern Railway Company v. City of Grand Rapids, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767 [1894]; Erie R. Co. v. City of Paterson, 72 N. J. L. (43 Vr.) 83, 59 Atl. 1031 [1905]; People v. Mayor of Syracuse, 2 Hun. (N. Y.) 433; (overruling Matter of Mayor, 11 Johns. (N. Y.) 77); Commissioners of Chatham County v. Seaboard Air Line Railway Company, 133 N. C. 216, 45 S. E. 566 [1903]; Northern Indiana Railroad Company v. Connelly, 10 O. S. 160 [1859]; Winona & St. P. R. Co. v. City of Watertown, 1 S. Dak. 46, 44 N. W. 1072 [1890].

³ Village of River Forest v. Chicago & Northwestern Railway Company, 197 Ill. 344, 64 N. E. 364

[1902]; Illinois Central Railroad Company v. People ex rel. Seaton, 189 Ill. 119, 59 N. E. 609 [1901]; Palmer v. City of Danville, 166 Ill. 42, 46 N. E. 629 [1897]; Chicago & Northwestern Railroad Company v. Village of Elmhurst, 165 Ill. 184, 46 N. E. 1152 [1897]; Chicago & Northwestern Railway Company v. Village of Elmhurst, 165 Ill. 148, 46 N. E. 437 [1897]; Illinois Central Railroad Company v. City of Kankakee, 164 Ill. 608, 45 N. E. 971 [1897]; Payne v. Village of South Springfield, 161 Ill. 285, 44 N. E. 105 [1896]; Drainage Commissioners of District No. 3, etc. v. Illinois Central Railroad Company, 158 Ill. 353, 41 N. E. 1073 [1895]; Chicago, Rock Island & Pacific Railway Co. v. City of Moline, 158 Ill. 64, 41 N. E. 877 [1895]; Chicago, Rock Island & Pacific Railway Co. v. City of Moline, 158 Ill. 64, 41 N. E. 877 [1895]; Illinois Central Railroad Co. v. City of Decatur, 154 Ill. 173, 38 N. E. 626 [1894]; Chicago & Alton Railroad Company v. City of Joliet, 153 Ill. 649, 39 N. E. 1077 [1894]; Rich v. City of Chicago, 152 Ill. 18, 38 N. E. 255 [1894]; The Illinois Central Railroad Company v. City of Mattoon, 141 Ill. 32, 30 N. E. 773 [1893]; Illinois Central Railroad Co. v. Commissioners of East Lake Fork Special Drainage District, 129 Ill. 417, 21 N. E. 925 [1890]; Chicago & Northwestern Railway Co. v. People, 120 Ill. 104, 11 N. E. 418; State, Paterson & Hudson River Railroad Co. v. City of Passaic, 54 N. J. L. (25 Vroom) 340, 23 Atl. 945 [1892]; State, New Jersey Midland Railroad Company, Pros. v. Mayor and Aldermen of Jersey City, 42 N. J. L. (13 Vr.) 97 [1880]; State, New Jersey Railroad & Transportation Company,

this view it has, however, been said that railroad property is *prima facie* to be looked upon as benefited by local improvement.⁴ In other jurisdictions a distinction is drawn between railroad property which is used for a right of way, or is otherwise permanently devoted to public use and such property as is not permanently so devoted. The courts drawing this distinction hold that property which is permanently devoted to public use cannot be assessed for local improvements, while property not so devoted can be assessed.⁵ The fact that railroad property is by statute exempt from general taxation does not operate to exempt it from local assessments levied on the theory of benefits.⁶ A statute exempting railroad property from taxation without showing any further than by the use of the word "taxation" the intention to exempt from local assessment, is regarded as applying only to general taxa-

Pros. v. City of Elizabeth, 37 N. J. L. (8 Vr.) 330 [1875]; People of the State of New York ex rel. Western New York & Pennsylvania Railroad Company v. Adams, 88 Hun. 122, 34 N. Y. S. 579 [1895]; New York & Harlem Railroad Company v. Board of Trustees of the Town of Morrisania, 7 Hun. 652 [1876]; In the Matter of the Application of Commissioners of Central Park to Confirm the Report of the Commissioners of Estimate and Assessment for Opening Riverside Drive, 63 Barb. 282 [1872]; *In re Cedar Park*, 1 How. Pr. N. S. 257 [1885].

⁴ *In re Cedar Park*, 1 How. Pr. N. S. 257 [1885].

⁵ Southern California Railway Co. v. Workman, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79 [1905]; Naugatuck Railroad Company v. City of Waterbury, 78 Conn. 193, 61 Atl. 474 [1905]; City of Bridgeport v. The New York & New Haven Railroad Company, 36 Conn. 255, 4 Am. Rep. 63 [1869]; Chicago, Rock Island & Pacific Railway Company v. City of Ottumwa, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900]; City of Muscatine v. Chicago, Rock Island & Pacific Railroad Company, 88 Ia. 291, 55 N. W. 100 [1893]; Saxton National Bank v. Haywood, 62 Mo.

App. 550 [1895]; McCutcheon v. Pacific Railroad Company, 72 Mo. App. 271 [1897]; City of Philadelphia v. Philadelphia, Wilmington & Baltimore Railroad Company, 33 Pa. St. 41 [1859].

⁶ Illinois Central Railroad Company v. Decatur, 147 U. S. 190, 197, 37 L. 132, 13 S. 293 [1892]; City of Bridgeport v. New York & New Haven Railroad Company, 36 Conn. 255, 4 Am. Rep. 63 [1869]; Illinois Central Railroad Company v. City of Decatur, 154 Ill. 173, 38 N. E. 626 [1894]; Illinois Central Railroad Company v. City of Mattoon, 141 Ill. 32, 30 N. E. 773 [1893]; Illinois Central Railroad Company v. City of Decatur, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315 [1890]; Lake Shore & Michigan Southern Railway Company v. City of Grand Rapids, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767 [1894]; State, New Jersey Midland Railroad Company v. Mayor and Aldermen of Jersey City, 42 N. J. L. (13 Vroom) 97 [1880]; State, New Jersey Railroad & Transportation Company. Pros. v. City of Elizabeth, 37 N. J. L. (8 Vr.) 330 [1875]; Winona & St. L. P. R. Co. v. City of Watertown, 1 S. Dak. 46, 44 N. W. 1072 [1890].

tion.⁷ Accordingly, a statute which provides that a certain form of exemption against a railroad is to be "in lieu of all other taxes,"⁸ or a statute which provides that no other tax or impost,⁹ or that no further tax or imposition,¹⁰ shall be levied upon the property of a railroad company, does not exempt such property from local assessment. The legislature may exempt the property of the railroad company from local assessment if it sees fit to do so and uses language which expresses such meaning.¹¹ A statute providing that the payment of a certain percent. of the gross earnings of a road should be "in full of all taxation and assessment whatever," is held to exempt the real property of a railroad from special assessment.¹² A statute providing for the sale of railroad property for taxes does not authorize a sale of such property for an assessment for street improvements.¹³ Where the land which is subject to assessment is that which is benefited by the improvement; and the question of benefit is to be determined as one of fact, it is said to be for the jury which decides such questions to determine whether railroad property is in fact benefited.¹⁴

§ 595. Effect of use to which railroad property is put—Right of way.

Since, in some jurisdictions local assessments levied upon a right of way are regarded as governed by considerations different from those which apply to other forms of railroad property, it is necessary to consider the various uses to which railroad property is devoted by the railroad company as affecting the right of

⁷ Illinois Central Railroad Company v. City of Decatur, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315 [1888].

⁸ Lake Shore & Michigan Southern Railway Company v. City of Grand Rapids, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767 [1894].

⁹ State, New Jersey Midland Railroad Company, Pros. v. Mayor and Aldermen of Jersey City, 42 N. J. L. (13 Vroom) 97 [1880].

¹⁰ State, New Jersey Railroad & Transportation Company, Pros. v. City of Elizabeth, 37 N. J. L. (8 Vr.) 330 [1875]; State, New Jersey Railroad & Transportation Company, Pros. v. Mayor and Common Council

of the City of Newark, 27 N. J. L. (3 Dutch.) 185 [1858].

¹¹ Paterson v. Chicago R. I. & P. Ry. Co., 99 Minn. 454; *sub nomine In re Drainage Ditch No. 6*, 109 N. W. 993 [1906].

¹² City of St. Paul v. St. Paul & Sioux City Railroad Company, 23 Minn. 469 [1877]; First Division of the St. Paul & Pacific Railroad Company v. City of St. Paul, 21 Minn. 526 [1875].

¹³ McCutcheon v. Pacific Railroad Company, 72 Mo. App. 271 [1897].

¹⁴ Kansas City v. Bacon, 157 Mo. 450, 57 S. W. 1045 [1900].

assessment. Property which is used for a right of way is in one sense indispensable to the operation of the road by the railway company under its franchise.¹ Even from this point of view however, it may be said that the specific tract of land used as a right of way by the railroad at any given time is not indispensable since other land might be obtained. We find that in some jurisdictions it is assumed that it is proper to assess the right of way of a railroad in the absence of facts showing that no benefit is conferred.² Under statutes which provide for assessing property "fronting on or adjoining an improvement,"³ or which authorize the council to determine what property is benefited by the improvement,⁴ the right of way of a railway may be assessed. In other jurisdictions, we find that by statute the right of way is exempt from assessment, while other property of a railway, though used in the business of transportation, is not exempt.⁵ Thus, a statute providing that "the offices, depots, car houses and other real property of railroad corporation, situated in said city of Philadelphia, the superstructure of said road and water stations only excepted, are and hereafter shall be subject to taxation by ordinance for city purposes," was held to exempt the road bed with whatever was constructed thereon and to subject

¹ Southern California Railway Co. v. Workman, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79 [1905].

² Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Company, 197 U. S. 430, 29 S. 466 [1905]; (affirming 116 Ky. 856, 76 S. W. 1097, 25 Ky. L. R. 1024); Appeal of North Beach & Mission R. R. Co. in the Matter of Widening Kearney Street, 32 Cal. 500 [1867]; Erie R. Co. v. City of Paterson, 72 N. J. L. (43 Vr.) 83, 59 Atl. 1031 [1905]; State, Paterson & Hudson River Railroad Company, Pros. v. City of Passaic, 54 N. J. L. (25 Vr.) 340, 23 Atl. 945 [1892]; Illinois Central Railroad Company v. People ex rel. Seaton, 189 Ill. 119, 59 N. E. 609 [1901]; Chicago & Northwestern Railway Company v. Village of Elmhurst, 165 Ill. 148, 46 N. E. 437 [1897]; Pittsburg, C. & St. L. Ry. Co. v. Taber, 168 Ind. 419, 77 N. E. 741 [1906]; Louisville & Nash-

ville R. R. Co. v. Barber Asphalt Paving Company, 116 Ky. 856, 25 Ky. L. R. 1024, 76 S. W. 1097 [1903]; Lake Shore & Michigan Southern Railway Company v. City of Grand Rapids, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767 [1894]; Northern Pacific Ry. Co. v. Seattle, — Wash. —, 91 Pac. 244 [1907]. This question was raised but not decided in City of Nevada to use of Gilfillan v. Eddy, 123 Mo. 562, 27 S. W. 471.

³ Heman Construction Co. v. Washash R. Co., 206 Mo. 172, 104 S. W. 67 [1907].

⁴ Northern Pacific Ry. Co. v. City of Seattle, — Wash. —, 91 Pac. 244 [1907]. (The right of way abutted on the street but was not part of it).

⁵ City of Philadelphia to use of McCann v. Philadelphia & Reading Railroad Company, 177 Pa. 292, 34 L. R. A. 564, 35 Atl. 610 [1896].

the rest of the real property of the railroad to local assessment as well as to general taxation.⁶ In other jurisdictions, it is assumed that a right of way is ordinarily not subject to assessment for local improvements.⁷ A reason assigned for holding that a right of way cannot be assessed, is that such right of way is not subject to sale on execution and is necessary to enable the railroad company to operate its road under its franchise.⁸ In such jurisdictions, it has been said that while it is possible that land occupied as a right of way might be benefited by the improvement of an adjacent street, as a rule it cannot be so benefited.⁹ The wording of statutes describing the property which may be assessed, is regarded in some jurisdictions as excluding the right of way of a railroad. Thus, a statute which authorizes a tax on lots and parcels of land fronting on a street, is held not to include a right of way in which the railroad has merely an easement.¹⁰ The right of way of a railroad company across a street is held not to be property abutting on such street within the meaning of the statute providing for assessment of such property.¹¹ In other jurisdictions, the right of way of a railroad company appropriated by eminent domain is regarded as a lot of land,¹² or as land,¹³ within the meaning of a statute authorizing the assessment of such property. The right of way of a railroad company lying within a street and extending along its length is held not to be abutting property within the meaning of a statute authorizing the assessment of such property.¹⁴ The right of way of a railroad company, being a

⁶ *City of Philadelphia v. Philadelphia & Reading Railroad Company*, 177 Pa. 292, 34 L. R. A. 564, 35 Atl. 610 [1896].

⁷ *City of Bridgeport v. New York & New Haven Railroad Company*, 36 Conn. 255, 4 Am. Rep. 63 [1869]; *City of Muscatine v. Chicago, Rock Island & Pacific Railway Company*, 88 Ia. 291, 55 N. W. 100 [1893]; *City of Philadelphia v. Philadelphia, Wilmington & Baltimore Railroad Company*, 33 Pa. St. 41 [1859].

⁸ *Southern California Railway Co. v. Workman*, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79 [1905].

⁹ *Village of River Forest v. Chicago & Northwestern Railway Company*, 197 Ill. 344, 64 N. E. 364 [1902].

¹⁰ *Chicago, Rock Island & Pacific Railway Company v. City of Ottumwa*, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900].

¹¹ *Chicago, Burlington & Quincy Railroad Company v. South Park Commissioners*, 11 Bradwell (Ill.) 562 [1882].

¹² *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Company*, 116 Ky. 856, 25 Ky. L. R. 1024, 76 S. W. 1097 [1903]; *Figg v. Louisville & N. R. R. Co.*, 116 Ky. 135, 25 Ky. L. R. 350, 75 S. W. 269 [1903].

¹³ *Northern Indiana Railroad Co. v. Connelly*, 10 O. S. 160 [1859].

¹⁴ *City of Boston v. Boston & Albany Railroad Company*, 170 Mass. 95, 49 N. E. 95 [1898]; *Boehme v. City of Monroe*, 106 Mich. 401, 64 N. W. 204 [1895].

mere easement, is not regarded as a lot adjacent to the street, within the meaning of a statute authorizing the assessment of such property.¹⁵ The term "right of way," used in an ordinance providing for the special taxation of railroad property for a street improvement, means the road bed and tracks lying in the street to be improved.¹⁶ The track of a railroad as distinct from the right of way, cannot be regarded as benefited by a system of drainage.¹⁷ In determining the value of a right of way where such value is material, the valuation of such railroad fixed by a state board in which both real and personal property are included, cannot be taken as a basis.¹⁸ Whether a right of way can be assessed or not is a matter to be determined by each state in accordance with its statutes and ideas of public policy.¹⁹ The assessment of a right of way for a street improvement is not a taking of property without due process of law; does not violate the Fourteenth Amendment; and does not present a Federal question for which the judgment of the State Supreme Court may be reversed by the United States Supreme Court.²⁰ An assessment was levied upon land owned by a railroad company, situated on either side of its right of way. Such land had formed an entire tract before such right of way was opened through it. On confirmation the court modified the assessment by assessing the amount of the assessment on each tract as one amount upon the entire tract. It was held that this did not amount to assessing the right of way.²¹

§ 596. Property other than right of way.

In some jurisdictions, it is assumed that railway property other than the right of way is liable to assessment for local improve-

¹⁵ *City of Muscatine v. Chicago, Rock Island & Pacific Railway Company*, 88 Ia. 291, 55 N. W. 100 [1893].

¹⁶ *Chicago, Rock Island & Pacific Railway Company v. City of Moline*, 158 Ill. 64, 41 N. E. 877 [1895].

¹⁷ *Drainage Commissioners of District No. 3, etc. v. Illinois Central Railroad Company*, 158 Ill. 353, 41 N. E. 1073 [1895].

¹⁸ *Chicago, Milwaukee & St. Paul Railway Company v. Phillips*, 111 Ia. 377, 82 N. W. 787 [1900]. To the same effect see *Commissioners of Chatham County v. Seaboard Air*

Line Railway Company, 133 N. C. 216, 45 S. E. 566 [1903].

¹⁹ *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 25 S. 466 [1905]; (affirming 116 Ky. 856, 76 S. W. 1097, 25 K. L. R. 1024).

²⁰ *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Company*, 197 U. S. 430, 25 S. 466 [1905]; (affirming 116 Ky. 856, 76 S. W. 1097, 25 K. L. R. 1024).

²¹ *Chicago, Rock Island & Pacific Railway Company v. City of Chicago*, 139 Ill. 573, 28 N. E. 1108 [1893].

ments, even if used for railway purposes.¹ The question of benefit to such property is said to be a question of fact.² In other jurisdictions a property which is used for railway purposes exclusively, seems to be regarded as not subject to assessment for local improvements.³ These general propositions are affected both by the purpose for which the property is used and the nature of the improvement for which it is sought to levy an assessment. Thus, it is held in many jurisdictions that the property used as a depot may be assessed for the improvement of an adjoining street.⁴ In some of the jurisdictions taking this view, the existence of such benefit must be proved as a fact in each case.⁵ So property used for a depot may be assessed for the cost of a sidewalk,⁶ or a sewer.⁷ Where this view obtains, it is still clearer

¹ New York, etc., *R. R. Co. v. New Britain*, 49 Conn. 40; *Chicago Terminal Transfer Company v. City of Chicago*, 178 Ill. 429, 53 N. E. 361 [1899]; *Chicago & Northwestern Railway Company v. Village of Elmhurst*, 165 Ill. 184, 46 N. E. 1152 [1897]; *Chicago, Rock Island & Pacific Railway Company v. City of Chicago*, 139 Ill. 573, 28 N. E. 1108 [1893]; *Lake Erie & Western Railroad Company v. Bowker*, 9 Ind. App. 428, 36 N. E. 864 [1893]; *Minneapolis & St. Louis R. R. Co. v. Lindquist*, 119 Iowa 144, 93 N. W. 103 [1903]; *Atchison, Topeka & Santa Fe Railroad Company v. Peterson*, 5 Kan. App. 103, 48 Pac. 877 [1897]; *State of Minnesota ex rel. Minnesota Transfer Railway Company v. District Court of Ramsey County*, 68 Minn. 242, 71 N. W. 27 [1896]; *City of Nevada to use of Gilfillan v. Eddy*, 123 Mo. 546, 27 S. W. 471 [1894]; *City of Philadelphia to use of McCann v. Philadelphia & Reading Railroad Company*, 177 Pa. 292, 34 L. R. A. 564, 35 Atl. 610 [1896]; *City of Philadelphia v. Philadelphia & Reading Railroad Company*, 177 Pa. 292, 34 L. R. A. 564; 35 Atl. 610 [1896]; *City of Erie v. Piece of Land Fronting on State Street*, 175 Pa. St. 523, 34 Atl. 808 [1896]; *Mt. Pleasant Bor. v. Baltimore & Ohio R. R. Co.*, 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052 [1890]; *Hamar*

v. Leihy, 124 Wis. 265, 102 N. W. 568 [1905]; *Chicago, Milwaukee & St. Paul Railway Company v. City of Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417 [1895].

² *The Chicago, Rock Island & Pacific Railway Company v. City of Chicago*, 139 Ill. 573, 28 N. E. 1108 [1893].

³ *Naugatuck Railroad Company v. City of Waterbury*, 78 Conn. 193, 61 Atl. 474 [1905]; *New York & New Haven Railroad Company v. City of New Haven*, 42 Conn. 279, 19 Am. Rep. 534 [1875].

⁴ *Chicago & Northwestern Railway Company v. Village of Elmhurst*, 165 Ill. 184, 46 N. E. 1152 [1897]; *Atchison, Topeka & Santa Fe Railroad Company v. Peterson*, 5 Kan. App. 103, 48 Pac. 877 [1897]; *City of Nevada to use of Gilfillan v. Eddy*, 123 Mo. 546, 27 S. W. 471 [1894]; *State, New Jersey Midland Railroad Company, Pros. v. Mayor and Aldermen of Jersey City*, 42 N. J. L. (13 Vroom) 97 [1880].

⁵ *Chicago, Rock Island & Pacific Railway Company v. City of Chicago*, 139 Ill. 573, 28 N. E. 1108 [1893].

⁶ *Mt. Pleasant Bor. v. Baltimore & Ohio R. R. Co.*, 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052 [1890].

⁷ *Lake Erie & Western Railroad Company v. Bowker*, 9 Ind. App. 428, 36 N. E. 864 [1893].

that property which is used in part as a depot and in part is leased for other purposes, is subject to assessment.⁸ It seems to be held in some jurisdictions that the increased facility of access to a depot is a benefit for which an assessment may be levied.⁹ In other jurisdictions it is said that the increased facility of access to a depot cannot be considered in assessing such depot for the benefits.¹⁰ The reasons given for this are inconsistent. One is, that such increased facilities for access do not result in any increase in the business of the railroad.¹¹ The other is that an assessment based upon the theory of an increase of business is a tax upon such business rather than an assessment upon the real property.¹² The logical result of these views is reached in some jurisdictions which hold that a depot cannot be assessed for the cost of a street improvement.¹³ It has been held that a depot cannot be assessed for the cost of fencing in a district in which such depot was situated.¹⁴ Land used for freight and lumber yards may be assessed for the cost of an adjoining sidewalk.¹⁵ By statute in Iowa, real estate belonging to a railroad company, not ex-

⁸ *Chicago Terminal Transfer Co. v. City of Chicago*, 178 Ill. 429, 53 N. E. 361 [1899].

⁹ *Chicago Terminal Transfer Company v. City of Chicago*, 178 Ill. 429, 53 N. E. 361 [1899].

¹⁰ *Naugatuck Railroad Company v. City of Waterbury*, 78 Conn. 193, 61 Atl. 474 [1905]; *New York & New Haven Railroad Company v. City of New Haven*, 42 Conn. 279, 19 Am. Rep. 534 [1875]; *Old Colony & Fall River Railroad Company v. Inhabitants of the County of Plymouth*, 80 Mass. (14 Gray) 155 [1859]; *Boston & Maine R. R. v. County of Middlesex*, 83 Mass. (1 All.) 324 [1861]; *Hook v. Chicago & Alton Railroad Company*, 133 Mo. 313, 34 S. W. 549 [1895]; *State, Morris & Essex Railroad Company, Pros. v. Jersey City*, 36 N. J. L. (7 Vr.) 56 [1872].

¹¹ "We are unable to see how the land assessed is made any more valuable to the owners for any other purpose for which they can lawfully use it. The land was originally taken, is now used, and presumptively must continue to be used, for rail-

road purposes. For such purposes it can be not more benefited by the improvement than land taken for water works, public streets, or parks.

"The fact that the pavement makes access to the railroad station easier shows a benefit to the public at large, but not a special benefit to the corporation. They carry no more passengers, and receive no greater compensation, in consequence of such increased facilities." *New York & New Haven Railroad Company v. City of New Haven*, 42 Conn. 279, 19 Am. Rep. 534 [1875].

¹² *State, Morris & Essex Railroad Company, Pros. v. Jersey City*, 36 N. J. L. (7 Vr.) 56 [1872].

¹³ *Naugatuck Railroad Company v. City of Waterbury*, 78 Conn. 193, 61 Atl. 474 [1905]; *New York & New Haven Railroad Company v. City of New Haven*, 42 Conn. 279, 19 Am. Rep. 534 [1875].

¹⁴ *Stiewel v. Fencing District No. 6, of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1903].

¹⁵ *Philadelphia v. Stevenson*, 132 Pa. 103, 19 Atl. 70 [1890].

clusively used in the operation of its road is subject to local assessment and taxation. Under such statute it was held that a grain elevator belonging to a railway company situated on its land next to its tracks, which was leased to tenants who paid a nominal rent and used it exclusively for storing grain for shipment over such railroad, is not subject to local assessment.¹⁶ Land owned by a railway in fee, which it may use as it pleases, and which it uses as a place for running off freight cars and leaving them, has been held to be subject to a sewer assessment.¹⁷ A railroad company owning a lot which is divided by its right of way into two parts, may be assessed for the parts of such lot not used for its right of way.¹⁸ It is not prejudicial error to assess such part separately.¹⁹ In some jurisdictions it is provided by statute that real property belonging to a railroad and used exclusively in the operation of its road is exempt from assessment while other real property owned by the road is subject to assessment.²⁰ In some states it is provided by statute that any real property belonging to a railroad, except the right of way, may be assessed.²¹ Accordingly, if it is shown that a railroad owns land, but it does not appear how such land is used, an assessment is regarded as *prima facie* valid.²² Under such a statute a tract of land used in part as a right of way and in part for railroad yards was subject to assessment except as to such part thereof as was used as a road bed.²³ In some jurisdictions, land used for side tracks may be assessed for local improvements.²⁴ The amount of the assessment is said to depend upon the probability that such land may thereafter be devoted to

¹⁶ *Herter v. Chicago, Milwaukee & St. Paul Railway Company*, 114 Ia. 339, 86 N. W. 266 [1901].

¹⁷ *New York, etc., R. R. Co. v. New Britain*, 49 Conn. 40.

¹⁸ *Minneapolis & St. Louis R. R. Co. v. Lindquist*, 119 Ia. 144, 93 N. W. 103 [1903].

¹⁹ *Minneapolis & St. Louis R. R. Co. v. Lindquist*, 119 Ia. 144, 93 N. W. 103 [1903].

²⁰ *Herter v. Chicago, Milwaukee & St. Paul Railway Company*, 114 Ia. 339, 86 N. W. 266 [1901].

²¹ *Minneapolis & St. Louis R. R. Co. v. Lindquist*, 119 Iowa 144, 93 N. W. 103 [1903]; *City of Philadel-*

phia to Use of McCann v. Philadelphia & Reading Railroad Company, 177 Pa. 292, 34 L. R. A. 564, 35 Atl. 610 [1896]; *City of Erie v. Piece of Land Fronting on State Street*, 175 Pa. St. 523, 34 Atl. 808 [1896].

²² *Minneapolis & St. Louis R. R. Co. v. Lindquist*, 119 Iowa, 144, 93 N. W. 103 [1903].

²³ *City of Philadelphia v. Philadelphia & Reading Railroad Company*, 177 Pa. 292, 34 L. R. A. 564, 35 Atl. 610 [1896].

²⁴ *State, New Jersey Midland Railroad Company, Pros. v. Mayor and Aldermen of Jersey City*, 42 N. J. L. (13 Vroom) 97 [1880].

other purposes.²⁵ In other jurisdictions it is said to be doubtful whether a side track can be assessed.²⁶ Land used for freight and lumber yards may be assessed for the construction of adjoining sidewalks.²⁷ Land used for warehouses, roundhouses and shops is said to be subject to assessment for local improvements.²⁸ Land which is not used for railway purposes is subject to local assessment, and the fact that it is owned by a railway company does not affect such liability.²⁹ The fact that it is probable that such land will in the future be required for railroad purposes does not exempt it from local assessment.³¹ If a railway company has constructed transfer tracks and stock yards on a part of a tract of land, the rest of such tract is not thereby rendered exempt from local assessment.³¹

§ 597. Effect of interest held by railroad in land.

In some jurisdictions the right to assess the right of way of a railroad seems to turn upon the nature of the interest which the railway company has in such land. If the railway company has appropriated such land by eminent domain and possesses only an easement therein, it is said that such easement cannot be assessed.¹ This result depends in part upon a question of statutory construction, the easement being held not to be a lot within the meaning of the statute providing for an assessment upon adjoining lots.² In other jurisdictions it is said to be immaterial whether the railroad company has acquired the fee or an easement in the land

²⁵ *State, Morris and Essex Railroad Company, Pros. v. Jersey City*, 36 N. J. L. (7 Vr.) 56 [1872].

²⁶ *Abern v. Board of Improvement District No. 3 of Texarkana*, 69 Ark. 68, 61 S. W. 575 [1901].

²⁷ *Mt. Pleasant Bor. v. Baltimore & Ohio Ry. Co.*, 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052 [1890]; *Philadelphia v. Stevenson*, 132 Pa. 103, 19 Atl. 70.

²⁸ *Atchison, Topeka & Santa Fe Railroad Company v. Peterson*, 5 Kan. App. 103, 48 Pac. 877 [1897].

²⁹ In the *Matter of the Jersey City and Bergen Railway Company* for a Summary Determination as to Certain Property Assessed by Jersey City and also by the State Board of

Assessors, 66 N. J. L. (37 Vr.) 501, 49 Atl. 437 [1901].

³⁰ *Chicago, Milwaukee & St. Paul Railway Company v. City of Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417 [1895].

³¹ *State of Minnesota ex rel. Minnesota Transfer Railway Company v. District Court of Ramsey County*, 68 Minn. 242, 71 N. W. 27 [1897].

¹ *Chicago, Rock Island & Pacific Railway Company v. City of Ottumwa*, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900]; *City of Muscatine v. Chicago, Rock Island and Pacific Railway Company*, 88 Ia. 291, 55 N. W. 100 [1893].

² See § 630.

which it uses for its right of way. This theory leads, however, to widely different results. In some jurisdictions it is said that the right of way cannot be assessed whether the railway company has a fee or an easement therein.³ In other jurisdictions it is said that the right of way can be assessed even if the railway company has merely an easement therein acquired by eminent domain.⁴ A railroad is said to have such an interest in the soil that such interest is subject to local assessment.⁵ It is real estate within the meaning of a statute authorizing the assessment of real estate.⁶ A railroad which has a mere license to run its trains over the tracks of another railroad which right is revocable on notice, has no interest in such right of way which may be assessed.⁷ Land owned by a railway in fee, without restriction in its use is held to be subject to assessment.⁸ In some jurisdictions, while the property of a railway company including its right of way may be assessed for local improvements,⁹ land donated by congress for the sole use of the railroad can be assessed only for the benefits which it receives if used for that particular purpose.¹⁰

§ 598. Specific type of improvement as affecting assessment of right of way.

Furthermore, since in many jurisdictions, the question of actual benefit to the property assessed is regarded as material, it is necessary to consider the chief types of local improvement with reference to the right to assess railroad property therefor. This

³ *Allegheny City v. West Penna. R. Co.*, 138 Pa. St. 375, 21 Atl. 763 [1890].

⁴ *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co.*, 116 Ky. 856, 25 Ky. L. Rep. 1024, 76 S. W. 1097 [1903]; *Figg v. Louisville & N. R. R. Co.*, 116 Ky. 135, 25 Ky. L. R. 350, 75 S. W. 269 [1903]; *Northern Indiana Railroad Company v. Connelly*, 10 O. S. 160 [1859].

⁵ *Appeal of North Beach and Mission Railroad Company*, in the matter of widening Kearney Street, 32 Cal. 500 [1867].

⁶ *Brighton Ry. Co. v. St. Giles*, 4 L. R. (Exch. Div.) 239; *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894]; *Peru and Indianapolis Rail-*

road Co. v. Hanna, 68 Ind. 562 [1879].

⁷ *Louisville and Nashville Railroad Company v. City of East St. Louis*, 134 Ill. 656, 25 N. E. 962 [1891].

⁸ *New York, New Haven and Hartford R. R. Co. v. New Britain*, 49 Conn. 40.

⁹ *Illinois Central Railroad Company v. Decatur*, 147 U. S. 190, 197, 37 L. 132, 13 S. 293 [1891]; (*affirming Illinois Central Railroad Company v. City of Decatur*, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315 [1890]); *Illinois Central Railroad Company v. City of Chicago*, 141 Ill. 509, 30 N. E. 1036 [1892].

¹⁰ *Illinois Central Railroad Company v. City of Chicago*, 141 Ill. 509, 30 N. E. 1036 [1892].

divergence of judicial opinion is evident when we come to a consideration of the specific types of local improvement. Under these different and inconsistent theories, widely different results have been reached in different courts upon facts substantially the same. Thus, in some jurisdictions it is proper to assess the right of way of a railroad for the improvement of an adjacent street.¹ Even under this theory, it has been held to be improper to assess a right of way for a street improvement where the only evidence as to benefit is based on the assumption that such property will at some time be used for a depot or a freight house.² In other jurisdictions, it is held that the right of way of a railway cannot be assessed for a street improvement on the ground that such improvement cannot confer any benefit upon such land while devoted to such use.³ Thus, where the right of way was from twelve

¹ Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430, 25 S. 466 [1905]; (affirming, 116 Ky. 856, 76 S. W. 1097, 25 Ky. L. R. 1024); Appeal of North Beach and Mission R. R. Co. in the Matter of Widening Kearney Street, 32 Cal. 590 [1867]; Illinois Central Railroad Company v. People ex rel. Seaton, 139 Ill. 119, 59 N. E. 609 [1901]; Palmer v. City of Danville, 166 Ill. 42, 46 N. E. 629 [1897]; Chicago and Northwestern Railway Company v. Village of Elmhurst, 165 Ill. 148, 46 N. E. 437 [1897]; Illinois Central Railroad Company v. City of Kankakee, 164 Ill. 608, 45 N. E. 971 [1897]; Chicago & Alton Railroad Company v. City of Joliet, 153 Ill. 649, 39 N. E. 1077 [1894]; Rich v. City of Chicago, 152 Ill. 18, 33 N. E. 275 [1894]; Pittsburgh C. C. & St. L. Ry. Co. v. Taber, 168 Ind. 419, 77 N. E. 741 [1906]; Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Fish, 158 Ind. 525, 63 N. E. 454 [1901]; Peru and Indianapolis Railroad Co. v. Hanna, 68 Ind. 562 [1879]; Indianapolis, Peru and Chicago Railroad Company v. Ross, 47 Ind. 25 [1874]; Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co., 116 Ky. 856, 76 S. W.

1097, 25 Ky. L. R. 1024 [1903]; Figg v. Louisville & N. R. R. Co., 116 Ky. 135, 75 S. W. 269, 25 Ky. L. R. 350 [1903]; City of Ludlow v. Cincinnati Southern Railway Company, 78 Ky. 357 [1880]; Lake Shore & Michigan Southern Railway Company v. City of Grand Rapids, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767 [1894]; Northern Indiana Railroad Company v. Connelly, 10 O. S. 160 [1859]; Northern Pacific Ry. Co. v. City of Seattle, — Wash. —, 91 Pac. 244 [1907].

² Village of River Forest v. Chicago and Northwestern Railway Company, 197 Ill. 344, 64 N. E. 364 [1902].

³ Southern California Railway Company v. Workman, 146 Cal. 83, 79 Pac. 586, 82 Pac. 79 [1905]; Naugatuck Railroad Company v. City of Waterbury, 78 Conn. 193, 61 Atl. 474 [1905]; City of Bridgeport v. New York and New Haven Railroad Company, 36 Conn. 555, 4 Am. Rep. 63 [1869]; Chicago, Rock Island & Pacific Railway Company v. City of Ottumwa, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900]; City of Muscatine v. Chicago, Rock Island & Pacific Railway Company, 88 Ia. 291, 55 N. W. 100 [1893]; McCutcheon v. Pacific Railroad Com-

to fifteen feet lower than the level of the adjoining street running parallel to such right of way, it was held that such right of way could not be assessed for the cost of such street improvement.⁴ It has been held that a street across a railway right of way cannot confer any benefit upon such railway and that no assessment can be levied therefor.⁵ So it is held proper to assess the right of way of a railway company for the improvement of highways.⁶ In some jurisdictions an assessment may be levied for improving a street parallel to a railway.⁷ In other jurisdictions a special assessment cannot be levied for improving a street parallel to right of way of railway.⁸ It has been held that a highway across the right of way of a railway cannot confer any benefit and that no assessment can be levied therefor.⁹ A railroad cannot be assessed for the cost of a public road crossing its tracks.¹⁰ If

pany, 72 Mo. App. 271 [1897]; *Saxton National Bank v. Haywood*, 62 Mo. App. 550 [1895]; *State, New Jersey Railroad & Transportation Company, Prs. v. City of Elizabethtown*, 37 N. J. L. (8 Vr.) 330 [1875]; *New York & Harlem Railroad Company v. Board of Trustees of the Town of Morrisania*, 7 Hun. 652 [1876]; *City of Erie v. Piece of Land Fronting on State Street*, 175 Pa. St. 523, 34 Atl. 808 [1896]; *Junction R. R. Co. v. City of Philadelphia*, 88 Pa. St. 424, 32 Am. Rep. 417 [1879]; *Allegheny City v. West Penna. Railroad Co.*, 138 Pa. 375, 21 Atl. 763 [1890]; *Hammar v. Leiby*, 124 Wis. 275, 102 N. W. 568 [1905]; *Chicago, Milwaukee & St. Paul Railway Company v. City of Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417 [1895]; "A railroad cannot from its nature derive any benefit from the paving while all of the rest of the neighborhood may." *Allegheny City v. West Penna. Railroad Co.*, 138 Pa. 375, 382, 21 Atl. 763 [1890]; (quoting, *City of Philadelphia v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 33 Pa. St. (9 Casey) 41 [1859]).

⁴ *Allegheny City v. West Penna. Railroad Co.*, 138 Pa. St. 375, 21 Atl. 763 [1890].

⁵ *Saxton National Bank v. Haywood*, 62 Mo. App. 550 [1895]; *State,*

New Jersey Railroad & Transportation Company, Prs. v. City of Elizabethtown, 37 N. J. L. (8 Vr.) 330 [1875]; *New York & Harlem Railroad Company v. Board of Trustees of the Town of Morrisania*, 7 Hun. 652 [1876].

⁶ *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Hays*, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597 [1896].

⁷ *Peru and Indianapolis Railroad Co. v. Hanna*, 68 Ind. 572 [1879]; *Indianapolis, Peru and Chicago Railroad Company v. Ross*, 47 Ind. 25 [1874].

⁸ *Allegheny City v. West Penna. Railroad Co.*, 138 Pa. St. 375, 21 Atl. 763 [1890].

⁹ *City of Bridgeport v. New York and New Haven Railroad Company*, 33 Conn. 255, 4 Am. Rep. 63 [1869]; *Hook v. Chicago and Alton Railroad Company*, 133 Mo. 313, 34 S. W. 549 [1895].

¹⁰ *Hook v. Chicago and Alton Railroad Company*, 133 Mo. 313, 34 S. W. 549 [1895]. (In this case it was suggested as a possible benefit that fewer cattle would be killed at a public crossing than at a farm crossing and that the general public would have better access to another road leading from a station on the line of the railway company.)

a right of way is situated in a street running along the length thereof, it has been held that such right of way is benefited by the improvement of such street and assessment may be levied therefor.¹¹ Under the theory that a right of way is not subject to local assessment it has been held that such right of way cannot be assessed for the cost of constructing a sidewalk along said right of way.¹² By special statute a railroad company may be required to pave the streets at a railway crossing,¹³ or to pave certain approaches,¹⁴ or to pay a certain proportion of the cost of such improvement.¹⁵ The percentage of the cost of the improvement imposed upon a railroad company made in good faith and in the exercise of reasonable discretion, will be regarded as properly apportioned.¹⁶ A statute imposing upon a railway company the entire cost of paving the street on which its track is laid, operates both to impose such cost upon the railroad,¹⁷ and to relieve the property owners from the cost of such improvement.¹⁸ If the railroad company is required by the ordinance granting its franchise to keep the streets paved at railway crossings, the cost of such pavement cannot be allowed to the railway company as damages sustained by condemning a right of way for a street crossing such track.¹⁹ Where a railroad is obliged to pave certain approaches, the city cannot include the cost of such approaches in the assessment.²⁰ Such error cannot be corrected after confirmation by the act of the city in making a new contract for an improvement different from that provided by the original ordin-

¹¹ *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894].

¹² *Mt. Pleasant Borough v. Baltimore & Ohio R. R. Co.*, 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052 [1890].

¹³ *Kansas City v. Kansas City Belt Railway Company*, 187 Mo. 146, 86 S. W. 190 [1904]; *Philadelphia to Use of Nestor v. Spring Garden Farmers' Market Company*, 161 Pa. 522, 29 Atl. 286 [1894].

¹⁴ *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39 [1903].

¹⁵ *Chicago, Rock Island and Pacific Railway Co. v. City of Moline*, 158 Ill. 64, 41 N. E. 877 [1895].

¹⁶ *Chicago, Rock Island and Pacific Railway Co. v. City of Moline*, 158

Ill. 64, 41 N. E. 877 [1895]. The question of the apportionment of the cost of improvement and the determination of the share which the railroad company is to pay is discussed elsewhere. See § 599 *et seq.*

¹⁷ *Philadelphia to Use of Nestor v. Spring Garden Farmers' Market Company*, 161 Pa. 522, 29 Atl. 286 [1894].

¹⁸ *Philadelphia to Use of Nestor v. Spring Garden Farmers' Market Company*, 161 Pa. 522, 29 Atl. 286 [1894].

¹⁹ *Kansas City v. Kansas City Belt Railway Company*, 187 Mo. 146, 86 S. W. 190 [1905].

²⁰ *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39 [1903].

ance by omitting such approaches.²¹ A sidewalk parallel to the right of way of a railway confers no benefit and no assessment can be levied therefor.²² In some jurisdictions, it is held to be proper to levy an assessment upon the right of way of a railroad for the cost of a sewer which furnishes drainage to such right of way.²³ If the sewer is at such a distance from the right of way, that it will not furnish drainage unless a connecting sewer is built in the future, such right of way cannot be assessed even under this theory.²⁴ In other jurisdictions it is held to be improper to assess a right of way for the construction of a sewer, on the ground that the property while devoted to that use cannot receive any appreciable benefit from such improvement.²⁵ In some of these cases the special facts of the case show the want of benefits. Thus, it is proper to omit from assessment the right of way of a railroad through which the sewer passes underground.²⁶ By special statute, the right of way of a railroad may be assessed for the benefits conferred upon it by the construction of a system of drainage.²⁷ Where by statute a railroad company is required to construct its tracks below the grade level and provide suitable bridges over the tracks at street crossings, it has been held that the city cannot require the railway company, at its sole cost, to remove a bridge which is in good condition and pay for the cost of constructing a new bridge which is strong enough to enable the cars

²¹ *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39 [1903].

²² *Mt. Pleasant Borough v. Baltimore & Ohio R. R. Co.*, 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052 [1890].

²³ *Lake Erie and Western Railroad Company v. Bowker*, 9 Ind. App. 428, 36 N. E. 864 [1893]; *State, Paterson & Hudson River Railroad Company, Pros. v. City of Passaic*, 54 N. J. L. (25 Vr.) 340, 23 Atl. 945 [1892]; *State, New Jersey Railroad & Transportation Company, Pros. v. City of Elizabeth*, 37 N. J. L. (8 Vr.) 330 [1875].

²⁴ *State, New Jersey Railroad & Transportation Company, Pros. v. City of Elizabeth*, 37 N. J. L. (8 Vr.) 330 [1875].

²⁵ *Payne v. Village of South*

Springfield, 161 Ill. 285, 44 N. E. 105 [1896]; *Minneapolis & St. Louis Ry. Co. v. Lindquist*, 119 Iowa 144, 93 N. W. 103 [1903]; *City of Philadelphia v. Philadelphia & Reading Railroad Company*, 177 Pa. 292, 34 L. R. A. 564, 35 Atl. 610 [1896].

²⁶ *Payne v. Village of South Springfield*, 161 Ill. 285, 44 N. E. 105 [1896].

²⁷ *Illinois Central Railroad Company v. Commissioners of East Lake Fork Special Drainage District*, 129 Ill. 417, 21 N. E. 925 [1890]; *Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Maehler*, 158 Ind. 159, 63 N. E. 210 [1901]; *Louisville, New Albany and Chicago Railway Company v. State for the Use of Beckman*, 122 Ind. 443, 24 N. E. 350 [1889].

of a street railway company to run over it.²⁸ The right of way of a railway company may be assessed for the cost of fencing in a district.²⁹ The assessors cannot, however, adopt the valuation put upon the road-bed by the corporation commissioners, since this valuation includes elements of value other than the land and improvements.³⁰ Under a statute providing for a tax for constructing fences, to be levied on all the real estate in the district which is taxable by the state and county, it is held that the right of way of a railway, if exempt from general taxation, cannot be assessed for such improvement.³¹ Whether railroad property may be assessed for the construction of a park and a system of boulevards is a question upon which there is some conflict of authority, some jurisdictions holding that such assessments can be levied,³² and others holding that they cannot.³³

§ 599. Exaction against street railway based on charter provisions.

The charter offered to a street railway company operating its cars on the surface often requires such company to pave between its tracks, and in some cases for a certain distance on either side. If the street railway company accepts and acts under such charter it is bound to pave or to pay the cost of paving, as so provided.¹ If, by constitutional or statutory provision franchises

²⁸ People of the State of New York ex rel. Western New York & Pennsylvania Railroad Company v. Adams, 88 Hun. 122, 34 N. Y. S. 579 [1895].

²⁹ Commissioners of Chatham County v. Seaboard Air Line Railway Company, 133 N. C. 216, 45 S. E. 566 [1903]. *Contra*: Stiegel v. Fencing District No. 6 of Johnson County, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1902].

³⁰ Commissioners of Chatham County v. Seaboard Air Line Railway Company, 133 N. C. 216, 45 S. E. 566 [1903].

³¹ Bradshaw v. Board of Commissioners of Guilford County, 92 N. C. 278 [1885].

³² Benefit is here held to be a question of fact as to which confirmation is conclusive. Chicago & Northwes-

tern Railway Co. v. People, 120 Ill. 104, 11 N. E. 418. It is said that railway property is *prima facie* liable. *In re Cedar Park*, 1 How. Pr. N. S. 257 [1885].

³³ Action of commissioners upheld in omitting right of way from assessment of benefits and damages. In the Matter of the Application of Commissioners of the Central Park, to Confirm the Report of the Commissioners of Estimate and Assessment, for Opening Riverside Park, 63 Barb. 282 [1872].

¹ Worcester v. Worcester Consol. St. Ry. Co., 196 U. S. 539, 25 S. 327 [1905]; (affirming, City of Worcester v. Worcester Consolidated Street Railway Company, 182 Mass. 49, 64 N. E. 581 [1902]); New Orleans City and Lake Railroad Company v. Louisiana ex rel. City of New Or-

granted to a street railroad company are subject to future legislative control, a railroad company which has occupied a public street under a franchise may by subsequent legislation be compelled in addition to its former liabilities, to pay a part of the cost of paving such street.² If a street railway company has accepted a franchise containing a provision that it should be liable for its share of the cost of improving streets on which it should run, to be assessed and collected as other street assessments, such company is liable for its share of improvements whether made under statutes then in force or under subsequent statutes.³ If the state reserves power to modify the charter of the street railway company, it may subsequently require the railway company to pave the street between its tracks;⁴ and if the railway company does not construct such paving, the city may construct it and charge the cost to the railway company.⁵ If, by change of statute a street railway company is relieved from a part of the cost of paving a street on which its tracks are located, and the railroad company does not complain of such statute, or of the liability imposed in lieu thereof, the city or the abutting property owners cannot object thereto.⁶ The same rule applies where by change of city ordinance the railroad company is relieved from

leans, 157 U. S. 219, 39 L. 679, 15 S. 581 [1895]; (affirming *State ex rel. City of New Orleans v. New Orleans City and Lake Railroad Co.*, 42 La. Ann. 550, 7 So. 606 [1890]); *Sioux City Street Railway Co. v. Sioux City*, 138 U. S. 98, 34 L. 898, 11 S. 226; *Springfield v. Springfield Street Ry. Co.*, 182 Mass. 41, 64 N. E. 577 [1901, 1902]; *City of Benton Harbor v. St. Joseph & Benton Harbor Street Railway Company*, 102 Mich. 386, 26 L. R. A. 245, 60 N. W. 758 [1894]; *City of Rochester v. Rochester Railway Company*, 182 N. Y. 99, 70 L. R. A. 773, 74 N. E. 953 [1905]; *Storrie v. Houston City Street Railway Company*, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898].

²*Fair Haven and Westville Railroad Company v. City of New Haven*, 203 U. S. 379 [1906]; (affirming, 77 Conn. 667, 60 Atl. 651 [1895]); *Fair Haven and Westville Railroad Company v. City of New Haven*, 75

Conn. 442, 53 Atl. 960 [1903]; *Storrie v. Houston City Street Railway Company*, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898].

³*Schmidt v. Market St. and Willow Glenn Railroad Company*, 90 Cal. 37, 27 Pac. 61 [1891].

⁴*Fair Haven and Westville Railroad Co. v. New Haven*, 203 U. S. 379 [1906]; (affirming, 77 Conn. 677).

⁵*Fair Haven and Westville Railroad Co. v. New Haven*, 203 U. S. 379 [1906]; (affirming, 77 Conn. 677).

⁶*City of Worcester v. Worcester Consolidated Street Railway Co.*, 196 U. S. 539, 25 S. 327 [1905]; (affirming *City of Worcester v. Worcester Consolidated Street Ry. Company*, 182 Mass. 49, 64 N. E. 581 [1902]). *Louisiana Imp. Co. v. Baton Rouge Electric & Gas Co.*, 114 La. 534, 38 So. 444 [1905].

the cost of such paving.⁷ A statute authorizing the city to assess a street railroad for the cost of paving nine feet of the width of the street for every line of track is not repealed by a subsequent statute authorizing the assessment of benefits upon abutting or adjoining property, since the charge against the street railway is not an assessment for benefits.⁸ A resolution by a city council provided that the cost of an improvement, should be assessed upon the "owners of abutting property" as provided for by a certain section of the city charter. This section provided for assessing part of the cost upon the owners of abutting property and for charging the rest upon the street railroad company occupying a part of such street. It was held that the council did not thereby relieve the railroad company from liability.⁹

§ 600. Statutory duty of street railway to pave.

The legislature has undoubted power to give a city the right to require street railway companies to pave a part of the street upon which the tracks are laid. In many jurisdictions the city or other public corporation is authorized to impose upon street railway companies which may desire to lay their tracks in public streets, a liability for paving a given portion of a street.¹ This form of liability differs from that of a contract between the city and the street railway company, because such liability may be imposed upon the railway company without its consent. This is said to be an exercise of the taxing power,² although the same results are reached as if it were regarded as an exercise of the police power.³ Where local assessments were held to be invalid,

⁷ *Philadelphia to Use v. Evans*, 139 Pa. St. 483, 21 Atl. 200 [1891].

⁸ *The Fair Haven, etc., R. R. Co. v. City of New Haven*, 75 Conn. 442, 52 Atl. 960

⁹ *Storrie v. Houston City Street Railway Company*, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898].

¹ *City of Worcester v. Worcester Consol. St. Ry. Co.*, 196 U. S. 539, 25 S. 327 [1905]; *Sioux City Street Ry. Co. v. Sioux City*, 138 U. S. 98, 34 L. 898, 11 S. 226; *City of Rochester v. Rochester Railway Company*, 182 N. Y. 99, 70 L. R. A. 773, 74 N. E. 953 [1905]; *The Fair Haven and Westville Railroad Company v. City of New Haven*, 75 Conn. 442, 53 Atl.

960 [1903]; *City of New Haven v. Fair Haven and Westville Railroad Company*, 38 Conn. 422, 9 Am. Rep. 399 [1871]; *City of Shreveport v. Shreveport Belt Railway Company*, 107 La. 785, 32 So. 189 [1901, 1902].

² *City of Worcester v. Worcester Consol. St. Ry. Co.*, 196 U. S. 539, 25 S. 327 [1905]; *Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 98, 34 L. 898, 11 S. 226; *City of Rochester v. Rochester Railway Company*, 182 N. Y. 99, 70 L. R. A. 773, 74 N. E. 953 [1905].

³ *City of Rochester v. Rochester Railway Co.*, 182 N. Y. 99, 70 L. R. A. 773, 74 N. E. 953 [1905].

it was also held that a railway company which accepted a franchise including in its terms a provision that such railroad company should pave between its tracks and three feet on each side thereof, and in case of failure to pave as required, such railroad company should be liable to a fine of five dollars a day, could not be compelled to pay the cost of such paving unless it had incurred fines under such act amounting to the cost of such paving.⁴

§ 601. Assessment upon street railway based on benefits.

Unless a street railway company is protected by a charter which cannot be altered, the legislature has undoubted power to provide for assessing its property, including its right of way along a street. If the statute specifically provides for assessing such property, including such right of way, full effect must be given to it.¹ On the other hand, the legislature has undoubted authority to exempt from assessment property belonging to a street railway company.² It may, if it sees fit, exempt all the property belonging to such corporation and not merely that which is used for railway purposes. Thus, a statute requiring street railway companies to pay license fees based upon their gross receipts and providing that the payment of such fees "shall be in lieu of all other taxes, assessments and licenses of any such corporation; and all personal property, franchises and real estate owned by such company or corporation, shall be exempt from assessment and taxation; except that all land or lots unimproved or having buildings thereon, owned by such person, company or corporation, shall be liable to taxation for state, county and school purposes," exempts all the property of a street railway company and not merely such property as is used for railway purposes.³ If the legislature has neither specifically provided for assessing the right of way of a street railway company, nor for exempting the property of a street railway company from assessment, we have a question presented as to the right of way upon which there is a divergence of judicial authority. In some jurisdictions it is held that the right of a

* Mayor, Aldermen, etc., of Mobile v. Royal Street Railroad Company, 45 Ala. 322 [1871]; Ware v. Willis, 45 Ala. 120 [1871]. This view seems to be abandoned where as in most jurisdictions assessments are held to be valid.

¹ Metropolitan Railroad Co. v. Macfarland, 20 App. D. C. 421 [1902].

² Milwaukee Electric Railway & Light Company v. City of Milwaukee, 95 Wis. 42, 69 N. W. 796 [1897].

³ Milwaukee Electric Railway & Light Company v. City of Milwaukee, 95 Wis. 42, 69 N. W. 796 [1897].

street railway to make use of a public street under its franchise, is property within the meaning of the statutes authorizing the assessment of property benefited and that such right of way is therefore subject to assessment.⁴ Under statutes providing for the assessment of "real property" it is held that the right of a street railway company to make use of a public street is real property.⁵ It is said to be an easement and therefore a valuable right in real property.⁶ The same result is reached under a statute authorizing an assessment "upon the persons whose property is especially benefited."⁷ The question of the benefit to the right of way is in such jurisdictions regarded as one of fact.⁸ In other jurisdictions, it is held or assumed that the right of a street railway company to make use of public streets is not a property right which is subject to assessment in the absence of a statute specifically enumerating such right as among those subject to assessment.⁹ The reason given for this holding, in some jurisdictions, is that the right of a street railway company to occupy a part of a public street with its track, is not real estate within the meaning

⁴ Appeal of North Beach and Mission R. R. Co. in the Matter of Widening Kearney Street, 32 Cal. 500 [1867]; City of New Haven v. Fair Haven and Westville Railroad Company, 38 Conn. 422, 9 Am. Rep. 399 [1871]; Cicero & Proviso Street Railway Company v. City of Chicago, 176 Ill. 501, 52 N. E. 866 [1898]; Kuehner v. City of Freeport, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372 [1893]; Chicago City Railway Company v. City of Chicago, 90 Ill. 573, 32 Am. Rep. 54 [1878]; City of Chicago v. Baer, 41 Ill. 306 [1866]; Little v. City of Chicago, 46 Ill. App. 534 [1892].

⁵ Appeal of North Beach and Mission R. R. Co. in the Matter of Widening Kearney Street, 32 Cal. 500 [1867]; Cicero & Proviso Street Railway Company v. City of Chicago, 176 Ill. 501, 52 N. E. 866 [1898]; Kuehner v. City of Freeport, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372 [1893]; City of Chicago v. Baer, 41 Ill. 306 [1866].

⁶ Appeal of North Beach and Mission R. R. Co. in the Matter of Widening Kearney Street, 32 Cal. 500 [1867].

⁷ New Haven v. Fair Haven R. R. Co., 33 Conn. 422, 9 Am. Rep. 399 [1871].

⁸ Farmers' Loan & Trust Company v. Borough of Ansonia, 61 Conn. 76, 23 Atl. 705 [1891].

⁹ Western Paving and Supply Company v. Citizens' Street Railroad Company, 128 Ind. 525, 25 Am. St. Rep. 462, 10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88 [1891]; Sixth Avenue Railroad Company v. Mayor, Aldermen and Commonalty of City of New York, 63 Hun. (N. Y.) 271, 17 N. Y. Supp. 903 [1892]; In the Matter of the Application of the Commissioners of Public Parks, etc., Relative to Opening Railroad Avenue, East, 47 Hun. (N. Y.) 302 [1888]; Dean v. Mayor and Aldermen of the City of Paterson, 67 N. J. L. (38 Vr.) 199, 50 Atl. 620 [1901].

of its statute.¹⁷ Its franchise is said to be in the nature of a contract between the city and the railroad company and not within the scope of assessment statutes,¹¹ even if increased in value by the improvement.¹² In other jurisdictions, the phraseology of the statute describing the property which may be assessed, is relied upon as showing an intention to exclude such right of way of a street railroad. Under statutes providing for the assessment of lands on both sides and adjoining a street,¹³ or lots fronting or abutting on a street,¹⁴ or real estate abutting on the improvement,¹⁵ or lands or lots bordering on the street improved,¹⁶ or lands and real estate bordering on the street,¹⁷ or lots and parcels of land fronting on the street,¹⁸ or "lots and parts of lots of [or] land,"¹⁹ or "lots, blocks, tracts and parcels of land" especially benefited,²⁰ it is held that the right of way of a street railway company in a public street is not subject to assessment. Under a statute providing that no part of the expense of an improvement can be assessed on lands not bordering on or adjoining the street, it is held that the right of way of a street railway company does not border on or adjoin the street and cannot be assessed.²¹ Under a statute providing for an assessment upon each lot or parcel of land specially benefited, it is held that the right of way of a street railroad cannot be assessed, since it is not a lot or parcel of land.²² Even where the franchise of a street railway

¹⁷ *State of Minnesota ex rel. St. Paul City Railway Company v. District Court of Ramsey County*, 31 Minn. 354, 17 N. W. 954 [1883].

¹¹ *In the Matter of the Application of the Commissioners of Public Parks, etc., Relative to Opening Railroad Avenue, East*, 47 Hun. (N. Y.) 302 [1888].

¹² *Farmers' Loan & Trust Co. v. Ansonia*, 61 Conn. 76, 23 Atl. 705.

¹³ *The Brick & Terra Cotta Company v. Hull*, 49 Mo. App. 433 [1892].

¹⁴ *Oshkosh City Railway Company v. Winnebago County*, 89 Wis. 435, 61 N. W. 1107 [1895].

¹⁵ *Harriott Avenue*, 24 Pa. Super. Ct. 597 [1904].

¹⁶ *Indianapolis and Vincennes Railway Company v. Capitol Paving and Construction Company*, 24 Ind. App. 114, 54 N. E. 1076 [1899].

¹⁷ *Dean v. Mayor and Aldermen of the City of Paterson*, 67 N. J. L. (38 Vr.) 199, 50 Atl. 620 [1901].

¹⁸ *Koons v. Lucas*, 52 Ia. 177, 3 N. W. 84 [1879].

¹⁹ *City of Maysville v. Maysville St. R. and Transfer Co.* — Ky. —, 108 S. W. 960 [1908].

²⁰ *In re City of Seattle*, — Wash. —, 94 Pac. 1075 [1908]; *Seattle v. Seattle Electric Co.*, — Wash. —, 94 Pac. 194 [1908]; (distinguishing the Illinois cases cited *ante* in this section, as decided under a statute which made the assessment a personal debt and a lien on all the real property of the owner).

²¹ *O'Reilly v. City of Kingston*, 114 N. Y. 439, 21 N. E. 1004 [1889].

²² *North Jersey Street Railway Company v. Mayor and Aldermen of Jersey City*, 68 N. J. L. (39 Vr.) 140, 52 Atl. 300 [1902].

company is regarded as real property, it is not "land and buildings" within the meaning of statute authorizing the assessment of "land and buildings benefited by an improvement."²³ However, if specific provision is made for charging a portion of the expense to a street railway, it is liable, even though the statute provides in general terms that the amounts assessed as benefits shall be collected against the parcels of land benefited.²⁴ If the power of regulating grade crossings is placed in the hands of railway commissioners, the city cannot compel the street railway company to pay a portion of the cost of constructing a bridge on which the street and the tracks of the street railway company were carried above the tracks of a railway.²⁵ Even if a street railway is contiguous to the street within which it is located, it cannot be assessed according to frontage.²⁶ An elevated railroad on posts which are set into a street is regarded as benefited by the improvement of such street and subject to assessment therefor.²⁷

§ 602. Contractual liability of street railway.

A city may make a contract with a street railway company by which the street railway company agrees to pave a part of the street upon which its tracks are located at its own expense, or to pay for the cost of paving such part, if the improvement is constructed by the city.¹ Such a contract often takes the form of an

²³ *Farmers' Loan & Trust Company v. Borough of Ansonia*, 61 Conn. 76, 23 Atl. 705 [1891].

²⁴ *Metropolitan Railroad Co. v. Macfarland*, 20 App. D. C. 421.

²⁵ *Fair Haven & Westville Railroad Co. v. City of New Haven*, 77 Conn. 494, 59 Atl. 737 [1905].

²⁶ *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69.

²⁷ *Lake Street Elevated Railroad Company v. City of Chicago*, 183 Ill. 75, 47 L. R. A. 624, 55 N. E. 721 [1899].

¹ *Washington and Georgetown Railroad Company*, 108 U. S. 522, 27 L. 807, 2 S. 865 [1882]; *Chicago v. Sheldon*, 76 U. S. (9 Wall.) 50, 19 L. 594 [1869]; *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893]; *Schmidt v. Market Street and Willow Glenn Railroad Company*, 90

Cal. 37, 27 Pac. 61 [1891]; *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885 [1891]; *City of New Haven v. Fair Haven and Westville Railroad Company*, 38 Conn. 422, 9 Am. Rep. 399 [1871]; *West Chicago Street Railway Company v. City of Chicago*, 178 Ill. 339, 53 N. E. 112 [1899]; *State ex rel. Keith v. Common Council of the City of Michigan City*, 138 Ind. 455, 37 N. E. 1041 [1894]; *Marshalltown Light, Power & Railway Company v. City of Marshalltown*, 127 Ia. 637, 103 N. W. 1095 [1905]; *People of the State of New York ex rel. Troy and Lansingburgh Railroad Company v. Coffey*, 66 Hun. 160, 21 N. Y. Supp. 34 [1892]; *Philadelphia v. Ridge Avenue Passenger Ry. Co.*, 143 Pa. St. 444, 22 Atl. 695 [1891].

ordinance enacted by the city granting such franchise to the street railway company upon certain terms, one of which is the assumption of this liability by the street railway company, which ordinance is accepted by the street railway company.² The consideration for such a contract may be the granting of a franchise,³ or the extension of the time of a pre-existing franchise.⁴ The acceptance of such franchise by the street railway company completes the contract, since such acceptance amounts to an acceptance of the entire offer.⁵ The acceptance may be made formally, as by entering into a written contract.⁶ In the absence of acceptance of such an offer, as where the railway company has not formally assumed liability and has not exercised the franchise by building its track, no liability exists.⁷ A contract by which a street railway company agrees to pave a part of the street is binding upon its successors in interest.⁸ If a street railway company is permitted to lay its tracks upon a street already paved, under a contract expressly relieving such railway company from any liability, the city cannot subsequently, after the railroad company has laid its tracks, impose a liability upon it for such prior paving.⁹

§ 603. Construction of liability of street railway.

If the statute is not mandatory in requiring the city to impose a part of the cost of paving upon the street railroad, the city

² *Washington and Georgetown Railroad Company v. District of Columbia*, 108 U. S. 522, 27 L. 807, 2 S. 865 [1883]; *Schmidt v. Market Street and Willow Glenn Railroad Company*, 90 Cal. 37, 27 Pac. 61 [1891]; *City of New Haven v. Fair Haven and Westville Railroad Company*, 38 Conn. 422, 9 Am. Rep. 399 [1871]; *West Chicago Street Railway Company v. City of Chicago*, 178 Ill. 339, 53, N. E. 112 [1899]; *Parmalee v. City of Chicago*, 60 Ill. 267 [1871]; *Marshalltown Light, Power & Railway Company v. City of Marshalltown*, 127 Ia. 637, 103 N. W. 1005 [1905]; *People of the State of New York ex rel. Troy and Lansingburgh Railroad Company v. Coffey*, 66 Hun. 160, 21 N. Y. Supp. 34 [1892].

³ *People of the State of New York*

ex rel. Troy and Lansingburgh Railroad Company v. Coffey, 66 Hun. 160, 21 N. Y. Supp. 30 [1892].

⁴ *Chicago Street Railway Company v. City of Chicago*, 178 Ill. 339, 53 N. E. 112 [1899].

⁵ *Schmidt v. Market Street and Willow Glenn Railroad Company*, 90 Cal. 37, 27 Pac. 61 [1891].

⁶ *Philadelphia v. Ridge Avenue Passenger Ry. Co.*, 143 Pa. St. 444, 22 Atl. 695 [1891].

⁷ *Harris v. City of Macomb*, 213 Ill. 47, 72 N. E. 762 [1904].

⁸ *Fent v. Common Council of City of Binghamton*, 94 App. Div. 522, 88 N. Y. S. 34 [1904]; *Philadelphia v. Ridge Avenue Passenger Ry. Co.*, 143 Pa. St. 444, 22 Atl. 695 [1891].

⁹ *Atlanta Consolidated Street Railway Company v. City of Atlanta*, 11 Ga. 255, 36 S. E. 667 [1900].

may relieve the said railroad from its proportion of the cost of paving if it believes that such paving is not a benefit to the railroad.¹ Under a statute providing that the city "shall have the power" to compel a street railway company to pave a certain part of the street, it was held that the exercise of such power was discretionary with the city, and if it was thought advisable it could relieve the street railroad company from such liability.² Contracts imposing upon a street railway a liability for paving are subject to the ordinary rules of construction as the means of determining the intention of the parties from the language used in such contract. A contract to pave a certain part of the street upon which the railroad might run does not bind the railroad company to pay any part of the improvement of a street upon which it has a right to lay its tracks, but upon which it has not in fact laid them.³ If the railroad is bound to keep a certain part of the street in good repair, it is not thereby bound to repave such part of the street,⁴ especially if such part of the street is in good condition when such repavement is made.⁵ The question whether in estimating the number of square feet for which a street railroad must pay the space occupied by the rails is to be considered was raised, but not decided, because the attention of the city council was not called to such question in the first instance, as, under the statute concerning procedure in assessment cases, should have been done.⁶ Under a contract

¹ *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894]; *State ex rel. Keith v. Common Council of the City of Michigan City*, 138 Ind. 455, 37 N. E. 1041 [1894]; *Ft. Dodge Electric Light & Power Company v. City of Ft. Dodge*, 115 Ia. 568, 89 N. W. 7 [1902]; *Lacey v. City of Marshalltown*, 99 Ia. 367, 68 N. W. 726 [1896]; *State of Minnesota ex rel. Benz v. District Court of Ramsey County*, 32 Minn. 181, 19 N. W. 732 [1884]; *People ex rel. Davidson v. Gilon*, 126 N. Y. 147, 27 N. E. 282 [1891]; (reversing *People of the State of New York ex rel. Davidson v. Gilon*, 58 Hun. (N. Y.) 76, 11 N. Y. S. 439 [1890]); *People ex rel. Markey v. City of Brooklyn*, 65 N. Y. 349 [1875]; *City of Philadelphia to use of O'Rourke v. Bowman*, 175 Pa. St. 91, 34 Atl. 353 [1896].

² *Lacey v. City of Marshalltown*, 99 Ia. 367, 68 N. W. 726 [1896].

³ *Harris v. City of Macomb*, 213 Ill. 47, 72 N. E. 762 [1904].

⁴ *Chicago v. Sheldon*, 76 U. S. (9 Wall.) 50, 19 L. 594 [1869]; *Western Paving & Supply Co. v. Citizens Street Railroad Co.*, 128 Ind. 525, 25 Am. St. Rep. 462, 10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88 [1891]; *State ex rel. City of Kansas v. Corrigan Consolidated Street Railway Co.*, 85 Mo. 263.

⁵ *City of Binghamton v. Binghamton & Port Dickinson Railway Company*, 61 Hun. 479, 16 N. Y. Supp. 225 [1891].

⁶ *Marshalltown Light, Power & Railway Company v. City of Marshalltown*, 127 Ia. 637, 103 N. W. 1005 [1905].

by which a street railroad agrees to pave a given part of the street no further assessment can be levied upon such railway company.⁷ A statute providing that a street railway company must pay a certain part of the cost of paving any street on which its tracks are situated "which the council may direct to be paved" is prospective in its operation, applies only to paving laid subsequently and does not authorize the city to require a street railroad company, as a condition precedent to laying its tracks upon a street already paved, which it has a right to occupy, to pay the cost of such paving.⁸ A contract by which a street railway company is to keep in repair so much of the street as it occupies, but such company is exempted from assessments for grading, paving, macadamizing, filling or planking such street, does not exempt such railway company from an assessment for the cost of widening such street.⁹ If the city has power to require a street railway company to repay to the abutting property owners the cost of the paving between the rails where street railroad tracks are laid upon a street already paved, such provision does not require the company to pay to the city the cost of paving at street intersections.¹⁰ If the street railway company is to pave that part of the street occupied by its rails the company has a right to a hearing upon the question of the amount of space thus occupied.¹¹ If the street railway company is to do the work in the style which council might order notice to the street railway company to do such work is necessary in order to charge it with the cost thereon.¹² A street railway company was to bear all the expense of a pavement between the rails and for two feet on each side thereof. In paving such street it was necessary to place expensive blue granite stone along each exterior rail by reason of the existence of such track. Such stone was more expensive than the average cost of paving such street. It was held that the railway company must bear such

⁷ *West Chicago Street Railway Co. v. City of Chicago*, 178 Ill. 339, 53 N. E. 112 [1899].

⁸ *Oskaloosa Street Railway & Land Company v. City of Oskaloosa*, 99 Ia. 496, 68 N. W. 808 [1896].

⁹ *Parmalee v. City of Chicago*, 60 Ill. 267 [1871].

¹⁰ *City of Council Bluffs v. Omaha and Council Bluffs Street Railway*

and Bridge Company, 114 Ia. 141, 86 N. W. 222 [1901].

¹¹ *City of Shreveport v. Prescott*, 51 La. Ann. 1895, 46 L. R. A. 193, 26 So. 664 [1899].

¹² *People of the State of New York ex rel. Troy & Lansingburgh Railroad Company v. Coffey*, 66 Hun. 160, 21 N. Y. Supp. 34 [1892].

extra cost.¹³ Under a contract by a railroad company to repave and repair it is for the city to determine the necessity of repaving or repairing and material with which it is to be done.¹⁴ Liability of a street railway company to pave and keep in good condition and repair a certain space in each street on which its tracks are situated does not make such company liable for the cost of laying a water pipe on one side of the street.¹⁵ If a railroad company is liable to pave and keep in repair a certain part of a street it cannot be held liable for an assessment for a street improvement which includes as a part thereof the cost of the improvement and an agreement to keep in repair for a long term of years if the bond of the contractor to maintain such repairs does not inure to the benefit of the street railway company, since otherwise such company might be obliged to pay twice for such repairs in case the contractor made default.¹⁶ If it is sought to assess the street railway on the theory of benefits, it is necessary, in the absence of legislative determination, to ascertain whether the railway is benefited by the improvement in question. Whether the right of a street railway company can be said to be benefited by widening the street is a question upon which there is a difference of authority. The greater number of jurisdictions hold that such widening can benefit such property.¹⁷ In other jurisdictions it is held that the widening of a street confers no benefit upon the right of way of a street railway.¹⁸ The construction of a sewer in a street upon which a railroad has laid its tracks is regarded as a benefit to such road.¹⁹ It has been held, however, that the grading of a street

¹³ *Washington & Georgetown Railroad Company v. District of Columbia*, 108 U. S. 522, 27 L. 807, 2 S. 865 [1883].

¹⁴ *Philadelphia v. Ridge Avenue Passenger Ry. Co.*, 143 Pa. St. 444, 22 Atl. 695 [1891]; (apparently to the same effect *Fair Haven and Westville Railroad Company v. New Haven*, 203 U. S. 379 [1906]; affirming 77 Conn. 667).

¹⁵ *McChesney v. City of Chicago*, 213 Ill. 592, 73 N. E. 368 [1905].

¹⁶ *Fair Haven and Westville Railroad Company v. City of New Haven*, 77 Conn. 667, 60 Atl. 651 [1905]; *Fair Haven and Westville Railroad*

Company v. City of New Haven, 77 Conn. 219, 58 Atl. 703 [1904].

¹⁷ *Appeal of North Beach and Mission R. R. Co. in the Matter of Widening Kearney Street*, 32 Cal. 500 [1867]; *Chicago City Railway Company v. City of Chicago*, 90 Ill. 573, 32 Am. Rep. 54 [1878]; *Parmalee v. City of Chicago*, 60 Ill. 267 [1871].

¹⁸ *In re Anthony Avenue*, 95 N. Y. S. 77, 46 Misc. Rep. 525 [1905]; *In re East 133rd Street* 95 N. Y. S. 76 [1904].

¹⁹ *Troy & Lansingburgh Railroad Company v. Kane*, 9 Hun. (N. Y.) 506 [1877].

does not confer any benefit upon a strip of land in the middle of such street belonging to a street railroad company whose cars are drawn by horses, so as to make it liable to assessment.²⁰

§ 604. Liability of street railway enures to benefit of property owners.

If a street railroad company is liable for part or all of the cost of paving its street on which the tracks are situated, the adjoining property owner can interpose such liability as a defense if the city attempts to assess upon such property owner any part of the cost which should be borne by the street railway company.¹ One who pays his assessment in full, not knowing of the ordinance which imposes a part of the cost upon the street railway company, may recover a proportionate part thereof.² If the contractor who constructs the improvement has agreed to look to the street railway company for compensation for paving the part of the street which the street railway company is bound to pay, he clearly cannot enforce compensation for paving from the abutting property owners.³ Property owners cannot take advantage of an agreement to pave a part of the street entered into by the street railroad company after the contract

²⁰ *Davis v. City of Newark*, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891].

¹ *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893]; *American Hide & Leather Company v. City of Chicago*, 203 Ill. 451, 67 N. E. 979 [1903]; *City of Chicago v. Noddeck*, 202 Ill. 257, 67 N. E. 39 [1903]; *McFarlane v. City of Chicago*, 185 Ill. 242, 57 N. E. 12 [1900]; *Sawyer v. City of Chicago*, 183 Ill. 57, 55 N. E. 645 [1899]; *City of Chicago v. Cummings*, 144 Ill. 446, 33 N. E. 34 [1893]; *State ex rel. Keith v. Common Council of the City of Michigan City*, 138 Ind. 455, 37 N. E. 1041 [1894]; *City of Shreveport v. Prescott*, 51 La. Ann. 1895, 46 L. R. A. 193, 26 So. 664 [1899]; *Wales v. Warren*, 66 Neb. 455, 92 N. W. 590 [1902]; *Gilmore v. City of Utica*, 55 Hun. (N. Y.) 514, 9 N. Y. S. 912; *In the Matter of Appleby to Vacate an Assessment*, 26 Hun. (N. Y.) 427 [1882]; *Philadelphia to use of*

O'Rourke v. Bowman, 166 Pa. St. 393, 31 Atl. 142 [1895]; *Philadelphia to use v. Spring Garden Farmers' Market Company*, 154 Pa. St. 93, 25 Atl. 1077 [1893]; *contra People ex rel. Markey v. City of Brooklyn*, 65 N. Y. 349 [1875]. Such question, cannot, however, be raised in a proceeding in which the only questions for determination are whether the property will be assessed for more than it will be benefited and whether it is assessed more than its share of the cost of the improvement; *Wells v. City of Chicago*, 202 Ill. 448, 66 N. E. 1056 [1903].

² *Delano v. Mayor, Aldermen and Commonalty of the City of New York*, 32 Hun. (N. Y.) 144 [1884].

³ *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893]; *State ex rel. Keith v. Common Council of the City of Michigan City*, 138 Ind. 455, 37 N. E. 1041 [1894].

and ordinance for paving the entire street have gone into effect;⁴ nor can the property owners take advantage of a subsequent ordinance authorizing the street railway company to occupy a part of the street and requiring it to pave the part so occupied.⁵ If the city has entered into a contract for paving a street, including part of the strip which the street railway company is bound to pave, the city is liable to the contractor under its contract and the city, not the contractor, has a right over against the street railway.⁶ The benefit of the paving by the street railway enures to all the property owners liable for the improvement and not merely to those whose property abuts on that part of the street on which the track is situated.⁷ If the city is given power to compel a railway company to pave a certain portion of the street, it is discretionary with the city whether it exercises such power or not, and it may impose the entire cost upon the property owners.⁸ If the street railway company has been relieved properly from liability for paving a part of the street, the abutting property owner must pay his share of such improvement without any deduction for the share which the railway company would have been obliged to pay had it not been released.⁹ Property owners cannot complain that the street railway company has been relieved from liability in an improper way where the assessment of such property owners is less in amount than it would have been if it had been made upon the basis claimed by them,¹⁰ as where a part of the expense in excess of the charge upon the street railway company is borne by the city.¹¹ If a street railroad company occupies a portion of the street with its tracks, it seems to be assumed in some jurisdictions that such company is *prima facie* liable for the cost of paving a part of such street in the absence of any showing that such company is exempt.¹² In other jurisdictions it seems to

⁴ City of Erie to use of Erie Paving Company v. Moody, 171 Pa. St. 610, 33 Atl. 378 [1895].

⁵ Thompson v. People ex rel. Foote, 184 Ill. 17, 56 N. E. 383.

⁶ Warren Bros. Co. v. Taylor, — R. I. —, 69 Atl. 303 [1908].

⁷ Seranton v. Koehler, 200 Pa. St. 126, 49 Atl. 792.

⁸ Lacey v. City of Marshalltown, 99 Ia. 367, 68 N. W. 726.

⁹ Lacey v. City of Marshalltown, 99 Ia. 367, 68 N. W. 726 [1896]; City of Philadelphia to use of O'Rourke v. Bowman, 175 Pa. St. 91, 34 Atl. 353 [1896].

¹⁰ Bowditch v. City of New Haven, 40 Conn. 503 [1873].

¹¹ O'Reilly v. City of Kingston, 39 Hun. (N. Y.) 285 [1886].

¹² Sawyer v. City of Chicago, 183 Ill. 57, 55 N. E. 645 [1899]; Page v. City of Chicago, 60 Ill. 441 [1871].

be held that the mere fact that the company occupies a part of the street with its tracks does not make out a *prima facie* case in favor of the liability of such company.¹³ A property owner who objects to an assessment on the ground that the assessment against him includes a part of what should have been assessed against a street railroad company must be able to show not merely that the railway company is liable, but also that the assessment includes a part of the cost for which the railway company was liable.¹⁴ The street railway is not liable for paving a street on which it is authorized to operate its line, but on which it has not laid any tracks; but the entire cost may be charged upon the property owners.¹⁵ If the cost of the improvement is apportioned among the abutting property owners and no part thereof is apportioned upon the street railway, it is not wrong to exclude the cost of paving that part of the street which the railroad company is bound to pay.¹⁶ It is, on the other hand, wrong to include the cost of improving such part of the street in an assessment against abutting property owners.¹⁷ In order to assess the property owners it is not necessary to wait for completion of the paving between the rails at the expense of the railroad company.¹⁸ Indeed, it has been said to be proper to omit entirely such paving between the rails if the city thinks it advisable.¹⁹ The abutting property owners cannot complain of such exercise of discretion on the part of the city.²⁰ If a street railway company does not object to the levy of an assessment upon its right of way for a street improvement the owner

¹³ State ex rel. Wheeler v. District Court of Ramsey County, 80 Minn. 293, 83 N. W. 183 [1900].

¹⁴ McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885 [1891].

¹⁵ Harris v. City of Macomb, 213 Ill. 47, 72 N. E. 762 [1904].

¹⁶ Chicago & Northern Pacific Railroad Company v. City of Chicago, 172 Ill. 66, 49 N. E. 1006 [1898]; Lichtner v. City of Peoria, 150 Ill. 80, 37 N. E. 69 [1894]; Voght v. City of Buffalo, 133 N. Y. 463, 31 N. E. 340 [1892].

¹⁷ City of Chicago v. Cummings, 144 Ill. 446, 33 N. E. 34 [1893].

¹⁸ Stifel v. MacManus, 74 Mo. App. 558 [1898].

¹⁹ Bowditch v. City of New Haven, 40 Conn. 503 [1873]; Billings v. City of Chicago, 167 Ill. 337, 47 N. E. 731 [1897]; State of Minnesota ex rel. Benz v. District Court of Ramsey County, 32 Minn. 181, 19 N. W. 732 [1884]; City of Springfield to use of Central National Bank v. Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276 [1896]; Matter of McCormack, 10 Abb. Pr. N. S. (N. Y.) 234 [1870].

²⁰ City of Springfield to use of Central National Bank v. Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276 [1896]; Matter of McCormack, 10 Abb. Pr. N. S. (N. Y.) 234 [1870].

of contiguous property cannot complain that such railway company ought not to be assessed.²¹ If, under the local practice, only a party taking an appeal can have his rights passed upon, a street railway company which has not taken an appeal cannot be heard in answer to the claims of a property owner that the street railway company should pay for paving the street between the tracks.²²

§ 605. Method of enforcing liability of street railway.

If the liability of the street railway rests on its charter or on other statutory provisions, such liability must be enforced in accordance with such statute.¹ A contract liability must be enforced as such. The liability of a street railway company to a city under a contract by which the street railway company agrees to pave a certain part of the street cannot be enforced in a proceeding to apportion an assessment on the theory of benefits.² It is held that a railway company may be compelled to pave its part of the street by a proceeding in mandamus.³ If, however, the railway company has no money and no credit it has been said that mandamus will not lie, since such company is unable to perform.⁴

§ 606. Street railway property other than right of way.

Land owned by a street railway company other than its right of way may be assessed in the absence of some statute spe-

²¹ *White v. City of Alton*, 149 Ill. 626, 37 N. E. 96 [1894].

²² *Berry v. City of Des Moines*, 115 Ia. 44, 87 N. W. 747 [1901].

¹ See § 60.

² *The Oshkosh City R. R. Co. v. Winnebago County*, 89 Wis. 435, 61 N. W. 1137 [1895]. "So far as the committee were influenced by the fact that the borough had done work on the street which the railroad company was bound to pay for, they misconceived the scope of legitimate inquiry and virtually converted a mere appeal from the doings of the warden and burgesses in the matter of the assessment of benefits under the borough charter into an action at law in favor of the borough

against the railroad corporation, based on a mere contract obligation." *Farmers' Loan & Trust Co. v. Borough of Ansonia*, 61 Conn. 76, 87, 23 Atl. 705 [1891].

³ *New Orleans City and Lake Railroad Company v. Louisiana ex rel. City of New Orleans*, 157 U. S. 219, 39 L. 679, 15 S. 581 [1895]; (affirming *State ex rel. City of New Orleans v. New Orleans City and Lake Railroad Co.*, 42 La. Ann. 550, 7 So. 606 [1890]; under a special statute authorizing such remedy). See § 1162.

⁴ *City of Benton Harbor v. St. Joseph & Benton Harbor Street Railway Company*, 102 Mich. 386, 26 L. R. A. 245, 60 N. W. 758 [1894].

ifically exempting it.¹ Land occupied by street car barns may be assessed for local improvements.² Under a statute exempting property which is used for railroad purposes, property belonging to a street railroad company and leased as a resort for public amusement,³ or for business and manufacturing purposes,⁴ is not exempt from assessment. The fact that such leases are subject to termination upon six months' notice, or the fact that the attorney general may require the railroad company to sell such realty as devoted to ordinary business or manufacturing purposes does not make it necessary to treat such property for purposes of local assessment as devoted to railroad purposes, and does not prevent such property from being subject to local assessment.⁵

§ 607. Homestead.

Property used as a homestead and exempt from sale on execution is not for that reason exempt from assessment for benefits conferred by a local improvement.¹ Accordingly, a homestead set off to a widow and child, which is by law exempt from liability for debts, is liable to assessment for a street improvement.² A different principle applies where the property is exempt from sale for non-payment of taxes. In Texas at one time it was held that a local assessment was within the meaning of the provision of the state constitution,³ providing for the sale of the homestead for taxes due thereon.⁴ This holding was based on the theory that within the meaning of this constitutional provision no difference was to be drawn between general and special taxes.⁵ This decision was subsequently overruled and it was held that a homestead was not liable to a forced sale for an

¹Chicago Union Traction Co. v. City of Chicago, 215 Ill. 410, 74 N. E. 449 [1905]; Chicago Union Traction Co. v. City of Chicago, 207 Ill. 544, 69 N. E. 849 [1904]; The Chicago Union Traction Co. v. City of Chicago, 204 Ill. 363, 68 N. E. 519 [1903].

²Chicago Union Traction Co. v. City of Chicago, 207 Ill. 544, 69 N. E. 849 [1904].

³Chicago Union Traction Co. v. City of Chicago, 215 Ill. 410, 74 N. E. 449 [1905].

⁴Chicago Union Traction Co. v. City of Chicago, 202 Ill. 576, 67 N. E. 383 [1903].

⁵Chicago Union Traction Co. v.

City of Chicago, 202 Ill. 576, 67 N. E. 383 [1903].

¹Ahern v. Board of Improvement Dist. No. 3, 69 Ark. 68, 61 S. W. 575; Perine v. Forbush, 97 Cal. 305, 32 Pac. 226 [1893]; Nevin v. Allen, 15 Ky. Law Rep. 836, 26 S. W. 180 [1894].

²Nevin v. Allen, 15 Ky. Law Rep. 836, 26 S. W. 180 [1894].

³Article XVI, § 50, Constitution of Texas.

⁴Lufkin v. City of Galveston, 58 Tex. 545 [1883].

⁵Lufkin v. City of Galveston, 58 Tex. 545 [1883]; Kettle v. City of Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874 [1904].

assessment for local benefits.⁶ Under such theory a homestead is for practical purposes exempt from local assessment. Subsequently a case was presented in which a contractor had constructed a street improvement, looking for his compensation to the assessments upon the property benefited, a part of which was occupied as a homestead. His contract was entered into and his rights acquired after the earlier decision and before the later decision. It was held that this change of judicial decision did not impair the liability of his contract; that the later decision applied; and that he could not enforce the lien of such assessment against such homestead property.⁷

§ 608. Vacant land.

Land situated within the limits of a city, which is not occupied by buildings or used for residence purposes, may nevertheless be assessed for local improvements which would confer a benefit upon such property under any use to which it is reasonably probable that such premises might be put if the owner saw fit to make such use of them.¹ Thus, vacant property may be assessed for the cost of improving a street,² or constructing a sidewalk,³ or constructing sewers,⁴ or laying water pipe,⁵ if

⁶ *Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770, 31 S. W. 52, 803 [1895]; *Lovenberg v. City of Galveston*, 17 Tex. Civ. App. 162, 42 S. W. 1024 [1897].

⁷ *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154 [1896].

¹ *Town of Monticello v. Banks*, 48 Ark. 251, 2 S. W. 852; *Clapp v. City of Hartford*, 35 Conn. 66 [1868]; *Washburn v. City of Chicago*, 198 Ill. 506, 64 N. E. 1064 [1902]; *Dasey v. Skinner*, 33 N. Y. S. R. 15; 11 N. Y. Supp. 821; *Ford v. City of Toledo*, 64 O. S. 92, 59 N. E. 779 [1901]; *Borough of Beltzhoover v. Maple*, 130 Pa. St. 335, 18 Atl. 650 [1889]; *Allen v. Drew*, 44 Vt. 174 [1872]. The same principle has been applied in general taxation. Vacant land may be taxed for the cost of improvements which will confer no benefit upon such land as long as it remains vacant. *Mitchell v. City of Negaunee*, 113 Mich. 359, 67 Am. St.

Rep. 468, 38 L. R. A. 157, 71 N. W. 646 [1897].

It seems to be assumed that vacant land cannot be assessed for sprinkling streets on which it fronts: *Coreoran v. Board of Aldermen of Cambridge*, — Mass. —, 85 N. E. 155 [1908].

² *Town of Monticello v. Banks*, 48 Ark. 251, 2 S. W. 852.

³ *Borough of Beltzhoover v. Maple*, 130 Pa. St. 335, 18 Atl. 650 [1889].

⁴ *Clapp v. City of Hartford*, 35 Conn. 66 [1868]; *Ford v. City of Toledo*, 64 O. S. 92, 59 N. E. 779 [1901]. It is said that the amount of the assessment is affected by the fact that the property is vacant. *Appeal of Wheeler*, 80 N. Y. S. 204, 39 Misc. Rep. 484 [1902]; *Allen v. Drew*, 44 Vt. 174 [1872].

⁵ *Jones v. Board of Water Commissioners of Detroit*, 34 Mich. 273 [1876]; *Dasey v. Skinner*, 33 N. Y. S. P. 15, 11 N. Y. Supp. 821; *Crawford's Estate*, 14 Phila. (Pa.) 323.

such improvement would confer a benefit upon such property, did the owner thereof see fit to use it for business or residence purposes. If the exaction is not based upon the theory of benefits, but is a charge for goods sold and delivered, such charge cannot be laid upon the vacant land upon which such property is not used. Thus, a charge in the nature of water rates for water used upon premises cannot be levied upon vacant land.⁶

§ 609. Unplatted land.

Land within a city which has not been platted or divided into city lots may be assessed for an improvement even if such improvement confers but little benefit upon such land while unplatted, if the improvement would benefit such land were it platted and used as city property ordinarily is.¹ The owner of such land cannot insist upon having the necessity and reasonableness of such improvement determined solely with view to the condition in which he has voluntarily left his own land.² If a special statute provides for the method of assessing unplatted property, such property must be assessed in the manner provided for by statute.³ By statute, in some jurisdictions, it is provided that "lots" of land are to be assessed. Whether a large tract of unplatted land is a lot within the meaning of such a statute is a question upon which there is a difference of authority. In some jurisdictions "lot" is said to be synonymous with "tract"

⁶State, Culver, Pros. v. Mayor and Aldermen of Jersey City, 45 N. J. L. (16 Vr.) 256 [1883]; State, Vreeland, Pros. v. Mayor and Aldermen of Jersey City, 43 N. J. L. (14 Vr.) 135 (affirmed 43 N. J. L. (14 Vr.) 638 [1881]); State, United New Jersey Railroad & Canal Co. v. Mayor and Aldermen of Jersey City, 41 N. J. L. (12 Vr.) 471 [1879]; Provident Institution for Savings v. Allen, 37 N. J. Eq. (10 Stew.) 36 [1883].

¹Connecticut Mutual Life Insurance Company v. City of Chicago, 217 Ill. 352, 75 N. E. 365 [1905]; Washburn v. City of Chicago, 198 Ill. 506, 64 N. E. 1064 [1902]; McGrew v. City of Kansas City, 64 Kan. 61, 67 Pac. 438 [1902]; State of Minnesota v. Robert P. Lewis Co., 72 Minn.

87, 75 N. W. 108; *sub nomine*, Ramsey County v. Robert P. Lewis Co., 42 L. R. A. 639 [1898]; Medland v. Linton, 60 Neb. 249, 82 N. W. 866 [1900]; Van Wagoner, Pros. v. Mayor and Aldermen of the City of Paterson, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902]; Kohler Brick Co. v. City of Toledo, 29 Ohio C. C. 599 [1907]; Bailey v. City of Zanesville, 20 Ohio C. C. 236 [1900]; Wilson v. Hall, 6 Ohio C. C. 570 [1892].

²Washburn v. City of Chicago, 198 Ill. 506, 64 N. E. 1064 [1902]. (Such land was divided into five and ten acre tracts.)

³McGrew v. City of Kansas City, 64 Kan. 61, 67 Pac. 438 [1902]; Bailey v. City of Zanesville, 20 Ohio C. C. 236 [1900].

or "parcel" and to include a large tract of unplatted land.⁴ Under a statute providing for assessing "town lots" it was held that a large tract of land not subdivided into city lots could not be assessed.⁵ Whether, for purposes of improvement, the city may regard a large tract of land as subdivided into smaller lots, and whether the city may make such assessment a lien upon such separate lots into which it has seen fit to treat the entire tract as divided, are questions upon which there is some conflict of authority. A city has no power to divide a tract of land or dictate to the land-owner how he shall divide it.⁶ Accordingly, where sewer connections were to be constructed every twenty feet on both sides of a sewer running through land used for agricultural purposes, it was held that such ordinance was unreasonable.⁷ In later cases, however, where the assessment is made against the property as an entire tract, it has been held not unreasonable to provide for sewer connections every twenty feet,⁸ or twenty-five feet.⁹ If the owner of a large unplatted tract of land has for some time acquiesced in assessing it as if divided into city lots he cannot subsequently object to an assessment for the construction of a sewer with connections in anticipation of a subsequent division of such tract of land.¹⁰ Unsurveyed land lying within the boundaries of a levee district may be taxed for levee purposes under a statute providing that all property, except that declared to be specifically exempt, shall be subject to taxation.¹¹

⁴State of Minnesota v. Robert P. Lewis Co., 72 Minn. 87, 75 N. W. 108; *sub nomine*, Ramsey County v. Robert P. Lewis Co., 42 L. R. A. 639 [1898].

⁵Town of Greendale v. Suit, 163 Ind. 282, 71 N. E. 658 [1904]. See also Minnesota & M. Land Improvement Company v. City of Billings, 111 Fed. Rep. 972, 50 C. C. A. 70 [1901]. In this case, however, the real question involved was whether any property owner who had not objected at the proper time to the omission of unplatted land from the assessment could object subsequently after the assessment was made.

⁶Bickerdike v. City of Chicago, 185 Ill. 280, 56 N. E. 1096 [1900]; (distinguished in Vandersyde v. People ex rel. Raymond, 195 Ill. 200,

62 N. E. 806 [1902]); People ex rel. Kochersperger v. Cook, 180 Ill. 341, 54 N. E. 173 [1899]; (distinguished in Vandersyde v. People ex rel. Raymond, 195 Ill. 200, 62 N. E. 806 [1901]).

⁷Bickerdike v. City of Chicago, 185 Ill. 280, 56 N. E. 1096 [1900].

⁸Vandersyde v. People ex rel. Raymond, 195 Ill. 200, 62 N. E. 806 [1901].

⁹Washington Park Club v. City of Chicago, 219 Ill. 323, 76 N. E. 383 [1906].

¹⁰Van Wagoner, Pros. v. Mayor and Aldermen of the City of Paterson, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902].

¹¹Buckner v. Sugg, 79 Ark. 442, 96 S. W. 184 [1906].

§ 610. Agricultural property.

If land situated within the limits of a city, used as agricultural property, is assessed for improvements which are urban in character, it is held in most jurisdictions that such land may be assessed if such improvement does in fact confer a benefit upon such property.¹ Thus, property within the limits of a city used as farm property may be assessed for the construction of a street,² or a sidewalk,³ or a sewer.⁴ Under a statute providing for the exemption of farm land within a city from taxation it is generally held that such statute refers to local taxation unless it contains language showing an affirmative intention to exempt such property from assessments for local improvements.⁵ Thus a statute exempting lands occupied and used in good faith for agricultural purposes from any taxation for city purposes is held not to exempt such land from local assessments,⁶ such as assessments for paving,⁷ or curbing.⁸ A statute providing that "no more

¹ Washburn v. City of Chicago, 198 Ill. 506, 64 N. E. 1064 [1902]; Clark v. City of Chicago, 166 Ill. 84, 46 N. E. 730 [1897]; Leitch v. LaGrange, 138 Ill. 291, 27 N. E. 917 [1892]; Taber v. Grafmiller, 109 Ind. 206, 9 N. E. 721 [1886]; Duker v. Barber Asphalt Paving Co., — (Ky.) —, 74 S. W. 744, 25 Ky. Law Rep. 135 [1903]; Barber Asphalt Paving Co. v. Gaar, 115 Ky. 334, 73 S. W. 1106, 24 Ky. Law Rep. 2227 [1903]; Hood v. Trustees of the Town of Lebanon, — (Ky.) —, 15 S. W. 516, 12 Ky. L. Rep. 813 [1891]. Benefit in this sense ordinarily and properly means an increase in the market value of such property. See § 653. The same principle has been applied to general taxation of farm lands within a city. Kelly v. Pittsburg, 104 U. S. 78, 26 L. 658; Kelly v. City of Pittsburg, 85 Pa. St. 170, 27 Am. Rep. 633 [1877]. In a Kentucky case it has been said that farm lands within the limits of a town could not be taxed for a street improvement if there was no city population on such land or near thereto. Town of Parkland v. Gaines, 88 Ky. 562, 11 S. W. 649 [1889].

² Duker v. Barber Asphalt Paving Co., — (Ky.) —, 74 S. W. 744, 25 Ky. Law Rep. 135 [1903]; Barber Asphalt Paving Co. v. Gaar, 115 Ky. 334, 24 Ky. Law. 2227, 73 S. W. 1106 [1903].

³ Taber v. Grafmiller, 109 Ind. 206, 9 N. E. 721 [1886]; Hood v. Trustees of the Town of Lebanon (Ky.), 15 S. W. 516, 12 Ky. Law Rep. 813 [1891].

⁴ Leitch v. LaGrange, 138 Ill. 291, 27 N. E. 917 [1892].

⁵ Kalbrier v. Leonard, 34 Ind. 497 [1870]; Allen v. City of Davenport, 107 Ia. 90, 77 N. W. 532 [1898]; Farwell v. Des Moines Brick Manufacturing Company, 97 Ia. 286, 35 L. R. A. 63, 66 N. W. 176 [1896].

⁶ Allen v. City of Davenport, 107 Ia. 90, 77 N. W. 532 [1898]; Farwell v. Des Moines Brick Manufacturing Company, 97 Ia. 286, 35 L. R. A. 63, 66 N. W. 176 [1896].

⁷ Allen v. City of Davenport, 107 Ia. 90, 77 N. W. 532 [1898].

⁸ Farwell v. Des Moines Brick Manufacturing Company, 97 Ia. 286, 35 L. R. A. 63, 66 N. W. 176 [1896].

than five acres of farming land shall be subject to taxation within such city" does not prevent local assessments for the construction of streets and sidewalks.⁹ If rural land situated in a city is benefited by an improvement which is not urban in its character it may be assessed therefor.¹⁰ Thus, agricultural lands of a city may be assessed for irrigation.¹¹ Where an assessment is levied in proportion to frontage and according to benefits received, an unplatted forty-acre tract, only a portion of which abuts on the improvement, which is all used for farm purposes exclusively, cannot be assessed as an entire tract.¹² In Pennsylvania land used for farm purposes may be assessed upon the basis of benefits, even if the improvement is one which is urban in character,¹³ but such assessment cannot be levied in proportion to frontage.¹⁴ Thus, assessments for street improvements,¹⁵ such as for the extension and grading of a street,¹⁶ or the paving thereof,¹⁷ an assessment for the construction of sewers,¹⁸ or laying water pipe,¹⁹ cannot be apportioned upon rural property in accordance with the frontage thereof. Whether property is urban or rural within the meaning of such rule is

⁹ *Kalbrier v. Leonard*, 34 Ind. 497 [1870].

¹⁰ *City of San Diego v. Linda Vista Irrigation District*, 108 Cal. 189, 35 L. R. A. 33, 41 Pac. 291 [1895].

¹¹ *City of San Diego v. Linda Vista Irrigation District*, 108 Cal. 189, 35 L. R. A. 33, 41 Pac. 291 [1895].

¹² *Ryan v. Sumner*, 17 Wash. 228, 49 Pac. 487 [1897].

¹³ *McKeesport v. Soles*, 165 Pa. St. 628, 30 Atl. 1019 [1895].

¹⁴ *Philadelphia to use v. Gowen*, 202 Pa. St. 453, 52 Atl. 3 [1902]; *City of Philadelphia to use of Mack v. Gorgas*, 180 Pa. St. 296, 36 Atl. 868 [1897]; *City of McKeesport v. Soles*, 178 Pa. St. 363, 35 Atl. 927 [1896]; *McKeesport v. Soles*, 165 Pa. St. 628, 30 Atl. 1019 [1895]; *Philadelphia to use, etc., v. Sheridan*, 148 Pa. St. 532, 24 Atl. 80 [1892]; *Pepper v. City of Philadelphia to use of Horter*, 114 Pa. St. 96, 6 Atl. 899 [1886]; *City of Philadelphia v. Keith*, (Pa.) 2 Atl. Rep. 207; *City of Scranton v. Pennsylvania Coal Co.*, 105 Pa. St. 445 [1884];

Ferson's Appeal, 96 Pa. St. 140 [1880]; *City of Philadelphia to use of Johnson v. Rule*, 93 Pa. St. 15 [1880]; *Craig v. City of Philadelphia*, 89 Pa. St. 265 [1879]; *Kaiser v. Weise*, 85 Pa. St. 366 [1877]; *Seely v. City of Pittsburgh*, 82 Pa. St. 360, 22 Am. Rep. 760 [1876].

¹⁵ *Craig v. City of Philadelphia*, 89 Pa. St. 265 [1879]; *Seely v. City of Pittsburgh*, 82 Pa. St. 360, 22 Am. Rep. 760 [1876].

¹⁶ *City of Scranton v. Pennsylvania Coal Co.*, 105 Pa. St. 445 [1884].

¹⁷ *City of Philadelphia v. Keith*, Pa., 2 Atl. Rep. 207; *Philadelphia to use v. Gowen*, 202 Pa. St. 453, 52 Atl. 3 [1902]; *City of Philadelphia to use of Mack v. Gorgas*, 180 Pa. St. 296, 36 Atl. 868 [1897]; *City of Philadelphia to use of Johnson v. Rule*, 93 Pa. St. 15 [1880].

¹⁸ *Beechwood Avenue Sewer*, (2) *Pittsburgh's Appeal*, (2), 179 Pa. St. 494, 36 Atl. 210 [1897].

¹⁹ *City of Allentown v. Adams*, 5 *Sadler* (Pa.) 253 [1887].

a question of fact, depending upon the character of the locality, its streets, the subdivision of the property, the neighboring buildings and improvements and the market value of the property assessed as well as all property in the neighborhood.²⁰ If the facts are undisputed the question is said to be one of law.²¹ It is, of course, possible that land at one time rural in character may lose that character and become urban property.²² Accordingly, an adjudication that land is rural in character is not conclusive as to the question of the character of such property four years later.²³ The owner of real property within a city may be estopped to deny its urban character,²⁴ as by his conduct in signing a petition for the improvement and inducing the city authorities to make the same,²⁵ or by his act in making specific objections to the passage of the improvement ordinance without raising the question of the rural character of such property.²⁶ In Rhode Island rural property cannot be assessed if the assessment is apportioned to the frontage.²⁷ Such assessment is said to be "so plainly unfair or extortionate that it could not be sustained."²⁸ This rule, however, does not apply to suburban property near the compact part of the city the land about which has been built up, even though no houses have been erected in the immediate vicinity of such property.²⁹

§ 611. Power of legislature to exempt from assessment.

The legislature, unless restrained by some specific constitutional provision, has power to decide what general classes of property

²⁰ City of Philadelphia to use of Mack v. Gorgas, 180 Pa. St. 296, 36 Atl. 868 [1897]; McKeesport v. Soles, 165 Pa. St. 628, 30 Atl. 1019 [1895]; Philadelphia to use, etc. v. Sheridan, 148 Pa. St. 532, 24 Atl. 80 [1892]; Keith v. City of Philadelphia, 126 Pa. St. 575, 17 Atl. 883 [1889]. For a discussion of the elements involved see City of McKeesport v. Soles, 178 Pa. St. 363, 35 Atl. 927 [1896].

²¹ City of Reading v. O'Reilly, 169 Pa. St. 366, 32 Atl. 420 [1895].

²² Philadelphia to use, etc. v. Sheridan, 148 Pa. St. 532, 24 Atl. 80 [1892].

²³ Feith v. City of Philadelphia, 126 Pa. St. 575, 17 Atl. 883 [1889].

²⁴ Pepper v. City of Philadelphia to

use of Horter, 114 Pa. St. 96, 6 Atl. 899 [1886]; Ferson's Appeal, 96 Pa. St. 140 [1880]; Bidwell v. City of Pittsburgh, 85 Pa. St. 412, 27 Am. Rep. 662 [1877].

²⁵ Ferson's Appeal, 96 Pa. St. 140 [1880]; Bidwell v. City of Pittsburgh, 85 Pa. St. 412, 27 Am. Rep. 662 [1877].

²⁶ Pepper v. City of Philadelphia to use of Horter, 114 Pa. St. 96, 6 Atl. 899 [1886].

²⁷ Bishop v. Tripp, 15 R. I. 466, 8 Atl. 692 [1887]; Cleveland v. Tripp, 13 R. I. 50 [1880].

²⁸ Bishop v. Tripp, 15 R. I. 466, 467, 8 Atl. 692 [1887].

²⁹ Sewer assessment. Bishop v. Tripp, 15 R. I. 466, 8 Atl. 692 [1887].

shall be exempt from local assessment.¹ A constitutional provision authorizing the legislature "to provide for the organization of cities and incorporated villages and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit so as to prevent abuses in assessments and taxation and in contracting debts by such municipal corporations," does not restrict the power of the legislature to provide by general statute for exempting the property of street railroad companies from assessments for local improvements.² A constitutional provision requiring uniformity of taxation does not prevent the legislature from exempting property from local assessment.³ A constitutional provision forbidding the exemption of property from taxation does not prevent the legislature from exempting property from assessment for local improvements.⁴ A specific grant of power to the legislature to exempt property of the state and of counties and property which the general assembly may deem necessary for school, religious and charitable purposes has been held to prevent the legislature from granting exemptions other than as therein specified.⁵ Accordingly, since such provision refers to general taxation, it has been held that the legislature cannot exempt property of a religious or charitable corporation from assessment for local improvements.⁶ In the absence of constitutional provisions restricting the power of the legislature a statute specifically exempting certain classes of real property from local assessment is valid.⁷ Where the legis-

¹ *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212; *City of Erie v. Griswold*, 184 Pa. 435, 39 Atl. 231 [1898]; *Philadelphia to use of Nestor v. Spring Garden Farmers' Market Company*, 161 Pa. St. 522, 29 Atl. 286 [1894]; *Milwaukee Electric Railway & Light Company v. City of Milwaukee*, 95 Wis. 42, 69 N. W. 796 [1897].

² *Milwaukee Electric Railway & Light Company v. City of Milwaukee*, 95 Wis. 42, 69 N. W. 796 [1897].

³ *City of Erie v. Griswold*, 184 Pa. 435, 39 Atl. 231 [1898].

⁴ *City of Erie v. Griswold*, 184 Pa. 435, 39 Atl. 231 [1898].

⁵ *City of Chicago v. Baptist The-*

ological Union, 115 Ill. 245, 2 N. E. 254 [1886].

⁶ *City of Chicago v. Baptist Theological Union*, 115 Ill. 245, 2 N. E. 254 [1886].

⁷ *District of Columbia v. Sisters of Visitation*, 15 App. D. C. 300 [1899]; *Hudson County Catholic Protectory v Board of Township Committee of the Township of Kearney*, 56 N. J. L. (27 Vr.) 385, 28 Atl. 1043 [1894]; *R. & A. R. R. Co. v. City of Lynchburg*, 81 Va. 473 [1866]; *Quirk v. City of Seattle*, 38 Wash. 25, 80 Pac. 207 [1905]; *Milwaukee Electric Railway & Light Company v. City of Milwaukee*, 95 Wis. 42, 69 N. W. 796 [1897]; *Smith v. Sherry*, 54 Wis. 114, 11 N. W. 465 [1896].

lature has power to grant special charters to corporations, the property of a charitable corporation may be exempted from local assessment by a provision inserted in its charter.⁸

§ 612. Necessity of express exemption.

If property is of a class which would ordinarily be included within the scope of a statute providing for local assessments, such property is, as a general rule, to be assessed, unless the legislature has exempted the same by some statute showing such intention.¹ In case of assessments against the public property we find some divergence of judicial opinion on this question. Property belonging to the United States is, of course, beyond the reach of the state legislature.² In case of other property belonging to the public and used for public purposes we find two theories. One is that property is exempt from local assessment unless by the provisions of some statute which specifically exempts such property.³ Even where this theory obtains land

⁸ *Hudson County Catholic Protective v. Board of Township Committee of the Town of Kearney*, 56 N. J. L. (27 Vr.) 385, 28 Atl. 1043 [1894].

¹ *Ford v. Delta and Pine Land Co.*, 164 U. S. 662, 41 L. 590, 17 S. 230 [1897]; *Minneapolis & St. Louis R. Co. v. Lindquist*, 119 Ia. 144, 93 N. W. 103 [1903]; *City of Ludlow v. Trustees of the Cincinnati Southern Railway*, 78 Ky. 357 [1880]; *Crowley v. Copley*, 2 La. Ann. 329 [1847]; *Lockwood v. City of St. Louis*, 24 Mo. 20; *State, New Jersey Midland Railroad Company, Pros. v. Mayor and Aldermen of Jersey City*, 42 N. J. L. (13 Vr.) 97 [1880]; *Matter of Mayor of New York*, 11 Johns (N. Y.) 80; *City of Philadelphia to use of McCann v. Philadelphia & Reading Railroad Co.*, 177 Pa. 292, 34 L. R. A. 564, 35 Atl. 610 [1896]; *Northern Liberties v. St. John's Church*, 13 Pa. St. 107.

² See § 579.

³ *Board of Education of City of Chicago v. People ex rel. Commissioners of Lincoln Park*, 219 Ill. 83, 76 N. E. 75 [1905]; *City of Chicago in Trust for Use of Schools v. City*

of Chicago, 207 Ill. 37, 69 N. E. 580 [1904]; *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]; *County of McLean v. City of Bloomington*, 106 Ill. 209 [1883]; *Cook County v. City of Chicago*, 103 Ill. 646 [1882]; *Edwards & Walsh Construction Company v. Jasper County*, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902]; *Hassan v. City of Rochester*, 67 N. Y. 528 [1876]; (former appeal, *Hassen v. City of Rochester*, 65 N. Y. 516 [1875]); *In re Howard Avenue, North, in City of Seattle*, 44 Wash. 62, 86 Pac. 1117 [1906]. "If there be any exemption it must be one implied by law for the statute authorizing the assessment is broad enough to cover all owners of property. The reason for exempting property belonging to the state or any of its instrumentalities, as counties and cities, from general taxation, does not, as it appears to us, apply to special assessments." *Edwards & Walsh Construction Company v. Jasper County*, 117 Ia. 365, 380, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902].

which has been conveyed in trust for school purposes only, is regarded as impliedly exempt.⁴ It is not to be presumed that the legislature would commit a breach of trust by diverting such funds from their proper use. By the other theory public property is presumed to be exempt in the absence of some provision showing affirmatively that the legislature intended to make it subject to local assessment.⁵ In these jurisdictions the distinction is made between laws exempting the property of private persons or corporations from local assessment and taxation and the rules applicable to public property. It is said that if the taxing power seeks to impose a tax upon public property it must be able to justify its authority by some legislative or constitutional provision.⁶

§ 613. Effect of exemption from taxation.

Exemption acts are in most jurisdictions construed strictly.¹ If property which it is sought to assess falls within the general description of the property assessed by authority of the legislature, the person claiming that such property is exempt must be able to show some provision which clearly manifests the intention of the legislature to exempt the same.² Exemption from

⁴The People ex rel. Little v. Trustees of Schools, 118 Ill. 52, 7 N. E. 262; Edgerton v. Huntington School Township, 126 Ind. 261, 26 N. E. 156 [1890]; City of Louisville v. Leatherman, 99 Ky. 213, 35 S. W. 625 [1896]. "Being state property there is no need of an exception in the law to exempt the property held in trust by the school board from subjection to a lien for taxes or assessments." City of Louisville v. Leatherman, 99 Ky. 213, 216, 35 S. W. 625 [1896]; (citing City v. Commonwealth, 1 Div. 296, 17 Ky. Law Rep. 445).

⁵County Commissioners of Baltimore County v. Board of Managers of the Maryland Hospital for the Insane, 62 Md. 127 [1884]; City of Big Rapids v. Supervisors of Mecosta County, 99 Mich. 351, 58 N. W. 358 [1894]; City of Clinton v. Henry County, 115 Mo. 537, 37 Am. St. Rep. 415, 22 S. W. 494.

⁶City of Big Rapids v. Board of Supervisors of Mecosta Co., 99 Mich. 351, 58 N. W. 358 [1894].

¹Paine v. Spratley, 5 Kan. 525 [1870]; Atchison, Topeka & Santa Fe Railroad Company v. Peterson, 5 Kan. App. 103, 48 Pac. 877 [1897]; Reeves v. Treasurer of Wood County, 8 O. S. 333 [1858].

²City of Chicago in Trust for Use of Schools v. City of Chicago, 207 Ill. 37, 69 N. E. 580 [1904]; County of Adams v. City of Quincy, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]; Erie R. Co. v. City of Patterson, 72 N. J. L. 83, 59 Atl. 1031 [1905]; Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 506 [1871]; People ex rel. Trustees of Amity Baptist Church v. Monroe, 81 N. Y. 3, 972, 40 Misc. Rep. 286 [1903]; Lima v. Cemetery Association, 42 O. S. 128, 51 Am. Rep. 809 [1884].

taxation in general terms is regarded as *prima facie* an exemption from general taxation and not from local assessment.³ A statute providing that no property which shall have been found

³ *Ford v. Delta and Pine Land Company*, 164 U. S. 662, 41 L. 590, 17 S. 230 [1897]; (affirming *Ford v. Delta and Pine Land Co.*, 43 Fed. 181 [1890]); *Illinois Central Railroad Company v. Decatur*, 147 U. S. 190, 37 L. 132, 13 S. 293 [1893]; (affirming *Illinois Central Railroad Company v. City of Decatur*, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315 [1890]); *Board of Improvement Paving District No. 5 v. Sisters of Mercy of Female Academy of Ft. Smith*, — Ark. —, 109 S. W. 1165 [1908]; *City of San Diego v. Linda Vista Irrigation District*, 108 Cal. 189, 35 L. R. A. 33, 41 Pac. 291 [1895]; *City of Bridgeport v. New York and New Haven Railroad Company*, 36 Conn. 255, 4 Am. Rep. 63 [1869]; *City of Atlanta v. First Presbyterian Church*, 86 Ga. 730, 12 L. R. A. 852, 13 S. E. 252 [1890]; (overruling *Trustees of First Methodist Episcopal Church, South v. City of Atlanta*, 76 Ga. 181 [1886]); *Board of Education of City of Chicago v. People ex rel. Commissioners of Lincoln Park*, 219 Ill. 83, 76 N. E. 75 [1905]; *City of Chicago in Trust for Use of Schools v. City of Chicago*, 207 Ill. 37, 69 N. E. 580 [1904]; *Illinois Central Railroad Company v. City of Decatur*, 154 Ill. 173, 38 N. E. 626 [1894]; *Illinois Central Railroad Company v. City of Mattoon*, 141 Ill. 32, 30 N. E. 773 [1893]; *Bloomington Cemetery Association v. People of the State of Illinois*, 139 Ill. 16, 28 N. E. 1076 [1893]; *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]; *County of McLean v. City of Bloomington*, 106 Ill. 209 [1883]; *Cook County v. City of Chicago*, 103 Ill. 646 [1882]; *Mix v. Ross*, 57 Ill. 121 [1870]; *Wright v. City of Chicago*, 46 Ill. 44 [1867]; *Seammon v. City of Chicago*, 42 Ill. 192 [1866]; *Peoria v. Kid-*

der, 26 Ill. 351; *City of Chicago v. Colby*, 20 Ill. 614 [1858]; *City of Ottawa v. Trustees of the Free Church*, 20 Ill. 424 [1858]; *Higgins v. City of Chicago*, 18 Ill. 276 [1857]; *Trustees of the Illinois and Michigan Canal v. City of Chicago*, 12 Ill. 403 [1851]; *Edwards & Walsh Construction Company v. Jasper County*, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902]; *Paine v. Spratley*, 5 Kan. 525 [1870]; *Atchison, Topeka & Santa Fe Railroad Company v. Peterson*, 5 Kan. App. 103, 48 Pac. 877 [1897]; *Hager v. Gast*, 119 Ky. 502, 84 S. W. 556, 27 Ky. Law Rep. 129 [1905]; *Gosnell v. City of Louisville*, 104 Ky. 201, 20 Ky. S. Rep. 519, 46 S. W. 722 [1898]; *Levi v. Louisville*, 97 Ky. 394, 28 L. R. A. 480, 30 S. W. 973; *Eligus v. Trustees of Orphanage of Good Shepherd*, 94 Ky. 439, 22 S. W. 750 [1893]; *Holzhauser v. City of Newport*, 94 Ky. 396, 22 S. W. 752 [1893]; *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212 [1891]; *Broadway Baptist Church v. McAttee*, 8 Bush. (71 Ky.) 508, 8 Am. Rep. 480 [1871]; *Rooney v. Brown*, 21 La. Ann. 51 [1869]; *City of Lafayette v. Male Orphans Asylum*, 4 La. Ann. 1 [1849]; *Crowley v. Copley*, 2 La. Ann. 329 [1847]; *Boston Seamen's Friend Society v. Boston*, 116 Mass. 181, 17 Am. Rep. 153; *Lefevre v. Mayor, etc., of Detroit*, 2 Mich. 586 [1853]; *State v. Trustees of Macalester College*, 87 Minn. 165, 91 N. W. 484 [1902]; *Washburn Memorial Orphan Asylum v. State*, 73 Minn. 343, 76 N. E. 204 [1898]; *Daily v. Swope*, 47 Miss. 367; *Barber Asphalt Paving Company v. City of St. Joseph*, 183 Mo. 451, 82 S. W. 64 [1904]; *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425, 74 S. W. 979 [1903]; *Kan-*

to be damaged by an improvement shall be assessed for benefits does not apply to a tract a part of which has been taken, but the rest of which has been found not to be damaged.⁴ In Pennsylvania the original view of the courts was that exemption from taxation did not exempt from local assessment.⁵ At one time, however, the courts of this state differed from those of most jurisdictions as to what language showed an intention to exempt from local assessment. A statute providing that certain property should be exempt from taxation, "except for state purposes,"⁶ or that certain property was "exempted from all and every

sas City v. Bacon, 147 Mo. 259, 48 S. W. 860 [1898]; City of Clinton to Use of Thornton v. Henry County, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893]; State ex rel. Chicago, Burlington & Quincy Railroad Company v. City of Kansas, 89 Mo. 34, 14 S. W. 515 [1886]; Sheehan v. Good Samaritan Hospital, 50 Mo. 155, 11 Am. Rep. 412 [1872]; Lockwood v. St. Louis, 24 Mo. 20; City of Beatrice v. Brethren Church of Beatrice, 41 Neb. 358, 59 N. W. 932 [1894]; State, Paterson and Hudson River Railroad Company v. City of Passaic, 54 N. J. L. (25 Vr.) 340, 23 Atl. 945 [1892]; Roosevelt Hospital v. Mayor, Aldermen and Commonalty of the City of New York, 84 N. Y. 108 [1881]; (affirming Roosevelt Hospital v. Mayor, Aldermen and Commonalty of the City of New York, 18 Hun. (N. Y.) 582 [1879]); Hassan v. City of Rochester, 67 N. Y. 528 [1876]; (former appeal, Hassen v. City of Rochester, 65 N. Y. 516 [1875]); People ex rel. Griffin v. Mayor, etc., of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; In the Matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York for the enlarging and improving a part of Nassau Street in the said city, 11 Johns (N. Y.) 77 [1814]; Lima v. Cemetery Association, 42 O. S. 128, 51 Am. Rep. 809 [1884]; Reeves v. Treasurer of Wood County, 8 O. S. 333 [1858]; Beals v. Providence

Rubber Company, 11 R. I. 381, 23 Am. Rep. 472 [1876]; In the Matter of College Street, 8 R. I. 474 [1867]; Second Universalist Society in Providence v. City of Providence, 6 R. I. 235 [1859]; Winona & St. P. R. Co. v. City of Watertown, 1 S. Dak. 46, 44 N. W. 1072 [1890]; *In re* Howard Avenue, North, in City of Seattle, 44 Wash. 62, 86 Pac. 1117 [1906]; Yates v. City of Milwaukee, 92 Wis. 352, 66 N. W. 248 [1896]. "Although an assessment is in the nature of a tax and is authorized by or is a branch of the taxing power, yet a general statute exempting certain property from taxation by any law of the state does not exempt it from liability for a street assessment levied for the improvement of a street upon which it abuts or is contiguous." County of Adams v. City of Quincy, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]. "It has been expressly—almost universally—held that exemptions from taxation do not include exemption from assessments for local benefits." Atchison, Topeka & Santa Fe Railroad Company v. Peterson, 5 Kans. App. 103, 107, 48 Pac. 877 [1897].

⁴ Quirk v. City of Seattle, 38 Wash. 25, 80 Pac. 207 [1905].

⁵ Northern Liberties v. St. John's Church, 15 Pa. St. 104.

⁶ Olive Cemetery Co. v. City of Philadelphia, 93 Pa. St. (12 Norris) 129, 39 Am. Rep. 732.

county, city, burrough, county road, school and poor tax,"⁷ exempted such property from local assessments levied on the theory of benefits. Even under such holding, however, assessments levied under the police power for the cost of performing a legal duty resting upon the owner of the property assessed,⁸ such as the construction of sidewalks in front of such property,⁹ were held not to be included within such provision, since such charge was not "in any proper sense of the word a tax,"¹⁰ and such property was accordingly not exempt from assessments of this kind.¹¹ In a subsequent case,¹² the Supreme Court of Pennsylvania seems to have reconsidered its original holding and to have come to the conclusion that "the constitutional exemption relates to taxes proper, or general public contributions levied and collected by the state, or by its governmental purposes, as distinguished from peculiar forms of taxation or special assessments imposed upon property within limited areas by which the property assessed is specially and peculiarly benefited and enhanced in value to an amount at least equal to the assessment."¹³ At present the Pennsylvania courts seem to hold in accordance with the general weight of authority that exemption from taxation in general terms does not include exemption from local assessment.¹⁴ By force of the peculiar statutes in some jurisdic-

⁷ *City of Erie v. First Universalist Church*, 105 Pa. St. 278 [1884].

⁸ *Philadelphia v. Pennsylvania Hospital*, 143 Pa. St. 367, 22 Atl. 744 [1891]; *Wilkinsburg Borough v. Home for Aged Women*, 131 Pa. St. 109, 6 L. R. A. 531, 18 Atl. 937 [1890].

⁹ *Philadelphia v. Pennsylvania Hospital*, 143 Pa. St. 367, 22 Atl. 744 [1891]; *Wilkinsburg Borough v. Home for Aged Women*, 131 Pa. St. 109, 6 L. R. A. 531, 18 Atl. 937 [1890].

¹⁰ *Philadelphia v. Pennsylvania Hospital*, 143 Pa. St. 367, 374, 22 Atl. 744 [1891]. (It was said to be rather "in the nature of a police regulation.")

¹¹ *Wilkinsburg Borough v. Home for Aged Women*, 131 Pa. St. 109, 6 L. R. A. 531, 18 Atl. 937 [1890].

¹² *City of Philadelphia v. Union Burial Ground Society of the City*

and County of Philadelphia, 178 Pa. St. 533, 36 L. R. A. 263, 36 Atl. 172 [1896].

¹³ *Broad Street, Sewickley Methodist Episcopal Church's Appeal*, 165 Pa. St. 475, 30 Atl. 1007 [1895]; (quoted in *City of Philadelphia v. Union Burial Ground Society of the City and County of Philadelphia*, 178 Pa. St. 533, 538, 36 L. R. A. 263, 36 Atl. 172 [1896], in which the court says that this question was not raised, considered or decided in *Philadelphia v. Pennsylvania Hospital for the Insane*, 154 Pa. St. 9, 25 Atl. 1076; *Philadelphia v. Church of St. James*, 134 Pa. St. 207, 19 Atl. 497 [1890]).

¹⁴ *City of Philadelphia v. Union Burial Ground Society of the City and County of Philadelphia*, 178 Pa. St. 533, 36 L. R. A. 263, 36 Atl. 172 [1896]; *Beltzhoover Borough v. Heirs of Beltzhoover*, 173 Pa. St.

tions, exemption from general taxation may operate as exemption from local assessment.¹⁵ Thus, a provision for assessing all the real estate which is taxed by the state and county, in effect exempts property which is not taxed by the state or county because it is exempt from general taxation.¹⁶ A statute which provides that the collection of an assessment shall be suspended "when an assessment is made for a parcel of land for which the owner is by law exempt from being taxed," extends exemptions from general taxation to local assessment.¹⁷ A statute authorizing local assessment may provide for ascertaining the amount thereof by the valuation of such property upon the tax duplicate.¹⁸ An assessment statute may restrict the amount of assessment to a certain percentage of the valuation of the property on the tax duplicate.¹⁹ Under such statutes it is impossible to levy an assessment upon property which is exempt from general taxation and for that reason has no valuation on the tax duplicate.²⁰ Under such statutes, however, the legislature does not intend to exempt such property from assessment and the exemption of such property follows only from the inability to assess it in the manner provided by statute.²¹ Accordingly, if property has been placed on the tax duplicate at a valuation in prior years, but has been omitted in recent years as exempt from taxation, it may be assessed upon the basis of its former

213, 23 Atl. 1047 [1896]; *New Castle City v. Jackson*, 172 Pa. St. 86, 33 Atl. 236 [1895]; *Broad Street, Sewickley Methodist Episcopal Church's Appeal*, 165 Pa. St. 475, 30 Atl. 1007 [1895].

¹⁵ *Bradshaw v. Board of Commissioners of Guilford County*, 92 N. C. 278 [1885].

¹⁶ *Bradshaw v. Board of Commissioners of Guilford County*, 92 N. C. 278 [1885].

¹⁷ *Boston v. Boston & Albany Railroad Co.*, 170 Mass. 95, 49 N. E. 95.

¹⁸ *First Presbyterian Church of Fort Wayne v. City of Fort Wayne*, 36 Ind. 338, 10 Am. Rep. 35 [1871].

¹⁹ In the Matter of the Petition of the Second Avenue Methodist Episcopal Church to Vacate an Assessment, 66 N. Y. 395 [1876]; In the Matter

of the Petition of the Rector, Church Wardens and Vestrymen of the Church of the Holy Sepulcher, to Vacate an Assessment, 62 Howard 315 [1880].

²⁰ In the Matter of the Petition of the Second Avenue Methodist Episcopal Church to Vacate an Assessment, 66 N. Y. 395 [1876]; In the Matter of the Petition of the Rector, Church Wardens and Vestrymen of the Church of the Holy Sepulcher, to Vacate an Assessment, 61 Howard 315 [1880]; *Bradshaw v. Board of Commissioners of Guilford County*, 92 N. C. 278 [1885].

²¹ In the Matter of the Petition of St. Joseph's Asylum in the City of New York to Vacate an Assessment, 69 N. Y. 353 [1877].

valuation if the statute does not specifically provide for basing the assessment upon the valuation of the current year.²²

§ 614. Construction of exemptions.

Since exemption from general taxation does not exempt from local assessment,¹ the question whether a given exemption statute exempts from local assessment or not turns on the determination of the question whether the language used can fairly be construed to include local assessments. If the statute provides for the exemption of certain property from "taxation," such property is not exempted from local assessment.² Thus, provisions that certain property shall be "exempt from taxation and execution,"³ or exempt from "all taxation,"⁴ or exempt from "taxation of every kind,"⁵ or from "all parliamentary taxes,"⁶ that certain property shall be exempted from taxation for state, county, city or other municipal purposes,⁷ that such property shall not be "taxed by any law of the state,"⁸ that a specific tax shall be "in lieu of all other taxes,"⁹ that "no other or further tax or impost shall be levied,"¹⁰ that "no further tax or impost shall be levied or assessed,"¹¹ or a provision exempting property

²² In the Matter of the Petition of St. Joseph's Asylum in the City of New York to Vacate an Assessment, 69 N. Y. 353 [1877].

¹ See §§ 42, 613.

² Illinois Central Railroad Company v. Decatur, 147 U. S. 190, 37 L. 132, 13 S. 293 [1893]; (affirming Illinois Central Railroad Company v. City of Decatur, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315 [1890]); *Falbrier v. Leonard*, 34 Ind. 497 [1870]; *Boston Seamen's Friend Society v. Boston*, 116 Mass. 181, 17 Am. Rep. 153; *Lefevre v. Mayor, etc., of Detroit*, 2 Mich. 586 [1853]; *Lima v. Cemetery Association*, 42 O. S. 128, 51 Am. Rep. 809 [1884]; *In re Howard Avenue, North, in City of Seattle*, 44 Wash. 62, 86 Pac. 1117 [1906]; *Yates v. City of Milwaukee*, 92 Wis. 352, 66 N. W. 248 [1896].

³ *Bloomington Cemetery Association v. People of the State of Illinois*, 139 Ill. 16, 28 N. E. 1076 [1893].

⁴ *Winona & St. P. R. Co. v. City of*

Watertown, 1 S. Dak. 46, 44 N. W. 1072 [1890].

⁵ *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155, 11 Am. Rep. 412 [1872].

⁶ *Bedford Union v. Commissioners of Bedford*, 7 Exch. 777.

⁷ *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425, 74 S. W. 979 [1903].

⁸ In the Matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York for the enlarging and improving of a part of Nassau Street in the said city, 11 Johns (N. Y.) 77 [1814].

⁹ *Lake Shore & Michigan Southern Railway Company v. City of Grand Rapids*, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767 [1894].

¹⁰ *State, New Jersey Railroad and Transportation Company, Pros. v. City of Elizabeth*, 37 N. J. L. (8 Vr.) 330 [1875].

¹¹ *State, New Jersey Midland Railroad Company, Pros. v. Mayor and Aldermen of Jersey City*, 42 N. J. L. (13 Vr.) 97 [1880].

from "taxes, charges or imposts,"¹² or from a tax "for any city purposes,"¹³ or from "all taxation, state, county, municipal and special,"¹⁴ none of them operate as an exemption from local assessments. Constitutional provisions exempting property from "taxation" are construed in the same way as are similar statutory provisions and are held not to exempt such property from local assessment.¹⁵ A provision exempting property from general and special taxation is not an exemption from liability for local assessments based on the theory of benefits.¹⁶ If the word "assessment" is used in the exemption statute, the question whether it refers to local assessment or to assessment as one of the steps of general taxation, is a question the solution of which depends largely upon the intention of the legislature as deduced from the context. The exemption of certain property from the imposition of any tax or assessment,¹⁷ or from "all public taxes and assessments,"¹⁸ or from "any and all taxes and assessments, national or municipal or county,"¹⁹ or a provision that certain property "shall not be subject to taxes or assessments,"²⁰

¹² President and Council of the City of Paterson v. Society for establishing Useful Manufactures, 24 N. J. L. (4 Zabriskie) 385 [1854].

¹³ Allen v. City of Davenport, 107 Ia. 90, 77 N. W. 532 [1898]; Farwell v. Des Moines Brick Manufacturing Company, 97 Ia. 286, 35 L. R. A. 63, 66 N. W. 176 [1896].

¹⁴ Board of Improvement Paving District No. 5 v. Sisters of Mercy of Female Academy of Ft. Smith. — Ark. —, 109 S. W. 1165 [1908].

¹⁵ Washburn Memorial Orphan Asylum v. State, 73 Minn. 343, 76 N. E. 204 [1898]; Barber Asphalt Paving Company v. City of St. Joseph, 183 Mo. 451, 82 S. W. 64 [1904]; Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 425, 74 S. W. 979 [1903]; City of Beatrice v. Brethren Church of Beatrice, 41 Neb. 358, 59 N. W. 932 [1894].

¹⁶ State ex rel. Chicago, Burlington & Quincy Railroad Company v. City of Kansas City, 89 Mo. 34, 14 S. W. 515 [1886].

¹⁷ Patterson v. Chicago, R. I. & P. R. Co., 99 Minn. 454; *sub nomine* In re Drainage Ditch No. 6, 109 N. W.

993 [1906]; State ex rel. Minnesota Transfer Co. v. District Court of Ramsey County, 68 Minn. 242, 71 N. W. 27; City of St. Paul v. St. Paul & Sioux City Railroad Company, 23 Minn. 469 [1877]; First Division of the St. Paul and Pacific Railroad Company v. City of St. Paul, 21 Minn. 526 [1875]; Hudson County Catholic Protectors v. Board of Township Committee of the Township of Kearney, 56 N. J. L. (27 Vr.) 385, 28 Atl. 1043 [1894]; Oakland Cemetery v. City of Yonkers, 182 N. Y. 564, 75 N. E. 1132 [1905]; (affirming 71 N. Y. S. 783, 63 App. Div. 448 [1901]); Swan Point Cemetery v. Tripp, 14 R. I. 199 [1883].

¹⁸ State of Minnesota ex rel. Oakland Cemetery Association v. City of St. Paul, 36 Minn. 529, 32 N. W. 781 [1887].

¹⁹ District of Columbia v. Sisters of Visitation, 15 App. D. C. 390 [1899].

²⁰ State, Protestant Foster Home Society, Pros. v. Mayor and Common Council of City of Newark, 36 N. J. L. (7 Vr.) 478, 13 Am. Rep.

operates to exempt such property from local assessments. If the statute provides that certain property shall be exempt from local assessment or special assessment, the intention of the legislature to exempt from local assessment is unambiguous.²¹ The use of the word "assessment" is not regarded as conclusive in all jurisdictions. The Supreme Court of the United States has pointed out that the special or local assessment was not in general use a century ago and that the word "assessment," used in an exemption statute, was often synonymous with public rates or taxes and referred to general taxation.²² A statute providing that certain property should be exempt from "public taxes, rates and assessments" has been held to apply to general taxation only and not to local assessments, which are said to be local and private, rather than public, within the meaning of this statute.²³ The word "assessed" as a verb, is regularly used in connection with general taxation. Accordingly, a provision that "no other tax or impost shall be levied or assessed" upon a corporation, does not exempt it from local assessment.²⁴ A statute providing that property which is exempt from taxation by the general law of the state may be assessed and taxed for local improvements in a state, is held to give such city power to assess for local improvements lands belonging to the state.²⁵ A statute providing that railroad property shall be exempt from taxation, "except that the same shall be subject to special assessment for local improvements in cities and villages," was held to restrict such exemption to general taxation, but not to confer any affirmative power of special assessment.²⁶ Accordingly, where property such as the right of way of a railroad is regarded as *prima facie* exempt from local assessment, it remains exempt under such statute.²⁷ A statute providing that certain property shall be exempt from

464 [1873]; (reversing *State, Protestant Foster Home Society v. Mayor and Common Council of City of Newark*, 35 N. J. L. (6 Vr.) 157, 10 Am. Rep. 223 [1871]).

²¹ *Yates v. City of Milwaukee*, 92 Wis. 352, 66 N. W. 248 [1896].

²² *Well's v. Savannah*, 181 U. S. 531, 45 L. 986, 21 S. 697 [1901].

²³ *Buffalo City Cemetery Association v. City of Buffalo*, 46 N. Y. 506 [1871]. See also *Buffalo Ceme-*

tary Association v. City of Buffalo, 118 N. Y. 61, 22 N. E. 962 [1889].

²⁴ *State, New Jersey Midland Railroad Company, Pros. v. Mayor and Aldermen of Jersey City*, 42 N. J. L. (13 Vr.) 97 [1880].

²⁵ *Hassan v. City of Rochester*, 67 N. Y. 528 [1876].

²⁶ *Chicago, Milwaukee & St. Paul Railway Company v. City of Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417 [1895].

²⁷ See §§ 594, 595.

“civil impositions, taxes and rates,” has been held to include local assessments for benefits.²⁸ The fact that no means is provided for selling certain kinds of property, such as public property or the right of way of a railroad, does not render such property exempt from local assessment if a means for compelling the owner of such property to pay local assessments is provided.²⁹ If no other means of compelling the owner of such property to pay such assessment is provided, the fact that such property cannot be sold is ordinarily regarded as exempting such property from local assessment.³⁰ Thus, the fact that public property cannot be sold is sometimes regarded as exempting it from assessment, if sale is the only means of collecting such assessment.³¹

§ 615. Power of legislature to authorize contracts for exemption.

It was once held that the legislature could not confer upon a city the power to make a valid contract for the commutation of local assessment.¹ This decision was rendered upon a contract which provided that a property owner who should contribute towards the expense of public improvements should be exempt from assessment for the cost thereof.² This decision was rendered subsequent to a line of decisions upholding similar contracts in which decisions the constitutional question was not raised.³ Before the decision holding such contracts invalid, a street railway company had accepted a franchise by which it was to keep “in good repair and condition” eight feet of the street where one track of such railroad should be laid and sixteen feet where two tracks should be laid. It was held by the Supreme Court of the United States that the subsequent decision of the state court holding such contracts invalid could not annul such pre-existing contract and that such contract was therefore enforceable.⁴ After this decision of the Supreme Court of the United States the validity of such contracts was recognized

²⁸ Harvard College v. Boston, 104 Mass. 482.

²⁹ See § 580 *et seq.*; § 594 *et seq.*

³⁰ Elwood v. City of Rochester, 43 Hun. 102 [1887].

³¹ City of Clinton to use of Thornton, v. Henry County, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893].

¹ Chicago v. Baer, 41 Ill. 306

[1866]; City of Chicago v. Larned, 34 Ill. 203 [1864].

² Chicago v. Baer, 41 Ill. 306 [1866].

³ Neustadt v. Illinois Central Railroad, 31 Ill. 484; Hunsaker v. Wright, 30 Ill. 146; Illinois Central Railroad v. County of McLean, 17 Ill. 291.

⁴ Chicago v. Sheldon, 76 U. S. (9 Wall.) 50, 19 L. 594 [1869].

by the Supreme Court of Illinois, following such decision of the Supreme Court of the United States.⁵ By the great weight of modern authority a city may make a valid contract for exemption from a local assessment or commutation thereof if it is authorized so to do by the legislature.⁶ Contracts of this sort assume a number of different forms. One type which is often found is that of a contract by which the owner of land conveys the land necessary for a public improvement, under an agreement that his adjoining property shall not be assessed for the cost of such improvement.⁷ Such dedication, however, does not exempt the owner unless it is made under a contract with the city, or under a statute providing for such exemption.⁸ Another form of contract for exemption or commutation exists where the owner of land damaged by an improvement surrenders his right to damages in consideration of exemption from assessment for such improvement.⁹

§ 616. Necessity of statutory authority for exemption contract.

In the absence of a statute authorizing a city to make contracts for exemption or commutation from local assessment a city has no power to make such contract.¹ Thus, in the absence of such

⁵ *Parmalee v. City of Chicago*, 60 Ill. 267 [1871]; *City of Chicago v. People of the State of Illinois*, 56 Ill. 327 [1870].

⁶ *Shelby v. City of Burlington*, 125 Iowa 343, 101 N. W. 101 [1904]; *Coit v. City of Grand Rapids*, 115 Mich. 493, 73 N. W. 311 [1898]; *State ex rel. City of Minneapolis v. District Court of Fourth Judicial District*, 83 Minn. 170, 86 N. W. 15 [1901]; *State of Minnesota ex rel. Merriek v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885]; *Browne v. Palmer*, 66 Neb. 287, 92 N. W. 315 [1902]; *City of Omaha v. Megeath*, 46 Neb. 502, 64 N. W. 1091 [1895].

⁷ *Coit v. City of Grand Rapids*, 115 Mich. 493, 73 N. W. 311 [1898]; *State ex rel. City of Minneapolis v. District Court of Fourth Judicial District*, 83 Minn. 170, 86 N. W. 15 [1901]; *State of Minnesota ex rel. Merriek v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W.

625 [1885]; *Browne v. Palmer*, 66 Neb. 287, 92 N. W. 315 [1902]; *City of Omaha v. Megeath*, 46 Neb. 502, 64 N. W. 1091 [1895].

⁸ *Terrell v. Hart*, — Ky. —, 90 S. W. 953, 28 Ky. L. R. 901 [1906]; *State, Moran, Pros. v. City of Hudson*, 34 N. J. L. (5 Vr.) 25 [1869]; *State v. Dean*, 23 N. J. L. (3 Zab.) 335 [1852].

⁹ *Shelby v. City of Burlington*, 125 Iowa 343, 101 N. W. 101 [1904].

¹ *Gilbert v. City of New Haven*, 40 Conn. 102 [1873]; *Whitecomb v. City of Boston*, 192 Mass. 211, 78 N. E. 407 [1906]; *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Oglesby*, 165 Ind. 542, 76 N. E. 165 [1905]; *Leggett v. City of Detroit*, 137 Mich. 247, 100 N. W. 566 [1904]; *Vrana v. City of St. Louis*, 164 Mo. 146, 64 S. W. 180 [1901]; *Rackliffe v. Dunean*, — Mo. App. —, 108 S. W. 1110 [1908]; *Richards v. City of Cincinnati*, 31 O. S. 506 [1877].

statute, the city cannot make a contract providing that if the owner of certain lands shall deed a part thereof for a street, the remaining land of such grantor shall be exempt from assessment for opening, extending or improving such street,² or a contract exempting from local assessment an owner of property who should open and grade certain streets.³ Where the statute in force provides for assessing the cost of an improvement upon the land benefited, such a contract on the part of the city is invalid, as its effect ordinarily is to cast upon the public at large that proportion of the assessment which would otherwise have been imposed upon the property exempted by such contract.⁴ A conveyance of land for streets and alleys on condition that the abutting lots shall be exempt from assessment unless a majority of the abutting owners shall assent thereto in writing, is valid as to the conveyance but unoperative as to the condition.⁵ Even if the city have no power to make such contract, however, such contract is binding until repudiated. Thus, the owner of land conveyed to the city land for laying a sewer on consideration that his adjoining property should not be assessed for the construction of said sewer, and that no charge should be made for the right to connect with such sewer. Subsequently the owner of such land connected with such sewer without paying for such privilege. The grantee of such owner was subsequently injured by the overflow of such sewer caused by the negligence of said city. In an action brought by him the city interposed as a defense that the payment of two cents per square foot for land benefited by the connection with the sewer which was required by the city ordinance, had not been paid. It was held that even if the city had a right to repudiate such contract, the owner or his grantee had a right to make such connection until the city repudiated such contract.⁶

² Pittsburgh. Cincinnati, Chicago & St. Louis Railway Company v. Oglesby, 165 Ind. 542, 76 N. E. 165 [1905]; Leggett v. City of Detroit, 137 Mich. 247, 100 N. W. 566 [1904]; Vrana v. City of St. Louis, 164 Mo. 146, 64 S. W. 180 [1901]; Rackliffe v. Duncan, — Mo. App. —, 108 Mo. App. 1110 [1908]; Richards v. City of Cincinnati, 31 O. S. 506 [1877].

³ Gilbert v. City of New Haven 40 Conn. 102 [1873].

⁴ Ayer v. City of Chicago, 149 Ill. 262, 37 N. E. 57; State, Gregory, Pros. v. Mayor and Aldermen of Jersey City, 34 N. J. L. (5 Vr.) 390 [1871]; *In re* City of Seattle. — Wash. —, 94 Pac. 1075 [1908].

⁵ Vrana v. City of St. Louis, 164 Mo. 146, 64 S. W. 180 [1901]; Richards v. City of Cincinnati, 31 O. S. 506 [1877].

⁶ Hendrie v. City of Boston, 179 Mass. 59, 60 N. E. 386 [1901].

§ 617. Construction of contracts for exemption.

A contract for exemption from taxation or local assessment or for the commutation of by payment of an equivalent therefor is not to be implied. A statute exempting property from local assessment or providing for a commutation thereof is, accordingly, not a contract and may be modified by subsequent action of the legislature.¹ An ordinance providing that an elevated railroad company may construct its tracks over a street and that it shall restore the pavements, gutters, sidewalks and water, gas and sewer pipes, if they are disturbed by the construction of said road, to as good a condition as they were before such construction, does not amount to a contract exempting such company from assessment for street improvements.² A conveyance in consideration of one hundred thousand dollars to be paid by exempting from assessment contiguous land of the grantor to the extent of one hundred thousand dollars includes not only assessments already made and due, but assessments which have been made that are not yet entered upon the tax books for collection, installments of prior assessments to come due in the future and assessments which may be made in the future.³ Under a statute authorizing the value of land donated for a street to be set off against assessments for the improvement of such street the value of land donated but not used for the street for which the assessment in question was levied, since it was several blocks away, cannot be set off against such assessments.⁴ A strip of land which surrounded a track intended for a public park was conveyed upon condition that the city should improve such strip as a street and keep it in good order and repair at its own expense. Under such contract it was held that the adjoining land belonging to the grantor of such strip could not be assessed for a street improvement, even in the hands of owners to whom he had subsequently conveyed it,⁵ nor could

¹ State, Mount Pleasant Cemetery Company, *Pros. v. Mayor and Common Council of Newark*, 59 N. J. L. (21 Vr.) 66, 11 Atl. 147 [1887]; *City of Rochester v. Rochester Railway Company*, 182 N. Y. 99, 70 L. R. A. 773, 74 N. E. 953 [1905]; *Ladd v. City of Portland*, 32 Ore. 271, 67 Am. St. Rep. 526, 51 Pac. 654 [1898].

² Lake Street Elevated Railroad

Company v. City of Chicago, 183 Ill. 75, 47 L. R. A. 624, 55 N. E. 721 [1899].

³ *State ex rel. City of Minneapolis v. District Court of Fourth Judicial District*, 83 Minn. 170, 86 N. W. 15 [1901].

⁴ *Shurtleff v. City of Chicago*, 190 Ill. 473, 60 N. E. 870 [1901].

⁵ *City of Omaha v. Megeath*, 46 Neb. 502, 64 N. W. 1091 [1895].

such land be assessed for the cost of constructing a sidewalk." A contract with reference to the assessment of land outside of the city for the construction of a sewer when such land should be connected with such sewer does not affect the liability of the owners thereof as to other property owned by them within the city.⁷ A deed from the state reciting that lands had been sold to the state for taxes due such state and that the grantee has paid two cents an acre in full of all state and county taxes due thereon to the present date, does not show payment of an assessment for a levee, although such assessment is referred to as a special tax.⁸ Another form of a contract for exemption from local assessments or commutation thereof is found in contracts between a city and a street railroad by which the street railroad is to pave a certain portion of a street in return for which it is relieved from other assessments.⁹ The transfer by a street railway company of its estate, property rights, privileges and franchises, does not pass to the grantee the benefit of an exemption contract.¹⁰ Another form of exemption from local assessment or commutation, is found where provision is made that the property owners may do part or all of the work and receive credit therefor upon their assessments.¹¹ If the property owners act in reliance upon such provision, the transaction may amount to a contract. In the absence of such action in reliance on such provisions, it is at least a statute for exemption or commutation and is valid until amended or repealed.¹²

⁶ *Browne v. Palmer*, 66 Neb. 287, 92 N. W. 315 [1902].

⁷ *State, Estate of Brown, Pros. v. Town of Union*, 62 N. J. L. (33 Vr.) 142, 40 Atl. 632 [1898].

⁸ *Ford v. Delta and Pine Land Company*, 164 U. S. 662, 41 L. 590, 17 S. 230 [1897].

⁹ *Chicago v. Sheldon*, 76 U. S. (9 Wall.) 50, 19 L. 594 [1869]; *West Chicago Street Railroad Company v. City of Chicago*, 178 Ill. 339, 53 N. E. 112 [1899]; *Western Paving and Supply Company v. Citizens Street Railroad Company*, 128 Ind. 525, 25 Am. St. Rep. 462, 10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88 [1891].

¹⁰ *Rochester Railway Co. v. City of Rochester*, 205 U. S. 236 (affirming 182 N. Y. 99).

¹¹ *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71 [1893]; *Dumesnil v. Louisville Artificial Stone Co.*, 109 Ky. 1, 58 S. W. 371 [1900]; *In the Matter of the Assessment for Improving East Eighteenth Street in the Town of Flatbush*, 75 Hun. (N. Y.) 603, 27 N. Y. Supp. 591 [1894].

¹² *Barber v. Board of Supervisors of the City and County of San Francisco*, 42 Cal. 630 [1872]; *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373 [1888]; *City of Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112 [1895]; *Beck v. Obst*, 12 Bush. (75 Ky.) 268 [1876]; *State, Fing. Pros. v. Duryea*, 45 N. J. L. (16 Vr.) 258 [1883].

§ 618. Construction of special statutes for exemption and commutation.

In Massachusetts a city may assume assessments for betterments against the portion of the land not taken on condition that the owner releases claims for damages caused by laying out the street. The board of street commissioners of a city cannot make a contract for exemption from assessment, except under such statute.¹ A property owner who has settled with the city for damages, cannot take advantage of a statute authorizing a property owner, a part of whose property is taken, to surrender the rest and recover the full value of the property.² If such statute applies to abutting property, property which is separated by a street from that which is taken cannot be surrendered under such statute.³ In New York under the charter of Greater New York, the owner of land within the lines of a street laid out on the map, may convey his interest in such land to the city without compensation, and if his title is good, such conveyance shall prevent assessment upon lands fronting on the portion of the street so conveyed, except a fair proportion of the awards made for the value of buildings destroyed in opening such street.⁴ Under such statute, such conveyance may be made after the application of the city to open the street, at least up to the time that commissioners are appointed.⁵ Under such statute the owner of land is liable for a fair proportion of the costs of buildings removed in opening such street.⁶ Under such statute, other land owners who do not acquire their title from the donor of the street and whose land does not front on the portion of the street so conveyed, cannot claim exemption from assessment by reason of such conveyance.⁷ The United States has conveyed swamp lands to the different states, the proceeds of which are to be applied to reclaim such swamp lands. The enforcement of such provisions, is left to the good faith of the re-

¹ *Whitecomb v. City of Boston*, 192 Mass. 211, 78 N. E. 407 [1906].

² *Holt v. City Council of Somerville*, 127 Mass. 408 [1879].

³ *Holt v. City Council of Somerville*, 127 Mass. 408 [1879].

⁴ Laws 1897, p. 355, c. 378, § 992, Amended Laws, 1901, p. 421, c. 466.

⁵ In the Matter of the Application of the Westminster Heights Company for a Peremptory Writ of Mandamus Against Delany as Corpora-

tion Counsel of the City of New York, 185 N. Y. 539, 77 N. E. 1198 [1906]; (affirming, *Westminster Heights Co. v. Delany*, 95 N. Y. S. 247, 107 App. Div. 577 [1905]).

⁶ *In re Avenue L*, in City of New York, 95 N. Y. S. 245, 107 App. Div. 581 [1905].

⁷ *In re Mayor, etc., of City of New York*, 93 N. Y. S. 84, 103 App. Div. 496 [1905].

spective states and an individual only who buys such land from the state, cannot take advantage of such statute as exempting such land from subsequent local assessments. Furthermore, if it is a contract, it is a contract between the United States and the state to which the United States has conveyed such lands. The individual who purchases such land from the state, cannot take advantage thereof.⁸ However, where such land was conveyed by such state under a statute providing that such land should be exempt from taxation for the term of ten years, or till it should be reclaimed, it was held that such statute amounted to a contract which could not be impaired by subsequent legislation and that local assessments known as special taxes were included in such exemption.⁹ The state may provide for the reclamation of swamp and overflowed lands, even if the title was derived from a Mexican grant.¹⁰

§ 619. Property not in physical contact with improvement.

In order to receive a benefit from a public improvement, land need not abut or front thereon in the absence of a determination by the legislature or some public corporation, or official authorized by statute, that only the abutting or fronting property is benefited.¹ Accordingly, non-abutting land may be benefited by

⁸ Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; (affirming Reclamation Dist. No. 108 v. Hagar, 4 Fed. 366 [1880]); Ritter v. Drainage Dist. No. 1, Poinsett County, 78 Ark. 580, 94 S. W. 711 [1906]; Reclamation District No. 108 v. Hagar, 66 Cal. 54, 4 Pac. 945 [1884]; *contra* Mason v. Austin, 46 Cal. 385 [1873].

⁹ McGee v. Mathis, 71 U. S. (4 Wall.) 143, 18 L. 314 [1866]; (reversing, McGehee v. Mathis, 21 Ark. 40 [1860]).

¹⁰ Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; (affirming, Reclamation Dist. No. 108 v. Hagar, 4 Fed. 366 [1880]); Hagar v. Board of Supervisors of Yolo County, 47 Cal. 222 [1874]; People of the State of California v. Hagar, 52 Cal. 171 [1877].

¹ Rooke's Case, 5 Rep. 99 b. (Hil. 40 Eliz.); City of Seattle v. Kelleher, 195 U. S. 351, 25 S. 44 [1904]; Cribbs v. Benedict, 64 Ark. 555, 44 S. W. 707 [1897]; Little Rock v. Katzenstein, 52 Ark. 107, 12 S. W. 198 [1889]; German Savings and Loan Society v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902]; McGilvery v. City of Lewiston, 13 Ida. 338, 90 Pac. 348 [1907]; Roberts v. City of Evanston, 218 Ill. 296, 75 N. E. 923 [1905]; Walker v. City of Chicago, 202 Ill. 531, 67 N. E. 369 [1903]; Shurtleff v. City of Chicago, 190 Ill. 473, 60 N. E. 870 [1901]; Mason v. City of Chicago, 178 Ill. 499, 53 N. E. 354 [1899]; Rich v. City of Chicago, 152 Ill. 18, 38 N. E. 255 [1894]; Louisville and Nashville Railroad Company v. East St. Louis, 134 Ill. 656, 25 N. E. 962 [1891]; Guild, Jr. v. City of Chicago.

the improvement of a street,² or by the construction of a sewer,³ or a system of drainage,⁴ or by a park,⁵ so that it may be assess-

82 Ill. 472 [1876]; *Goodrich v. City of Minonk*, 62 Ill. 121 [1871]; *Culbertson v. Knight*, 152 Ind. 121, 52 N. E. 700 [1898]; *Ray v. City of Jeffersonville*, 90 Ind. 567 [1883]; *Mock v. City of Muncie*, 9 Ind. App. 536, 37 N. E. 281 [1893]; *Kansas City v. Napiecek*, — Kan. —, 92 Pac. 827 [1907]; *Olsson v. City of Topeka*, 42 Kan. 709, 21 Pac. 219 [1889]; *City of Ottawa v. Barney*, 10 Kan. 270 [1872]; *Pfaffinger v. Kremer*, 115 Ky. 498, 74 S. W. 238, 24 Ky. L. Rep. 2368 [1903]; *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]; *Warren v. City of Grand Haven*, 30 Mich. 24 [1874]; *State ex rel. Hughes v. District Court of Ramsey County*, 95 Minn. 70, 103 N. W. 744 [1905]; *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600 [1896]; *State v. Several Parcels of Land*, — Neb. —, 113 N. W. 248 [1907]; *Hart v. City of Omaha*, 74 Neb. 836, 105 N. W. 546 [1905]; *Lansing v. City of Lincoln*, 32 Neb. 457, 49 N. W. 650 [1891]; *Allison Land Co. v. Borough of Tenally*, 69 N. J. L. (40 Vr.) 587, 55 Atl. 39 [1903]; (affirming on rehearing *Allison Land Co. v. Borough of Tenally*, 68 N. J. L. (39 Vr.) 205, 52 Atl. 231 [1902]); *State, Henderson, Pros. v. Mayor, etc., of Jersey City*, 41 N. J. L. (12 Vroom) 489 [1879]; *In the Matter of the Application of the Common Council of the City of Amsterdam to take lands for the extension of Grove and Jay Streets*, 55 Hun. (N. Y.) 270, 8 N. Y. Supp. 234 [1889]; *Kelly v. City of Cleveland*, 34 O. S. 468 [1878]; *Coates v. Village of Norwood*, 16 Ohio C. C. 196 [1898]; *Miller v. City of Toledo*, 12 Ohio C. C. 706 [1894]; *In the Matter of Westlake Avenue, Seattle*, 40 Wash. 144, 82 Pac. 279 [1905].

² *Roberts v. City of Evanston*, 218 Ill. 296, 75 N. E. 923 [1905]; *Shurtleff v. City of Chicago*, 190 Ill.

473, 60 N. E. 870 [1901]; *Louisville and Nashville Railroad Company v. East St. Louis*, 134 Ill. 656, 25 N. E. 962 [1891]; *Ray v. City of Jeffersonville*, 90 Ind. 567 [1883]; *Mock v. City of Muncie*, 9 Ind. App. 536, 37 N. E. 281 [1893]; *Olsson v. City of Topeka*, 42 Kan. 709, 21 Pac. 219 [1889]; *City of Ottawa v. Barney*, 10 Kan. 270 [1872]; *Pfaffinger v. Kremer*, 115 Ky. 498, 74 S. W. 238, 24 Ky. L. Rep. 2368 [1903]; *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]; *State ex rel. Hughes v. District Court of Ramsey County*, 95 Minn. 70, 103 N. W. 744 [1905]; *Allison Land Co. v. Borough of Tenally*, 69 N. J. L. (40 Vr.) 587, 55 Atl. 39 [1903]; (affirming on rehearing *Allison Land Co. v. Borough of Tenally*, 68 N. J. L. (39 Vr.) 205, 52 Atl. 231 [1902]); *In the Matter of the Application of the Common Council of the City of Amsterdam to take lands for the extension of Grove and Jay Streets*, 55 Hun. (N. Y.) 270, 8 N. Y. Supp. 234 [1889]; *Kelly v. City of Cleveland*, 34 O. S. 468 [1878]; *In the Matter of Westlake Avenue, Seattle*, 40 Wash. 144, 82 Pac. 279 [1905].

³ *McGilvery v. City of Lewiston*, 13 Ida. 338, 90 Pac. 348 [1907]; *Walker v. City of Chicago*, 202 Ill. 531, 67 N. E. 369 [1903]; *Mason v. City of Chicago*, 178 Ill. 499, 55 N. E. 354 [1899]; *Warren v. City of Grand Haven*, 30 Mich. 24 [1874]; *State, Henderson, Pros. v. Mayor, etc., of Jersey City*, 41 N. J. L. (12 Vroom) 489 [1879]; *Miller v. City of Toledo*, 12 Ohio C. C. 706 [1894].

⁴ *Rooke's Case*, 5 Rep. 99 b. (Hil. 40 Eliz.); *Goodrich v. City of Minonk*, 62 Ill. 121 [1871]; *Culbertson v. Knight*, 152 Ind. 121, 52 N. E. 700 [1898].

⁵ *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600 [1896]; *Hart v.*

ed for the expense thereof. The fact that property to be assessed for a park or boulevard is three-quarters of a mile away therefrom does not justify the court as a matter of law, in saying that such property is not benefited.⁶ By statute, assessments for local improvements were to be made upon the contiguous property benefited. After an ordinance for appropriating land for a street was passed but before the supplementary petition was filed, such statute was modified by omitting the word "contiguous." It was held that under such statutes it was proper to assess any property actually benefited though not contiguous to the improvement.⁷ In Illinois, under the constitutional provision authorizing the construction of public improvements by general taxation, by special assessment or by special taxation of contiguous property, it has been held that the phrase "of contiguous property" is connected only with the grant of the power of special taxation and does not limit the power of special assessment.⁸ Accordingly, an assessment based on the theory of benefits may be levied upon property benefited but not contiguous to the improvement.⁹

§ 620. Abutting property.

The assessment district is often described as consisting of property which bears a certain relation in space to the improvement. Property which abuts¹ on the improvement for which the assessment is levied is frequently made into an assessment district by the legislature or public corporation or officer duly authorized to determine what property is benefited and to lay out the

City of Omaha, 74 Neb. 836, 105 N. W. 546 [1905].

⁶Hart v. City of Omaha, 74 Neb. 836, 105 N. W. 546 [1905].

⁷In the Matter of Westlake Avenue, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

⁸Guild, Jr. v. City of Chicago, 82 Ill. 472 [1876]; (construing Article IX., § 9, of the Constitution of Illinois.)

⁹Roberts v. City of Evanston, 218 Ill. 296, 75 N. E. 923 [1905]; Shurtleff v. City of Chicago, 190 Ill. 473, 60 N. E. 870 [1901]; Louisville and Nashville Railroad Company v. City of East St. Louis, 134 Ill. 656, 25 N. E. 962 [1891]; Guild, Jr. v. City of Chicago, 82 Ill. 472 [1876].

¹City of Seattle v. Kelleher, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904]; Chadwick v. Kelley, 187 U. S. 540, 47 L. 293, 23 S. 175 [1903]; (affirming, Kelley v. Chadwick, 104 La. 719, 29 So. 295 [1901]); City of Denver v. Londoner, 33 Colo. 104, 80 Pac. 117 [1904]; Bacon v. Mayor and Aldermen of Savannah, 91 Ga. 500, 17 S. E. 749 [1893]; Speer v. Mayor and Council of Athens, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890]; Vandersyde v. People ex rel. Raymond, 195 Ill. 200, 62 N. E. 806 [1902]; Bass v. South Park Commissioners, 171 Ill. 370, 49 N. E. 549 [1898]; Thorn v. West Chicago Park Commissioners, 130 Ill. 594, 22 N. E. 520 [1890]; Green v. City of

assessment district. Districts consisting of the abutting property

Springfield, 130 Ill. 515, 22 N. E. 602 [1890]; Pittsburgh, C. C. & St. L. Ry. Co. v. Taber, 168 Ind. 419, 77 N. E. 741 [1906]; Klein v. Nugent Gravel Company, 162 Ind. 509, 70 N. E. 801 [1903]; Deane v. Indiana Macadam & Construction Company, 161 Ind. 371, 68 N. E. 686 [1903]; Leeds v. Defrees, 157 Ind. 392, 61 N. E. 930 [1901]; Martin v. Wills, 157 Ind. 153, 60 N. E. 1021 [1901]; Taylor v. City of Crawfordsville, 155 Ind. 403, 58 N. E. 490; Adams v. City of Shelbyville, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; Helm v. Witz, 35 Ind. App. 131, 73 N. E. 846 [1904]; Byram v. Foley, 17 Ind. App. 629, 47 N. E. 351 [1897]; Rawson v. City of Des Moines, 133 Ia. 514, 110 N. W. 918 [1907]; Minneapolis & St. Louis R. Co. v. Lindquist, 119 Iowa 144, 93 N. W. 103 [1903]; Edwards & Walsh Construction Company v. Jasper County, 117 Iowa 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902]; Hackworth v. City of Ottumwa, 114 Ia. 467, 87 N. W. 424 [1901]; Ottumwa Brick & Construction Co. v. Ainley, 109 Ia. 386, 80 N. W. 510 [1899]; Gilcrest v. McCartney, 97 Ia. 138, 66 N. W. 103 [1896]; Amery v. City of Keokuk, 72 Ia. 701, 30 N. W. 780 [1887]; Kendig v. Knight, 60 Ia. 29, 14 N. W. 78 [1882]; Morrison v. Hershire, 32 Ia. 271 [1871]; Warren v. Henly, 31 Ia. 31 [1870]; McGrew v. City of Kansas City, 64 Kan. 61, 67 Pac. 438 [1902]; Morton v. Sullivan. (Ky.) 29 Ky. L. Rep. 943, 96 S. W. 807 [1906]; City of Covington v. Matson. — Ky. —, 34 S. W. 897, 17 Ky. L. R. 1323 [1896]; Slocum v. Selectmen of Brookline, 163 Mass. 23, 39 N. E. 351 [1895]; Ayer v. Mayor and Aldermen of Somerville, 143 Mass. 585, 10 N. E. 457 [1887]; Barber Asphalt Paving Co. v. Munn, 185 Mo. 552, 83 S. W. 1062 [1904]; Meier v. City of St. Louis, 180 Mo. 391, 79 S. W. 955 [1903];

Heman v. Gilliam, 171 Mo. 258, 71 S. W. 163 [1902]; City of Springfield to Use of Central National Bank v. Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276 [1896]; Heman Construction Company v. McManus, 102 Mo. App. 649, 77 S. W. 310 [1903]; City of Omaha v. Gsanter, 4 Neb. Unoff. 52, 93 N. W. 407 [1903]; Kuhns v. City of Omaha, 55 Neb. 183, 75 N. W. 562 [1898]; Hutchinson v. City of Omaha, 52 Neb. 345, 72 N. W. 218 [1897]; McCormick v. City of Omaha, 37 Neb. 829, 56 N. W. 626 [1893]; Farrington v. City of Mt. Vernon, 166 N. Y. 233, 59 N. E. 826 [1901]; Parsons v. City of Rochester, 43 Hun. (N. Y.) 258 [1887]; Hilliard v. City of Asheville, 118 N. C. 845, 24 S. E. 738 [1896]; Kelly v. City of Cleveland, 34 O. S. 468 [1878]; Meissner v. City of Toledo, 31 O. S. 387 [1877]; Smith v. City of Toledo, 24 O. S. 126 [1873]; Creighton v. Scott, 14 O. S. 438 [1863]; Maloy v. City of Marietta, 11 O. S. 636 [1860]; Northern Indiana Railroad Company v. Connelly, 10 O. S. 160 [1859]; Seoville v. City of Cleveland, 1 O. S. 126 [1853]; (followed in Clark v. City of Cleveland, 1 O. S. 139 [1853]); Oliver v. City of Newberg. — Or. —, 91 Pac. 470 [1907]; In the Matter of the Opening of Orkney Street, Appeal of the City of Philadelphia, 194 Pa. St. 425, 48 L. R. A. 274, 45 Atl. 314 [1900]; Beechwood Avenue Sewer, Pittsburg's Appeal, 179 Pa. St. 490, 36 Atl. 209 [1897]; Park Avenue Sewers, Appeal of Parker, 169 Pa. St. 433, 32 Atl. 574 [1895]; City of Reading v. O'Reilly, 169 Pa. St. 366, 32 Atl. 420 [1895]; Fifty-Fourth Street, Pittsburg's Appeal, 165 Pa. St. 8, 30 Atl. 503 [1894]; Morewood Avenue, Chamber's Appeal, 159 Pa. St. 20, 28 Atl. 123 [1893]; Main Street, Big Run Borough, 137 Pa. St. 590, 20 Atl. 711 [1890]; Magee v. Common-

are most frequently found in assessments for street improvements,² but may also be found in assessments for sewers,³ as where the assessment is levied upon the property abutting the street in which the sewer is located.⁴ Assessment districts of this sort are also found where the improvement is the construction of a gutter,⁵ or the construction of a curb or gutter,⁶ or the improvement of an alley.⁷ Property is ordinarily said to abut on an improvement or a street when it is so situated with reference thereto that it is not separated therefrom by any intervening property,⁸ or at

wealth for the Use of the City of Pittsburgh, 46 Pa. St. 358 [1863]; Wabash Avenue, 26 Pa. Super. Ct. 305 [1904]; Bishop v. Tripp, 15 R. I. 466, 8 Atl. 692 [1887]; Taylor v. Boyd, 63 Tex. 533 [1885]; Ryan v. Sumner, 17 Wash. 228, 49 Pac. 487 [1897]; Schintgen v. City of La Crosse, 117 Wis. 158, 94 N. W. 84 [1903]; Hennessy v. Douglas County, 99 Wis. 129, 74 N. W. 983 [1898]; Chicago, Milwaukee & St. Paul Railway Company v. City of Milwaukee, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417 [1895]; Johnson v. City of Milwaukee, 40 Wis. 315 [1876].

²City of Seattle v. Kelleher, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904]; Chadwick v. Kelley, 187 U. S. 540, 47 L. 293, 23 S. 175 [1903] (affirming, Kelley v. Chadwick, 104 La. 719, 29 So. 295 [1901]); Green v. City of Springfield, 130 Ill. 515, 22 N. E. 602 [1890]; Pittsburgh, C. C. & St. L. Ry. Co. v. Taber, 168 Ind. 419, 77 N. E. 741 [1906]; Hackworth v. City of Ottumwa, 114 Ia. 467, 87 N. W. 424 [1901]; Ottumwa Brick & Construction Co. v. Ainley, 109 Ia. 386, 80 N. W. 510 [1899]; Amery v. City of Keokuk, 72 Ia. 701, 30 N. W. 780 [1887]; Morrison v. Hershire, 32 Ia. 271 [1871]; Morton v. Sullivan. — Ky. —, 29 Ky. L. Rep. 943, 96 S. W. 807 [1906]; Barber Asphalt Paving Co. v. Munn, 185 Mo. 552, 83 S. W. 1062 [1904]; City of Springfield to Use of Central National Bank v. Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276 [1896]; Hilliard v. City of Asheville, 118 N. C. 845,

24 S. E. 738 [1896]; City of Cincinnati v. Batsche, 52 O. S. 324, 27 L. R. A. 536, 40 N. E. 21 [1895]; Kelly v. City of Cleveland, 34 O. S. 468 [1878]; In the Matter of the Opening of Orkney Street, Appeal of the City of Philadelphia, 194 Pa. St. 425, 48 L. R. A. 274, 45 Atl. 314 [1900]; Fifty-fourth Street, Pittsburgh's Appeal, 165 Pa. St. 8, 30 Atl. 503 [1894]; Fifty-fourth Street, Pittsburgh's Appeal, 165 Pa. St. 8, 30 Atl. 503 [1894]; Morewood Avenue, Chamber's Appeal, 159 Pa. St. 20, 28 Atl. 123 [1893]; Main Street, Big Run Borough, 137 Pa. St. 590, 20 Atl. 711 [1890]; Magee v. Commonwealth for the Use of the City of Pittsburgh, 46 Pa. St. 368 [1863]; Taylor v. Boyd, 63 Tex. 533 [1885].

³Vandersyde v. People ex rel. Raymond, 195 Ill. 200, 62 N. E. 806 [1902]; Minneapolis & St. Louis R. Co. v. Lindquist, 119 Iowa 144, 93 N. W. 103 [1903]; Beechwood Avenue Sewer, Pittsburgh's Appeal, 179 Pa. St. 490, 36 Atl. 209 [1897]; Park Avenue Sewers, Appeal of Parker, 169 Pa. St. 433, 32 Atl. 574 [1895].

⁴Byram v. Foley, 17 Ind. App. 629, 47 N. E. 351 [1897].

⁵Kendig v. Knight, 60 Ia. 29, 14 N. W. 78 [1882].

⁶City of Omaha v. Gsanter, 4 Neb. Unoff. 52, 93 N. W. 407 [1903].

⁷Heman v. Gilliam, 171 Mo. 258, 71 S. W. 163 [1902].

⁸"To speak of property as abutting upon a street, has a well understood and definite meaning, as well in legal

least only by intervening property which is subject to a public easement, for the use for which the improvement has been constructed.⁹ It is said that property cannot be abutting an improvement if it does not touch it.¹⁰ "Abutting is sometimes used as equivalent to "adjoining" or "fronting."¹¹ The context of the statute or ordinance in which the term is employed may, however, suggest a different meaning for each of these respective terms.¹² In Illinois, constitutional and statutory provisions authorizing the assessment of contiguous property are held to authorize assessment by the city of property abutting on the street or improvement. Within the meaning of these provisions "contiguous" is regarded as synonymous with or including "abutting."¹³ In most jurisdictions the question whether property abuts on an improvement or not, is to be determined by the actual use made of it at the time of the assessment proceedings and not by the platted lines, if the property is actually used and occupied.¹⁴ Accordingly, if a platted lot has been divided in actual use into two distinct tracts, one of which is separated from the street by the other, the one in the rear is not regarded as abutting on the im-

as in common parlance. It means property which lies adjacent to and is bounded by the lines of the street, the street line and property line being coincident." *Chicago, Burlington & Quincy Railroad Company v. South Park Commissioners*, 11 Ill. App. 562, 563 [1882]. "'Abut' means the same as 'bound' that is to terminate or border; to be contiguous; to meet." *Barney v. City of Dayton*, 8 Ohio C. C. 480, 481 [1894].

⁹ *Allman v. District of Columbia*, 3 App. D. C. 8 [1894]; *City of Joplin ex rel. Kee v. Freeman*, — Mo. App. —, 103 S. W. 130 [1907]; *Richards v. City of Cincinnati*, 31 O. S. 506 [1877].

¹⁰ *Holt v. City Council of Somerville*, 127 Mass. 408 [1879].

¹¹ *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014 [1895].

¹² "We have reached this conclusion (i. e. that a lot adjoining a street on its side is not one fronting on such street) after a due consideration of the authorities in other juris-

dictions construing the statutes on germane subjects in which the words 'fronting,' 'adjoining,' 'abutting' and similar expressions are held to be synonymous, but in none of them have these different words been so carefully distinguished as they appear to be in the framing of these amendments. We cannot regard these different words 'adjoining,' 'fronting' and 'abutting,' apparently so carefully differentiated with reference to their context in the charter, as merely tautological or as synonymous." *Collier Estate v. Western Paving Supply Company*, 180 Mo. 362, 383, 79 S. W. 947 [1904].

¹³ *Vandersyde v. People ex rel. Raymond*, 195 Ill. 200, 62 N. E. 806 [1902]; *Thorn v. West Chicago Park Commissioners*, 130 Ill. 594, 22 N. E. 520 [1890]; *Green v. City of Springfield*, 130 Ill. 515, 22 N. E. 602 [1890].

¹⁴ *Langlois v. Cameron*, 201 Ill. 301, 66 N. E. 332 [1903].

provement.¹⁵ The authorities, however, are not unanimous on this question. Where two lots are used together as a single tract, it has been held that they cannot be regarded as one tract abutting upon an improvement, upon which only one of such lots as laid out in the plat actually abuts.¹⁶

In determining the scope and meaning of the term "abutting," a number of interesting questions have been discussed. One of them is whether property can be said to abut on an improvement, if the improvement touches the property at the side along its greatest length and not at the end which is used as a front. It is ordinarily said that property which touches an improvement upon its side is to be regarded as abutting property.¹⁷ In Ohio, under a statute provided for assessing abutting property in proportion to the number of front feet, it has been held that while a lot could abut an improvement upon its side, the depth of such lot to be assessed depended upon the width of the front of the lot and not upon its depth abutting on the improvement for which the assessment was levied.¹⁸ These decisions, however, turn on the meaning of "front foot" and not on the meaning of "abutting."¹⁹ Somewhat similar results have been reached in New Jersey under a statute providing for apportioning assessments according to benefits.²⁰ In Pennsylvania it was held that property in the front of which a water pipe had been laid could not be assessed for laying a pipe along the side thereof.²¹ The decision of this case, however, turned rather upon the question whether such improvement was in fact a benefit to the land thus assessed than on the question of what abutting property was.²² Whether part of a sidewalk at the corner of two streets meeting at right angles, which is bounded by the prolongation of the side and front lines of the corner lot, can be said to abut upon the corner lot, which it touches only at one point has been discussed but not

¹⁵ *Langlois v. Cameron*, 201 Ill. 301, 66 N. E. 332 [1903]; *Clapton v. Taylor*, 49 Mo. App. 117 [1892].

¹⁶ *Smith v. City of Des Moines*, 106 Ia. 590, 76 N. W. 836 [1898].

¹⁷ *City of Springfield v. Green*, 120 Ill. 269, 11 N. E. 261; *City of Lawrence v. Tillam*, 11 Kan. 499 [1873]; *Moheiv v. Hoan*, 131 Mo. 19, 32 S. W. 1014 [1895].

¹⁸ *Sandrock v. Columbus*, 51 Ohio St. 317, 42 N. E. 255 [1894]; *Haviland v. City of Columbus*, 50 O. S. 471, 34 N. E. 679 [1893].

¹⁹ See § 625; § 704.

²⁰ *Cossitt Land Co. v. Neuscheler*. — N. J. —, 60 Atl. 1128 [1905].

²¹ *Baker v. Gartside*, 86 Pa. St. (5 Norris) 498.

²² *Baker v. Gartside*, 86 Pa. St. (5 Norris) 498.

decided.²³ Property which is separated from the improvement by intervening land over which neither the public nor the owner of the tract in question possesses an easement giving access to the improvement for which the easement is levied is not regarded as abutting property.²⁴ However, a tract of land which was separated from a street by a small stream over which were two bridges giving access to such tract was said to be abutting on such street.²⁵ If the strip of land intervening between the land in question and the improvement, has been conveyed fraudulently in order to prevent the property in question from being assessed, it has been held that the existence of such intervening strip does not prevent the property back of it from being regarded as abutting property.²⁶ This principle has been applied where the property back of such strip has been conveyed to a grantee, who had notice of such fraudulent conveyance.²⁷ The intervening strip may have been conveyed after the time at which the condition of the property is regarded as fixed. In such case, the existence of such intervening strip does not prevent the property from being regarded as abutting.²⁸ The intervening strip may in some way have become the property of the owner of the tract which is separated from such improvement by such strip. In such case, the tract back of such strip is regarded as abutting on the improvement.²⁹ Thus, where a city in straightening a street vacated a strip of ground on one side and by ordinance provided that the portion of such strip in front of each lot should be donated to the owner thereof, to become a part of each lot and further provided that the mayor should execute conveyances accordingly, it was held that although such conveyances were not executed, yet if the portion of such strip in front of each lot was enclosed therewith for years, with the knowledge of the owner, he became at least the equitable owner of the portion of such strip and the en-

²³ *City of Laurence v. Killam*, 11 Kan. 499 [1873].

²⁴ *Damkoehler v. City of Milwaukee*, 124 Wis. 144, 101 N. W. 706 [1905].

²⁵ *Wakefield Local Board of Health v. Lee*, 1 Ex. Div. 336.

²⁶ *Eagle Manufacturing Company v. City of Davenport*, 101 Ia. 493, 38 L. R. A. 480, 70 N. W. 707 [1897]; *Stifel v. Brown*, 24 Mo. App. 102

[1887]; *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533 [1884].

²⁷ *Eagle Manufacturing Company v. City of Davenport*, 101 Ia. 493, 38 L. R. A. 480, 70 N. W. 707 [1897].

²⁸ *Douglass v. City of Cincinnati*, 29 O. S. 165 [1876].

²⁹ *Ottumwa Brick & Construction Co. v. Ainley*, 109 Ia. 386, 80 N. W. 510 [1899].

tire lot was to be regarded as abutting on the improvement.³⁰ The intervening strip may be one in which the public or the owner has such an easement that he can have free access to the improvement. In such cases the existence of such strip does not prevent the property back of it from being abutting property.³¹ Thus, a city encroached upon grounds which were dedicated to the county as a public square, by using a strip on the side of such square as a part of the street. Subsequently the city obtained a decree preventing the county from interfering with the city's possession of such strips. It was held that the existence of such strips did not prevent the public square owned by the county from abutting on such street.³² The existence of a public parking between a lot and the sidewalk in front of it does not prevent such lot from abutting on such sidewalk.³³ A strip of land ninety-one feet in width was dedicated for a street. The city improved a street thereon ninety feet in width, leaving one foot upon one side, used only for sloping embankments and excavations. It was held that the existence of such strip did not prevent lots abutting on such strip from abutting on the street.³⁴ The property including the right of way of a railway company which touches a street may be regarded as abutting thereon.³⁵ If such property is held not to be subject to assessment, it is not because it is held not to abut upon the improvement, but because it is held to be exempt

³⁰ *Ottumwa Brick & Construction Co. v. Ainley*, 109 Ia. 386, 80 N. W. 510 [1899].

³¹ *Allman v. District of Columbia*, 3 App. D. C. 8 [1894]; *Edwards & Walsh Construction Company v. Jasper County*, 117 Iowa 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902]; *City of Joplin ex rel. Kee v. Freeman*, — Mo. App. —, 103 S. W. 130 [1907]; *Richards v. City of Cincinnati*, 31 O. S. 506 [1877].

³² *Edwards & Walsh Construction Company v. Jasper County*, 117 Iowa 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902].

³³ *Allman v. District of Columbia*, 3 App. D. C. 8 [1894].

³⁴ "It seems to us that, in order to exempt these proprietors from assessment as abutters on the improvement, it must appear that this inter-

vening foot of land deprives them of full, free, and lawful access to the street improved; but such deprivation could result only when the right and exclusive use thereto have reverted to the original dedicators and their heirs. If the public right to its use still continues, or if the right to the strip has vested absolutely in the owners of lands abutting upon it, after abandonment by the public, then, in either case, their liability to assessment is certain." *Richards v. City of Cincinnati*, 31 O. S. 506, 514 [1877].

³⁵ *Pittsburgh, C. C. & St. L. Ry. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741 [1906]; *Chicago, Milwaukee & St. Paul Railway Company v. City of Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417 [1895].

from assessment generally,³⁶ or because it is held not to be a lot of land within the meaning of the statute. The tracks of a railroad which are situated in a street and run along the length thereof are not regarded as abutting on such street.³⁷ The right of way of a railroad company running across a street has been held not to be abutting property.³⁸ One street which intersects another is not regarded as property abutting on such street.³⁹ Thus, under an ordinance providing that where railroad tracks are laid in a street already paved, the owners shall pay the property owners for the paving between the rails, the railway company is not obliged to pay the city for the paving opposite intersecting streets.⁴⁰ If part of an undivided tract abuts upon an improvement, it has been held that the entire tract is liable to assessment.⁴¹ On the other hand, it has been said that a tract of forty acres unplatted and used for farm purposes, a part of which abuts upon a street improvement, cannot be assessed for such improvement as an entirety.⁴² If the property belonging to one owner consists of two or more different tracts, the fact that one of the tracts abuts upon the improvement does not constitute the other tract abutting property within the meaning of the assessment statute.⁴³ Where the improvement consists of a part of the width of a street,

³⁶ *Chicago, Milwaukee & St. Paul Railway Company v. City of Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417 [1895].

³⁷ *South Park Commissioners v. The Chicago, Burlington and Quincy Railroad Company*, 107 Ill. 105 [1883]; *City of Boston v. Boston and Albany Railroad Company*, 170 Mass. 95, 49 N. E. 95 [1898]; *Boehme v. City of Monroe*, 106 Mich. 401, 64 N. W. 204 [1895]; *Harriott Avenue*, 24 Pa. Super. Ct. 597 [1904]. *Contra*, *Pittsburgh, C. C. & St. L. Ry. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741 [1906].

³⁸ *Chicago, Burlington and Quincy Railroad Company v. South Park Commissioners*, 11 Bradwell (Ill.) 562 [1882]. "The right of way of a railroad company across a street can in no proper sense of the term be classed as property abutting on the street. It is merely a right of occupancy of a portion of the street, sub-

ject to the reasonable supervision of the police powers of the city." *Chicago, Burlington and Quincy Railroad Company v. South Park Commissioners*, 11 Bradwell (Ill.) 562, 564 [1882].

³⁹ *City of Council Bluffs v. Omaha & Council Bluffs Street Railway & Bridge Company*, 114 Ia. 141, 86 N. W. 222 [1901].

⁴⁰ *City of Council Bluffs v. Omaha & Council Bluffs Street Railway & Bridge Company*, 114 Ia. 141, 86 N. W. 222 [1901].

⁴¹ *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692 [1887].

⁴² *Ryan v. Sumner*, 17 Wash. 228, 49 Pac. 487 [1897].

⁴³ This was held under a statute making unplatted property abutting on a street subject to assessment to a depth of three hundred feet. *McGrew v. City of Kansas City*, 64 Kan. 61, 67 Pac. 438 [1902].

property abutting on the side of the street not improved is regarded as abutting on the improvement.⁴⁴ Property which abuts upon a private way through which a sewer runs, which private way is subsequently laid out into a public way becomes property abutting on a public way through which a sewer runs, and is liable to assessment under a statute providing for assessing such property.⁴⁵ Property abutting on a lateral sewer is not regarded as abutting on the main sewer within the meaning of a statute providing for levying an assessment upon property abutting the sewer for which the assessment is levied.⁴⁶ A tract of land which as originally platted abutted on one street but which as actually used, is severed from the rest of such tract and is separated from the street by such residue, is not a lot abutting on such street.⁴⁷ If, in the exercise of proper discretion, the assessment district is made to consist of abutting property, other property cannot be assessed for the cost of such improvement, even if it is in fact benefited thereby.⁴⁸ Under a statute authorizing an assessment upon land bounding and abutting upon a street, it has been held that the city could not provide by ordinance for assessing the cost of an improvement "upon all the lots and parcels of land benefited thereby."⁴⁹ So under a statute restricting the assessment to abutting property, if made in proportion to frontage, non-abutting property though benefited cannot be assessed.⁵⁰ Land abutting upon one improvement cannot be treated as abutting upon another improvement by the process of providing for constructing the two improvements together and assessing the property abut-

⁴⁴ *Klein v. Nugent Gravel Company*, 162 Ind. 509, 70 N. E. 801 [1903]; *Helm v. Witz*, 35 Ind. App. 131, 73 N. E. 846 [1904]; *City of Cincinnati v. Batsche*, 52 O. S. 324, 27 L. R. A. 536, 40 N. E. 21 [1895].

⁴⁵ *Slocum v. Selectmen of Brookline*, 163 Mass. 23, 39 N. E. 351 [1895].

⁴⁶ *Ayer v. Mayor and Aldermen of Somerville*, 143 Mass. 585, 10 N. E. 457 [1887].

⁴⁷ *Lancet v. Cameron*, 201 Ill. 301, 66 N. E. 332 [1903].

⁴⁸ *Hill v. City of Chicago*, 29 Ill. 31 [1862]; *Cincinnati v. Batsche*, 52 O. S. 324, 27 L. R. A. 536, 40 N. E.

21 [1895]; *Kelly v. City of Cleveland*, 34 O. S. 468 [1878]; *Beechwood Avenue Sewer*, *Pittsburg's Appeal*, 179 Pa. St. 490, 36 Atl. 209 [1897]; *Park Avenue Sewers*, *Appeal of Parker*, 169 Pa. St. 433, 32 Atl. 574 [1895]; *Fifty-fourth Street*, *Pittsburg's Appeal*, 165 Pa. St. 8, 30 Atl. 503 [1894]; *Morewood Avenue*, *Chamber's Appeal*, 159 Pa. St. 90, 28 Atl. 123 [1893].

⁴⁹ *Kelly v. City of Cleveland*, 34 O. S. 468 [1878].

⁵⁰ *Cincinnati v. Batsche*, 52 O. S. 324, 27 L. R. A. 536, 40 N. E. 21 [1895].

ting upon either.⁵¹ This is especially true if only one of the streets provided for in the ordinance has been improved.⁵² If two alleys are established in one block, a separate district must be made for each alley, consisting of the property abutting on each.⁵³ On the other hand, a break or jog in a street does not make the parts thereof distinct streets. A tract of land abutting upon one part of such street may be said to abut on the entire street and may be assessed, although the improvement is upon the other part of such street.⁵⁴ The statute or ordinance for assessing abutting property often describes such property as abutting on the improvement. Under such a statute or ordinance, only property which abuts upon that part of the street, sewer and the like which is being improved, and for the improvement of which the assessment is levied, can be assessed.⁵⁵ Under a statute providing that abutting property is to be assessed for a street improvement, part of a tract which abuts upon a bridge in a street, which bridge is not improved, cannot be assessed.⁵⁶ However, under such a statute it was held that where a street improvement consisted of grading and planking, property abutting on the street as improved by either of these means, might be assessed for the improvement, although some of the land assessed was a thousand feet beyond the termination of the planking.⁵⁷ In this case, it was suggested as possible that the cost of the grading at that end of the street might have been the most expensive part of the work and that the owner of such land might not therefore be paying more than a proportionate share of the cost of such

⁵¹ *City of Covington v. Matson*, (Ky.), 34 S. W. 897, 17 Ky. L. R. 1323 [1896]; *Hutchinson v. City of Omaha*, 52 Neb. 345, 72 N. W. 218 [1897]; *City of Reading v. O'Reilly*, 169 Pa. St. 366, 32 Atl. 420 [1895].

⁵² *Willard v. Albertson*, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403 [1899].

⁵³ *City of St. Louis v. Brinckwirth*, 204 Mo. 280, 102 S. W. 1091 [1907].

⁵⁴ *Kuhns v. City of Omaha*, 55 Neb. 183, 75 N. W. 562 [1898].

⁵⁵ *Cincinnati v. Batsche*, 52 O. S. 324, 27 L. R. A. 536, 40 N. E. 21 [1895]; *Smith v. City of Toledo*, 24 O. S. 126 [1873]; *Creighton v. Scott*,

14 O. S. 438 [1863]; *Northern Indiana Railroad Company v. Connelly*, 10 O. S. 160 [1859]; *Seoville v. City of Cleveland*, 1 O. S. 126 [1853]; (followed without opinion in *Clark v. City of Cleveland*, 1 O. S. 139 [1853]); *In the Matter of the Opening of Orkney Street*, Appeal of the City of Philadelphia, 194 Pa. St. 425, 46 L. R. A. 274, 45 Atl. 314 [1900]; *Fifty-fourth Street*, *Pittsburg's Appeal*, 165 Pa. St. 8, 30 Atl. 503 [1894]; *Wabash Avenue*, 26 Pa. Super. Ct. 305 [1904].

⁵⁶ *Town of Salem v. Henderson*, 13 Ind. App. 563, 41 N. E. 1062 [1895].

⁵⁷ *City of Seattle v. Kelleher*, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904].

improvement. Some statutes or ordinances provide for assessing property which abuts upon the line of the street improved. Under such provisions it is not necessary to assess merely the property abutting on that part of the street which is improved. Property abutting on the street beyond the part thereof which is improved, may be assessed.⁵⁸

§ 621. Adjoining property.

In the exercise of its discretion, the legislature or public corporation or officer to whom is given by statute the power to determine what property is benefited in laying out an assessment district may provide for levying an assessment upon "adjoining" property.¹ A district consisting of adjoining land is not looked upon as unduly restricted in boundary.² A statute authorizing an assessment "upon the property adjoining and to be specially benefited by the improvement" is held to amount to a legislative determination that the property adjoining is specially benefited, and not to mean that the adjoining property is to be assessed only if it is benefited.³ The term "adjoining" with reference to property means that such property is in immediate contact with the improvement and not separated therefrom by intervening property.⁴ The term "adjoining" is said to be the equivalent of "fronting."⁵ Accordingly, under a constitutional provision allowing an assessment to be made "upon the property fronting such

⁵⁸ McCormick v. City of Omaha, 37 Neb. 829, 56 N. W. 626 [1893]; Main Street, Big Run Borough, 137 Pa. St. 590, 20 Atl. 711 [1890].

¹ Johnson v. District of Columbia, 6 Mackey (D. C.) 21 [1887]; United States ex rel. Henderson v. Edmunds, 3 Mackey (D. C.) 142 [1884]; Casey v. City of Leavenworth, 17 Kan. 189 [1876]; Scott County v. Hinds, 50 Minn. 204, 52 N. W. 523 [1892]; Forry v. Ridge, 56 Mo. App. 615 [1893]; In the Matter of the Petition of Ward to Vacate Certain Assessments, 52 N. Y. 395 [1873]; City Council v. Pinekney, 1 Treadway (S. C.) 42 [1812]; Schintgen v. City of La Crosse, 117 Wis. 158, 94 N. W. 84 [1903]; Hennessy v. Douglas County, 99 Wis. 129, 74 N. W. 983 [1898]; Jenkins v. Board of Super-

visors of Rock County, 15 Wis. 11 [1862].

² Hennessy v. Douglas County, 99 Wis. 129, 74 N. W. 983 [1898].

³ United States ex rel. Henderson v. Edmunds, 3 Mackey (D. C.) 142 [1884].

⁴ Johnson v. District of Columbia, 6 Mackey (D. C.) 21 [1887]; In the Matter of the Petition of Ward to Vacate Certain Assessments, 52 N. Y. 395 [1873]. "The word adjoining in its etymological sense means touching or contiguous as distinguished from lying near or adjacent." Hennessy v. Douglas County, 99 Wis. 129, 137, 74 N. W. 983 [1898].

⁵ Scott County v. Hinds, 50 Minn. 204, 52 N. W. 523 [1892].

improvements," a statute providing for assessing "lots and parcels of land adjoining said sidewalks" has been upheld.⁶ The context may, however, show that the word "adjoining" has a meaning different from "fronting."⁷ Thus, under a statute providing that assessments for improvements of streets shall be levied upon "grounds fronting upon or adjoining the improvement," it has been held that the word "fronting" refers to the end of the lot used as the front which touches upon an improvement, while the term "adjoining" refers to a side street which touches the property assessed.⁸ Property separated from an improvement is ordinarily held not to be adjoining thereto.⁹ Thus, where a public square intervened between a lot and a street which was improved, it was held that while such lot might be adjacent to such street, it was not adjoining thereto.¹⁰ However, where a street ninety-five feet wide was paved in the middle for a width of twenty-five feet leaving room for travel on each side between the pavement and the curb stone, it was held that such improvement adjoined the lots which touched the street as laid out.¹¹ The tracks of a railroad company within a street and running along the length thereof do not adjoin such street within the meaning of a statute providing for assessing adjoining property.¹² Whether property adjoins a street, is to be determined by the use made thereof at the time of such improvement or assessment, as distinguished from the way in which such property is laid out by the lines of a plat, if such tract is in fact occupied and used.¹³ Thus, where two lots were occupied and used as one, it was held that the entire tract was adjoining to a street which touched one of such lots.¹⁴ On the other hand, if a lot has been divided in fact and is used as two distinct tracts, the one which is separated from the improvement by the other cannot be regarded as adjoining su b

⁶ Scott County v. Hinds, 50 Minn. 204, 52 N. W. 523 [1892].

⁷ Collier Estate v. Western Paving & Supply Company, 180 Mo. 362, 79 S. W. 947 [1904].

⁸ Collier Estate v. Western Paving & Supply Company, 180 Mo. 362, 79 S. W. 947 [1904]; Meier v. City of St. Louis, 180 Mo. 391, 79 S. W. 955 [1903].

⁹ In the Matter of the Petition of Ward to Vacate Certain Assessments, 52 N. Y. 395 [1873].

¹⁰ Johnson v. District of Columbia 6 Mackey (D. C.) 21 [1887].

¹¹ Bowditch v. City of New Haven 40 Conn. 503 [1873].

¹² O'Reilly v. City of Kingston 114 N. Y. 439, 21 N. E. 1004 [1889].
Brick & Terra Cotta Company v. Hull, 49 Mo. App. 433 [1892].

¹³ Romig v. Lafayette, 33 Ind. 30 [1870].

¹⁴ Wolfert v. City of St. Louis, 115 Mo. 139, 21 S. W. 912 [1892].

improvement.¹⁵ The expression "adjoining the locality to be affected" includes property adjoining the improvement or near thereto, which is affected physically or the value of which is affected commercially by the improvement.¹⁶

§ 622. Adjacent property.

The legislature, in the exercise of its discretion, or the public corporation or officer authorized by statute to determine what property is benefited by an improvement and to lay out an assessment district therefor, may provide for levying an assessment upon "adjacent" property.¹ Assessment districts of this sort are most frequently laid out in assessments for street improvements,² but may be laid out in assessments for a park,³ or a drain.⁴ The

¹⁵ Romig v. Lafayette, 33 Ind. 40 [1870].

¹⁶ Little Rock v. Katzenstein, 52 Ark. 107, 12 S. W. 198 [1889].

¹ Chambers v. Satterlee, 40 Cal. 497 [1871]; Burnett v. Mayor and Common Council of the City of Sacramento, 12 Cal. 76, 73 Am. Dec. 518 [1859]; Town of Woodruff Place v. Raschig, 147 Ind. 517, 46 N. E. 990 [1896]; Wormley v. Board of Supervisors of Wright County, Iowa, 108 Ia. 232, 78 N. W. 824 [1899]; Nevin v. Allen, (Ky.), 26 S. W. 180, 15 Ky. Law Rep. 836 [1894]; Municipality Number Two, Praying for the Opening of Benton Street v. White, 9 La. Ann. 446 [1854]; Walker v. City of Ann Arbor, 118 Mich. 251, 76 N. W. 394 [1898]; State of Minnesota ex rel. Merchant v. District Court for St. Louis County, 66 Minn. 161, 68 N. W. 860 [1896]; City of St. Louis v. Speck, 67 Mo. 403 [1878]; Mound City Construction Company v. Macgurn, 97 Mo. App. 403, 71 S. W. 460 [1902]; Kuhns v. City of Omaha, 55 Neb. 183, 75 N. W. 562 [1898]; McCormick v. City of Omaha, 37 Neb. 829, 56 N. W. 626 [1893]; Matter of the City of New York, 190 N. Y. 350, *sub nomine*; *In re* Water Front in City of New York, 83 N. E. 299 [1907]; (modifying judgment, 105 N. Y. S. 750,

120 App. Div. 849); Raymond v. Cleveland, 42 O. S. 522 [1885]; Meissner v. City of Toledo, 31 O. S. 387 [1877]; St. Benedict's Abbey v. Marion County, — Or. —, 93 Pac. 231 [1908]; Franklin v. Hancock, 204 Pa. St. 110, 53 Atl. 644 [1902]; State v. Moss, 44 Wash. 91, 86 Pac. 1129 [1906].

² Town of Woodruff Place v. Raschig, 147 Ind. 517, 46 N. E. 990 [1896]; Nevin v. Allen, (Ky.) 15 Ky. Law Rep. 836, 26 S. W. 180 [1894]; Municipality Number Two, Praying for the Opening of Benton Street v. White, 9 La. Ann. 446 [1854]; Walker v. City of Ann Arbor, 118 Mich. 251, 76 N. W. 394 [1898]; City of St. Louis v. Speck, 67 Mo. 403 [1878]; Mound City Construction Company v. Macgurn, 97 Mo. App. 403, 71 S. W. 460 [1902]; Kuhns v. City of Omaha, 55 Neb. 183, 75 N. W. 562 [1898]; Raymond v. Cleveland, 42 O. S. 522 [1885]; Meissner v. City of Toledo, 31 O. S. 387 [1877]; State v. Moss, 44 Wash. 91, 86 Pac. 1129 [1906].

³ State of Minnesota ex rel. Merchant v. District Court for St. Louis County, 66 Minn. 161, 68 N. W. 860 [1896].

⁴ Wormley v. Board of Supervisors of Wright County, Iowa, 108 Ia. 232, 78 N. W. 824 [1899].

term "adjacent" as ordinarily used means that the property is near the improvement so as to be affected thereby and so as to enjoy the use thereof, but not necessarily touching such improvement.⁵ Accordingly, it is possible that land which is separated from an improvement by intervening land may be adjacent.⁶ Thus, where an intervening strip of land two feet in width separated a tract of land from a street, such tract was nevertheless held to be adjacent to such street.⁷ The context of some statutes may make necessary a narrower meaning for the term "adjacent."⁸ Thus, under a statute requiring a petition for a ditch to be signed by "a majority of persons resident in the county owning land adjacent to such improvement," it was held that the term adjacent meant abutting on.⁹ The term "adjacent" is frequently found in combination with other terms which to a greater or less extent modify its primary meaning. Thus, a provision may be made that an assessment shall be levied on property "abutting on or adjacent" to,¹⁰ or lots and lands that are "contiguous and adjacent as well as those that abut,"¹¹ or "adjacent

⁵ *Town of Woodruff Place v. Raschig*, 147 Ind. 517, 46 N. E. 990 [1896]; *In the Matter of the Petition of Ward to Vacate Certain Assessments*, 52 N. Y. 395 [1873]. "The meaning of these words (i. e. contiguous and adjacent) especially 'adjacent' cannot be limited by any absolute or fixed measurement, but in each case must be determined by circumstances; yet for all practical purposes they may be said to embrace lots and lands 'near to' the improvement; and all such when specially benefited are liable to be charged with the costs and expense." *Meissner v. City of Toledo*, 31 O. S. 387, 395, 396 [1877]. "Not only the real estate abutting on the street but adjacent real estate may be included in such taxing district and so assessed for the contemplated work and improvement. 'Adjacent' signifies, in this connection, 'lying near, close to, or contiguous' but not actually 'touching.' The distinction between 'adjacent' and 'adjoining' seems to be

that the former implies that the two bodies are not widely separated though they may not actually touch, while 'adjoining' indicates that they are so joined or united that no third body intervenes." *Hennessy v. Douglas County*, 99 Wis. 129, 136, 137, 74 N. W. 983 [1898].

⁶ *Town of Woodruff Place v. Raschig*, 147 Ind. 517, 46 N. E. 990 [1896].

⁷ *Town of Woodruff Place v. Raschig*, 147 Ind. 517, 46 N. E. 990 [1896].

⁸ *Wormley v. Board of Supervisors of Wright County, Iowa*, 108 Ia. 232, 78 N. W. 824 [1899].

⁹ *Wormley v. Board of Supervisors of Wright County, Iowa*, 108 Ia. 232, 78 N. W. 824 [1899].

¹⁰ *Kuhns v. City of Omaha*, 55 Neb. 183, 75 N. W. 562 [1898]; *McCormick v. City of Omaha*, 37 Neb. 829, 56 N. W. 626 [1893].

¹¹ *Raymond v. Cleveland*, 42 O. S. 522 [1885]; *Meissner v. City of Toledo*, 31 O. S. 387 [1877].

to or fronting,"¹² or "immediately upon and adjacent to,"¹³ or "specially benefited and adjacent,"¹⁴ to the improvement for which the assessment is levied. A statute providing for assessing property "adjacent" to an improvement, means, with reference to the improvement of a street which has been improved in sections, adjacent to that part of the street upon which has been done work for which the assessment is levied.¹⁵ The legislature may, of course, authorize property adjacent to the street at any part of its length to be assessed for an improvement upon one section thereof.¹⁶ By statute, it may be provided that if an improvement is constructed upon one side of a street, the property adjacent to such side shall be assessed for the cost of such improvement.¹⁷ In the absence of such specific provision, however, property may be adjacent to an improvement, although the work is done on the side of the street not immediately next to such property.¹⁸

§ 623. Contiguous property.

The legislature or the public corporation or officer authorized to determine what property is benefited by an improvement and to lay out an assessment district, may provide that such assessment district shall consist of property "contiguous" to the improvement.¹ Such determination is ordinarily conclusive and cannot be invalidated by showing that property other than that which is contiguous is in fact benefited.² Furthermore, contiguous property is not as a matter of law, benefited. If property

¹² Municipality Number Two, Praying for the Opening of Benton Street v. White, 9 La. Ann. 446 [1854].

¹³ Town of Woodruff Place v. Raschier, 147 Ind. 517, 46 N. E. 990 [1896].

¹⁴ Chambers v. Satterlee, 40 Cal. 497 [1871]; St. Louis v. Speck, 67 Mo. 403 [1878]; Meissner v. City of Toledo, 31 O. S. 387 [1877].

¹⁵ Clapton v. Taylor, 49 Mo. App. 117 [1892].

¹⁶ Kuhns v. City of Omaha, 55 Neb. 183, 75 N. W. 562 [1898]; McCormick v. City of Omaha, 37 Neb. 829, 56 N. W. 626 [1893].

¹⁷ Marion Trust Co. v. City of Indianapolis, 37 Ind. App. 672, 706, 37 Ind. App. 706, 75 N. E. 834, 836 [1905].

¹⁸ Marion Trust Co. v. City of Indianapolis, 37 Ind. App. 672, 706, 75 N. E. 834, 836 [1905].

¹ Langlois v. Cameron, 201 Ill. 301, 66 N. E. 332 [1903]; West Chicago Park Commissioners v. Farber, 171 Ill. 146, 49 N. E. 427 [1898]; Davis v. City of Litchfield, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; Chicago, Burlington and Quincy Railroad Company v. City of Quincy, 136 Ill. 563, 29 Am. St. Rep. 334, 27 N. E. 192 [1892]; Lake v. City of Decatur, 91 Ill. 596 [1879]; Meissner v. City of Toledo, 31 O. S. 387 [1877]; Raymond v. Cleveland, 42 O. S. 522 [1885].

² Lake v. City of Decatur, 91 Ill. 596 [1879].

is omitted from assessments, the mere fact that it is contiguous does not show that it is benefited and therefore is improperly omitted.³ If by statute it is necessary at the time that the ordinance provided for an improvement is adopted to assess "contiguous property benefited" but before the assessment is made, the statute is amended by omitting the word "contiguous," it is proper to assess any property benefited though not contiguous.⁴ The term "contiguous" is generally used in statutes in its popular meaning, which is said to be "in actual or close contact," "touching" or "near."⁵ It seems to be regarded in some cases as equivalent to "abutting" or "bounding."⁶ In other cases the term "contiguous" has been regarded as equivalent to "near."⁷ Land separated from an improvement by an intervening strip of land over which the owner of the tract in question has no easement and which is not subject to a public easement is not contiguous thereto.⁸ If a lot as originally platted touched the line of a street but in its subsequent use it has been divided into two lots, one of which is separated from such street by the other, the tract thus separated from such street is not contiguous thereto.⁹ If the intervening strip of land is subject to a public easement, its existence does not prevent the property separated from the street thereby from being contiguous to a street.¹⁰ Thus, property separated from a street by a strip of ground used for a sidewalk is contiguous to the street.¹¹ Property lying at the end of a street which is to be improved may, if contiguous thereto, be assessed under a statute providing for the assessment of contiguous property.¹² Under the provision of the Illinois constitution authoriz-

³ *Holdom v. City of Chicago*, 169 Ill. 109, 48 N. E. 164 [1897]; *Chicago, Rock Island & Pacific Railway Company v. City of Chicago*, 139 Ill. 573, 28 N. E. 1108 [1893].

⁴ *In the Matter of Westlake Avenue*, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

⁵ *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890].

⁶ "The word 'contiguous' as used in the statute and foregoing ordinance means 'in actual or close contact,' 'touching,' 'adjacent' or 'near.'" *Langlois v. Cameron*, 201 Ill. 301, 306, 66 N. E. 332 [1903].

⁷ *Meissner v. City of Toledo*, 31 O. S. 387 [1877].

⁸ *Langlois v. Cameron*, 201 Ill. 301, 66 N. E. 332.

⁹ *Langlois v. Cameron*, 201 Ill. 301, 66 N. E. 332 [1903].

¹⁰ *Chicago, Burlington & Quincy Railroad Company v. City of Quincy*, 136 Ill. 563, 29 Am. St. Rep. 334, 27 N. E. 192 [1892].

¹¹ *Chicago, Burlington & Quincy Railroad Company v. City of Quincy*, 136 Ill. 563, 29 Am. St. Rep. 334, 27 N. E. 192 [1892].

¹² *Brooks v. City of Chicago*, 168 Ill. 60, 48 N. E. 136 [1897].

ing public improvements to be made by general taxation, special assessment or special taxation of contiguous property, the term "contiguous property" refers only to special taxation.¹³ Accordingly, a special assessment based on the theory of benefits may be levied on property benefited whether contiguous or not.¹⁴ On the other hand, in the exercise of the city's discretion a special assessment may be levied upon contiguous property only.¹⁵ The fact that an ordinance confines an assessment to abutting or contiguous property is not conclusive that the charge is a special tax. It may also be a special assessment.¹⁶ A right of way of a railroad which touches an improvement may be regarded as contiguous thereto.¹⁷ A railroad situated in a street and running along the length thereof has been held to be contiguous to such street, within the meaning of constitutional and statutory provisions authorizing assessment or special taxation of contiguous property.¹⁸ A different result may be reached if other terms are combined in the term statute or ordinance with the word "contiguous." Thus, a statute authorizing assessments or special taxes upon "contiguous property abutting" upon the street or avenue improved, does not authorize an assessment upon the right of way of a railway company in a street on the theory that a street or avenue cannot be said to abut on itself and accordingly an incorporeal right in such street cannot be said to abut.¹⁹ While contiguous it does not front on the improvement, and cannot be assess-

¹³ *Guild, Jr. v. City of Chicago*, 82 Ill. 472 [1876].

¹⁴ *Farr v. West Chicago Park Commissioners*, 167 Ill. 355, 46 N. E. 893 [1897]; *Guild, Jr. v. City of Chicago*, 82 Ill. 472 [1876].

¹⁵ *Lake v. City of Decatur*, 91 Ill. 596 [1879].

¹⁶ *Bass v. South Park Commissioners*, 171 Ill. 370, 49 N. E. 549 [1898].

¹⁷ *Palmer v. City of Danville*, 166 Ill. 42, 46 N. E. 629 [1897]; *Chicago & Northwestern Railway Company v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437 [1897]; *Illinois Central Railroad Company v. City of Fankakee*, 164 Ill. 608, 45 N. E. 971 [1897]; *Indianapolis, Peru & Chicago Railroad Company v. Ross*, 47 Ind. 25 [1874].

¹⁸ *Chicago, Rock Island & Pacific Railway Company v. City of Moline*, 158 Ill. 64, 41 N. E. 877 [1895]; *Freeport Street Railway Company v. City of Freeport*, 151 Ill. 451, 38 N. E. 137 [1894]; *Kuehner v. City of Freeport*, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372 [1893]; *The Jacksonville Railway Company v. City of Jacksonville*, 114 Ill. 562, 2 N. E. 478 [1886].

¹⁹ *South Park Commissioners v. The Chicago, Burlington & Quincy Railroad Company*, 107 Ill. 105 [1883]. (The result reached in this case depends primarily upon the use and meaning of the word "abut" and not upon the meaning of the word "contiguous.")

ed according to its frontage.²⁰ A public street or alley is not property contiguous to an improvement.²¹ It seems to be held that where several streets are improved together, property contiguous to any one of them may be regarded as contiguous to the entire improvement.²²

§ 624. Property fronting on improvement.

In the exercise of its discretion, the legislature, or the public corporation or official authorized to determine what property is benefited and to lay out an assessment district, may provide for assessing the property "fronting" upon an improvement.¹ Such a determination is not an undue restriction of the assessment district, even though it excludes some property which is in fact benefited.² This is true, even if the council in its resolution of intention, declares that the contemplated work is of more than ordinary or local public benefit and the statute under which such an assessment is levied provides that if the contemplated work is of more than ordinary or public local benefit, the council may make the expense of such improvement chargeable upon the dis-

²⁰ *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69.

²¹ *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69.

²² *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624.

¹ *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020 [1904]; *San Diego Investment Co. v. Shaw*, 129 Cal. 273, 61 Pac. 1082 [1900]; *White v. Harris*, 103 Cal. 528, 37 Pac. 502 [1894]; *Dougherty v. Miller*, 36 Cal. 83 [1868]; *Emery v. San Francisco Gas Co.*, 28 Cal. 346 [1865]; *Parker v. Challis*, 9 Kan. 155 [1872]; *Barber Asphalt Paving Co. v. Watt*, 51 La. Ann. 1345, 26 So. 70 [1899]; *Surgi v. Snetchman*, 11 La. Ann. 387 [1856]; *Municipality Number Two, Praying for the Opening of Benton Street v. White*, 9 La. Ann. 446 [1854]; *Weller v. City of St. Paul*, 5 Minn. 95 [1861]; *State ex rel. Barber Asphalt Paving Company v. City of St. Louis*, 183 Mo. 230, 81 S. W. 1104 [1904]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *Collier Estate v. West-*

ern Paving & Supply Company, 180 Mo. 362, 79 S. W. 947 [1904]; *City of Sedalia v. Coleman*, 82 Mo. App. 560 [1899]; *Erismann v. Board of Chosen Freeholders of the County of Burlington*, 64 N. J. L. (35 Vr.) 516, 45 Atl. 998 [1900]; *State, Society for Establishing Useful Manufactures, Pros. v. Mayor and Aldermen of the City of Paterson*, 42 N. J. L. (13 Vr.) 615 [1880]; *State, Gobisch, Pros. v. Inhabitants of the Township of North Bergen in the County of Hudson*, 37 N. J. L. (8 Vr.) 402 [1875]; *State, Graham, Pros. v. Mayor, etc., of Paterson*, 37 N. J. L. (8 Vr.) 380 [1875]; *Franklin v. Hancock*, 204 Pa. St. 110, 53 Atl. 644 [1902]; *Violett v. Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896]; *Meggett v. City of Eau Claire*, 81 Wis. 326, 51 N. W. 566 [1892].

² *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020 [1904]; *State, Society for Establishing Useful Manufactures, Pros. v. Mayor and Aldermen of the City of Paterson*, 42 N. J. L. (13 Vr.) 615 [1880].

trict which the council shall decide to be benefited.³ Under a statute authorizing an assessment to be levied upon property fronting an improvement, property not fronting upon the improvement cannot be assessed even if benefited.⁴ If the statute authorizes the grading of a street at the expense of the property fronting thereon and the construction of sewers at the expense of the property immediately benefited thereby, the assessment for grading is limited to the property fronting on such improvement.⁵ The action of the council in determining that property fronting upon the improvement is benefited is conclusive.⁶ Under a statute authorizing assessments for street improvements upon property fronting on the street, property at the end of the street and at right angles thereto is not regarded as fronting on the street, within the meaning of such provision.⁷ However, such property may be included under a statute which specifically provides that where one street terminates in another, a certain part of the cost may be assessed upon lots fronting upon such termination.⁸ A statute providing for the assessment of lots fronting on a given street does not authorize the apportionment upon each lot of the expense of that part of the work done immediately in front thereof.⁹ Under a statute providing for assessing property fronting on an improvement, ordinarily only property which fronts upon that part of the street or other public improvement for the cost of which the assessment in question is levied can be assessed.¹⁰ Accordingly, where an improvement is to be constructed, except where the work is already done, property fronting upon accepted work already done cannot be assessed.¹¹ Property fronting on one side of a street is to be assessed even if the greater part of the work is done upon the other side of the street.¹² Under a

³ *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020 [1904].

⁴ *Miller v. Mayo*, 88 Cal. 568, 26 Pac. 364 [1891]; *Harriman v. City of Yonkers*, 95 N. Y. S. 816, 109 App. Div. 246 [1905]; *Ryan v. Sumner*, 17 Wash. 228, 49 Pac. 487 [1897].

⁵ *People v. Common Council of the City of Kingston*, 99 N. Y. S. 657, 114 App. Div. 326 [1906].

⁶ *Meggett v. City of Eau Claire*, 81 Wis. 326, 51 N. W. 566 [1892].

⁷ *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1905].

⁸ *Beckett v. Morse*, 4 Cal. App. 228, 87 Pac. 408 [1906]; *San Francisco Paving Co. v. Dubois*, 2 Cal. App. 42, 83 Pac. 72 [1905].

⁹ *Weller v. City of St. Paul*, 5 Minn. 95 [1861].

¹⁰ *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71 [1893]; *Ryan v. Sumner*, 17 Wash. 228, 49 Pac. 487 [1897].

¹¹ *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71 [1893].

¹² *San Diego Investment Company v. Shaw*, 129 Cal. 273, 61 Pac. 1082 [1900].

statute which shows such specific intention, an assessment may be levied upon property fronting upon a street for an improvement at some distance from the property assessed.¹³ Thus, under a statute providing therefor, property fronting on a street may be assessed for the cost of one-half of the street intersections at each end of the block in which such property is situated.¹⁴ The term "fronting" ordinarily means that the improvement at some point touches the property assessed.¹⁵ A lot situated at the corner of two streets crossing each other at an oblique angle, which lot is triangular in shape and is situated almost entirely outside of a line drawn at right angles to the part of the street improved has been held to front on such improvement where one side of the lot touches the street improved.¹⁶ "Fronting" is said in some jurisdictions to be equivalent to "adjoining."¹⁷ Hence, under a constitutional provision authorizing the assessment of property fronting upon an improvement, the legislature may provide for the assessment of property adjoining an improvement.¹⁸ In other jurisdictions, while it is conceded that the word "front" often is synonymous with "adjoin," the context is held however, to show a different intention.¹⁹ Thus, a provision for assessing land fronting upon or adjoining an improvement has been construed to mean by "fronting" the land which faces the street improved at the end of the lot used as a "front," and by the word "adjoin" the land which touches an improved street upon the side of the lot.²⁰ A somewhat similar result has been reached in Ohio under provisions for assessing abutting property according to the

¹³ *City of Sedalia v. Coleman*, 82 Mo. App. 560 [1899].

¹⁴ *City of Sedalia v. Coleman*, 82 Mo. App. 560 [1899].

¹⁵ *Erisman v. Board of Chosen Freeholders of the County of Burlington*, 64 N. J. L. (35 Vr.) 516, 45 Atl. 998 [1900].

¹⁶ *Felt v. City of Ballard*, 38 Wash. 300, 80 Pac. 532 [1905].

¹⁷ *Scott County v. Hinds*, 50 Minn. 204, 52 N. W. 523 [1892].

¹⁸ *State of Minnesota ex rel. City of Duluth v. District Court of St. Louis County*, 61 Minn. 542, 64 N. W. 190 [1895]; *Scott County v. Hinds*, 50 Minn. 204, 52 N. W. 523 [1892].

¹⁹ "There is no doubt that the word 'front' may in some circumstances be interpreted to mean and include the word 'adjoin.'" *Collier Estate v. Western Paving & Supply Company*, 180 Mo. 362, 377, 79 S. W. 947 [1904].

²⁰ *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]. "In our opinion the words 'fronting on the side to be improved' taken in their natural and ordinary sense do not mean adjoining such street on the side, but the side on which the buildings front." *Collier Estate v. Western Paving & Supply Company*, 180 Mo. 362, 382, 383, 79 S. W. 947 [1904].

front foot.²¹ The term "fronting" implies that the land in question touches the improvement. Accordingly, the existence of a strip of land between certain property and the improvement prevents such property from fronting upon the improvement.²² A lot which is separated from a highway by a railroad which runs parallel to the highway does not front thereon.²³ The condition of the property at the time the improvement was begun determines whether the property fronts on the improvement or not.²⁴ Accordingly, if after the assessment ordinance has been passed and the work commenced, the owner of a tract of land conveys away a narrow strip fronting upon the street, such conveyance does not relieve the entire tract from assessment.²⁵ So, after jurisdiction to assess has once attached, the division of a lot which originally fronted upon the improvement does not relieve from assessment that part of the lot, which no longer touches the improvement.²⁶ If a lot is actually used and occupied, the actual method of use and not the platted lines control in determining whether such lot fronts an improvement or not.²⁷ So, if a lot has been in fact divided, though the division has not been platted, the part of such lot which is separated from a street by the rest thereof cannot be said to front on said street.²⁸ However, under a statute providing that in case of platted lots, the assessment can cover only "the depths of such lots," the fact that a lot in the rear of one which fronts a street is in fact used in connection with such lot fronting of the street, as an entire tract does not cause such entire tract to front upon the street within the meaning of the statute.²⁹ Ordinarily, a street cannot be said to front upon a cross street. However, where lots fronting on a short cross street were properly assessed for a part of the improvement of the main intersecting street, it was held that the fact that on the diagram,

²¹ See § 620; § 625; § 704.

²² *City of New Albany v. Cook*, 29 Ind. 220 [1867]; *Crane v. French*, 59 Mo. App. 367 [1892]; *Damkoehler v. City of Milwaukee*, 124 Wis. 144, 101 N. W. 706 [1905].

²³ *City of Philadelphia v. Eastwick*, 35 Pa. St. 75 [1860].

²⁴ *Dougherty v. Miller*, 36 Cal. 83 [1868]; *State, Gobish, Pros. v. Inhabitants of the Township of North Bergen in the County of Hudson*, 37 N. J. L. (8 Vr.) 402 [1875].

²⁵ *State, Gobish, Pros. v. Inhabitants of the Township of North Bergen in the County of Hudson*, 37 N. J. L. (8 Vr.) 402 [1875].

²⁶ *Dougherty v. Miller*, 36 Cal. 83 [1868].

²⁷ *City of New Albany v. Cook*, 29 Ind. 220 [1867].

²⁸ *City of New Albany v. Cook*, 29 Ind. 220 [1867].

²⁹ *State ex rel. Barber Asphalt Paving Company v. City of St. Louis*, 183 Mo. 230, 81 S. W. 1104 [1904].

such cross street was also referred to as a lot fronting on the main intersecting street, did not invalidate the assessment.³⁰ By statute, it may be provided that an assessment for a street improvement may be levied upon land fronting on cross streets or streets forming a junction with the improvement for which the assessment is levied.³¹ Under such a statute, an improvement was ordered to be made on a given street from a specified street to another specified street. It was held that land fronting on the latter street could not be assessed.³²

§ 625. Effect of assessment according to frontage.

Provisions are frequently found for assessing property in proportion to its frontage. Such provisions ordinarily restrict the assessment district to property abutting upon such improvement and bounded by the lines thereof.¹ Property separated from the improvement by other property is not subject to assessment under such provisions.² Under a provision for assessing property according to frontage, any abutting property may be subject to assessment.³ A provision for assessing abutting property in proportion to its frontage or in proportion to the number of front feet of such property is held in some jurisdictions to apply to a street improvement which adjoins such property upon the side thereof.⁴ In Ohio, under such provisions a different result has been reached. It has been held that if a lot abuts an improvement upon the side of such lot, but fronts upon another street, such lot may be assessed for the improvement of the street upon its side; but that for purposes of determining the amount of frontage, such lot should be regarded as fronting breadthwise upon the improvement and should be assessed for the number of feet it would have if it so fronted.⁵ Accordingly, a triangular corner

³⁰ *Dyer v. Martinovich*, 63 Cal. 353 [1883].

³¹ *Schumaeker v. Toberman*, 56 Cal. 508 [1880].

³² *Schumaeker v. Toberman*, 56 Cal. 508 [1880].

¹ *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889]; *Barber Asphalt Paving Company v. Kiene*, 99 Mo. App. 528, 74 S. W. 872 [1903].

² *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889].

³ *Inhabitants of Leominster v. Conant*, 139 Mass. 384, 2 N. E. 690 [1885].

⁴ *Moherly v. Hogan*, 131 Mo. 19, 32 S. W. 1014 [1895].

⁵ The leading case on this point is *Haviland v. City of Columbus*, 50 O. S. 471, 34 N. E. 679 [1893]. The same view has been taken in a number of other cases: *City of Toledo v. Sheill*, 53 O. S. 447, 30 L. R. A. 598, 42 N. E. 323 [1895]; *Sandroek v. Columbus*, 51 Ohio St. 317, 42 N.

lot should be assumed as having an assessable frontage not exceeding the length of its base or rear line on its greatest frontage along its breadth.⁶ If a corner lot abuts upon one street a distance materially greater than the distance which it abuts on the other, the presumption is that it fronts upon the street upon which its abutting distance is least.⁷ However, a finding of fact that a lot fronts thirty feet on one street and lies lengthwise one hundred and forty feet upon another street, is not sufficient as a finding of fact that it does not front upon the latter street.⁸ The actual use which is made of a lot prevails over the platted lines in determining what its front is.⁹ What is the front of a lot is a question of fact to be determined by the way in which it is laid out or the way in which it is used and occupied.¹⁰ If a fence runs along the side of a lot without any opening therein, it is quite clear that the side is not used as a front.¹¹ Even if there are entrances on the side for giving access to a barn or some such purpose, such entrances do not show that the side is used as a front.¹² If a

E. 255 [1894]; McMaken v. Hayes, 29 Ohio C. C. 535 [1907]; Metcalf v. Carter, 19 Ohio C. C. 196 [1900]; Wolfe v. Village of Avondale, 14 Ohio C. C. 375 [1897]; Calkins v. City of Toledo, 12 Ohio C. C. 202. [1896]; Manns v. City of Cincinnati, 10 Ohio C. C. 549 [1895]; Baker v. Schott, 10 Ohio C. C. 81 [1894]; Rooney v. City of Toledo, 9 Ohio C. C. 267 [1894]; Gibson v. City of Cincinnati, 9 Ohio C. C. 243 [1894].

⁶ Tompkins v. Village of Norwood, 18 Ohio C. C. 883 [1897].

⁷ City of Toledo v. Sheill, 53 O. S. 447, 30 L. R. A. 598, 42 N. E. 323 [1895].

⁸ Findlay v. Frey, 51 O. S. 390, 38 N. E. 114 [1894].

⁹ City of Toledo v. Sheill, 53 O. S. 447, 30 L. R. A. 598, 42 N. E. 323 [1895]; Betz v. City of Canton, 18 Ohio C. C. 676 [1893]. "A lot may be built upon, used, and occupied with reference to a street on which it lies lengthwise, and in such case, for the payment of an improvement on the street, should be assessed for its full length, where the mode of apportionment adopted is by the

front foot. Where it does not front, but lies lengthwise, upon the improvement, its real front must be taken as the length of the frontage thereon, as to exonerate it entirely would be to carry a principle beyond the limits of reason, for every lot abutting on a street improvement must, as a general rule, be benefited to some extent by it, and should, therefore, upon the principle of equality, be made to contribute proportionately to the cost of the work." Haviland v. City of Columbus, 50 Ohio St. 471, 474, 34 N. E. Rep. 679 [1893].

¹⁰ Betz v. City of Canton, 18 Ohio C. C. 676 [1893]; Schmidt v. City of Cincinnati, 1 Ohio N. P. 48 [1894].

¹¹ Barney v. City of Dayton, 8 Ohio C. C. 480 [1894].

¹² *Side entrance to barn*: Daiber v. Toledo, 7 Ohio N. P. 389 [1900]. *Side entrance for driveway*: Manns v. City of Cincinnati, 10 Ohio C. C. 549 [1895]. *Side entrance to yard and kitchen*: Wehage v. City of Cincinnati, 1 Ohio N. P. 82 [1894]. *Anarently contra*: Shattuck v. City of Cincinnati, 1 Ohio N. P. 394 [1895],

building be constructed which in appearance fronts on the street which touches the lot on width thereof, the fact that such building has a side entrance which is often used by the occupants thereof, does not constitute the length of such lot an additional front.¹³ The use of the property at the time at which the improvement is made determines what its front is.¹⁴ Accordingly, if after the making of such improvement a building has been built on the rear of a corner lot fronting on the side, the construction of the building does not give the city a right to assess such additional frontage.¹⁵ If several platted lots, one of which is a corner lot, are owned by one person, the corner lot should be assessed for the number of feet of its platted frontage, unless the property as a whole has been so improved as to make it front in fact upon the side street.¹⁶ On the other hand, if one lot has been divided into two by a line running lengthwise, the corner lot can be assessed only to a depth equal to its frontage as actually used.¹⁷ The mere fact that the owner of a corner lot has signed a petition for the improvement of the street upon the side of his lot, does not estop him from claiming that only the number of feet of the breadth of his lot is to be assessed for such improvement.¹⁸

§ 626. Bordering, bounding and binding property, and property in neighborhood of improvement.

It is sometimes provided that an assessment shall be levied upon property "bordering" upon the improvement.¹ The term "bor-

where gates in the fence along the length of the lot and substantial pathways from such fences to the building were held to constitute such side an additional front.

¹³ *City of Toledo v. Sheill*, 53 O. S. 447, 30 L. R. A. 598, 42 N. E. 323 [1895].

¹⁴ *Sandroek v. Columbus*, 51 O. S. 317, 42 N. E. 255 [1894] (reversing *Sandroek v. City of Columbus*, 8 Ohio C. C. 79 [1894]); *Metcalf v. Carter*, 19 Ohio C. C. 196 [1900]; *Burggreve v. City of Cincinnati*, 1 Ohio N. P. 80 [1894].

¹⁵ *Sandroek v. Columbus*, 51 Ohio St. 317, 42 N. E. 255 [1894]; (reversing *Sandroek v. City of Columbus*, 8 Ohio C. C. 79 [1894]).

¹⁶ *Wolfe v. Village of Avondale*, 14 Ohio C. C. 375 [1897].

¹⁷ *Bentley v. Toledo*, 7 Ohio N. P. 388 [1900]. (The original frontage was sixty-seven feet; the frontage of each lot as used was thirty-three and one-half feet for which the depth could be assessed.)

¹⁸ *Baker v. Schott*, 10 Ohio C. C. 81 [1894]; *Rooney v. City of Toledo*, 9 Ohio C. C. 267 [1894]; *Gibson v. City of Cincinnati*, 9 Ohio C. C. 243 [1894]. For a case in which estoppel exists see *Baker v. Schott*, 10 Ohio C. C. 81 [1894].

¹ *Voris v. Pittsburg Plate Glass Company*, 163 Ind. 599, 70 N. E. 249 [1904]; *Klein v. Nacent Gravel Co.*, 162 Ind. 509, 70 N. E. 801 [1903];

dering'' implies that the property must at some point touch the improvement.² Land which touches an improved street upon the section thereof which is improved, borders on the improvement, even if the improvement is situated entirely on one side of the middle line of such street.³ The right of way of a railway which lies within a street and which extends along the length thereof, does not border upon such street within the meaning of these statutes and cannot be assessed under such statutes for the improvement thereof.⁴ In Maryland it is frequently provided by statute that property ''binding'' upon the street improved is to be assessed for the cost thereof.⁵ The exact meaning of ''binding'' has been discussed but little; but it is ordinarily regarded as equivalent to ''fronting.''''⁶ An assessment district may consist of land ''bounding'' on the improvement.⁷ ''Bounding'' as used in this sense is synonymous with ''abutting'' and is frequently used in connection with that term in the statutes.⁸ Under such a statute an ordinance which provides for assessing lots and parcels of land ''benefited'' by the improvement is invalid, since it provides for assessing land other than that bounding on

(reversing *Klein v. Nugent Gravel Co.*, — Ind. App. —, 66 N. E. 486 [1903]); *Helm v. Witz*, 35 Ind. App. 131, 73 N. E. 846 [1904]; *City of Terre Haute v. Mack*, 139 Ind. 99, 38 N. E. 468 [1894]; *City of New Albany v. Conger*, 18 Ind. App. 230, 47 N. E. 852 [1897]; *Anderson v. Cortelyou*, — N. J. —, 68 Atl. 118 [1907]; (reversing *Cortelyou v. Anderson*, 73 N. J. L. (44 Vr.) 427, 63 Atl. 1095 [1906]).

² *Erisman v. Board of Chosen Freeholders of the County of Burlington*, 64 N. J. L. (35 Vr.) 516, 45 Atl. 998 [1900].

³ *Klein v. Nugent Gravel Company*, 162 Ind. 509, 70 N. E. 801 [1903]; (reversing *Klein v. Nugent Gravel Co.*, — Ind. App. —, 66 N. E. 486 [1903]).

⁴ *Indianapolis and Vincennes Railway Company v. Capitol Paving and Construction Company*, 24 Ind. App. 114, 54 N. E. 1076 [1899]; *O'Reilly v. City of Kingston*, 114 N. Y. 439, 21 N. E. 1004 [1889].

⁵ *Mayor and City Council of Baltimore v. Ulman*, 79 Md. 469, 30 Atl. 43 [1894]; *Ulman v. Mayor and City Council of Baltimore*, 72 Md. 587, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709, 32 Am. & Eng. Corp. Cas. 228 [1890]; *Alberger v. Mayor and City Council of Baltimore*, 64 Md. 1, 20 Atl. 988 [1885]; *Moale v. Mayor and City Council of Baltimore*, 61 Md. 224 [1883]; *Mayor, Recorder and Aldermen of the City of Annapolis v. Harwood and Wife*, 32 Md. 471, 3 Am. Rep. 151 [1870].

⁶ *Moale v. Mayor and City Council of Baltimore*, 61 Md. 224 [1883]; *Mayor and City Council of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1.

⁷ *Smith v. City of Des Moines*, 106 Ia. 590, 76 N. W. 836 [1898]; *Kelly v. City of Cleveland*, 34 O. S. 468 [1878].

⁸ *City of Cincinnati v. Batsche*, 52 O. S. 324, 27 L. R. A. 536, 40 N. E. 21 [1895]. ''Bound'' is synonymous with ''limit'' or ''border.'''' *Barney v. City of Dayton*, 8 Ohio C. C. 480, 481 [1894].

the street.⁹ Under a statute providing that the assessment shall be a lien on the lots or lands bounding or abutting on the street improved, it has been held that the platted boundaries control.¹⁰ Accordingly, if two or more lots which are platted so that only one of them touches the improvement, are used together as a single tract, it has been held that only that lot bounds on the street which is so platted as to touch such improvement.¹¹ Under a statute which provides for assessing the property "abounding" on the improvement, it has been held that this term was erroneously used for the term "bounding."¹²

The legislature, or the public corporation, or officer authorized to determine the property benefited and to lay out the assessment district may provide that property "in the vicinity" or "in the neighborhood" of the improvement should be assessed.¹³ Under such statute, land may be assessed which does not front on a proposed street, or touch it at any point.¹⁴ The term "vicinity" does not denote any particular or definite distance from the improvement.¹⁵ Whether property is in the vicinity of the improvement or not is a question of fact.¹⁶ Thus, where property was situated more than three thousand feet from a proposed street improvement, it was held that the question whether such property was in the vicinity of such improvement should be submitted to the jury.¹⁷ Other provisions of the assessment statute may, however, operate to give a different meaning to the terms "neighborhood" or "vicinity" from those which they pri-

⁹ Kelly v. City of Cleveland, 34 O. S. 468 [1878].

¹⁰ Smith v. City of Des Moines, 106 Ia. 590, 76 N. W. 836 [1898].

¹¹ Smith v. City of Des Moines, 106 Ia. 590, 76 N. W. 836 [1898].

¹² Barney v. City of Dayton, 8 Ohio C. C. 480 [1894].

¹³ Board of Improvement District No. 5 of Texarkana v. Offenhauser, 84 Ark. 257, 105 S. W. 265 [1907]; Goodrich v. City of Detroit, 123 Mich. 559, 82 N. W. 255 [1900]; Extension of Hancock Street, 18 Pa. St. (6 Harr.) 26 [1851]; *In re Howard Avenue, North*, in City of Seattle, 44 Wash. 62, 83 Pac. 1117 [1906].

¹⁴ Goodrich v. City of Detroit, 123 Mich. 559, 82 N. W. 255 [1900].

[This holding was made in a proceeding to open a street. The statute provided that in case of grading or paving a street the lands fronting on the portion thereof so improved should constitute an assessment district. Such restriction did not, however, apply to proceedings to open streets.]

¹⁵ Mock v. City of Muncie, 9 Ind. App. 536, 37 N. E. 281 [1893]; Extension of Hancock Street, 18 Pa. St. (6 Harr.) 26 [1851].

¹⁶ Mock v. City of Muncie, 9 Ind. App. 536, 37 N. E. 281 [1893]; Extension of Hancock Street, 18 Pa. St. (6 Harr.) 26 [1851].

¹⁷ Mock v. City of Muncie, 9 Ind. App. 536, 37 N. E. 281 [1893].

marily bear.¹⁸ Under statutes providing for assessing property in the neighborhood or vicinity of the improvement but containing other provisions for levying the assessment against the owners of land along the line of such streets, it is held that only property abutting on the street can be assessed.¹⁹ This result has been reached even where another provision of the assessment statute has provided for visiting and inspecting the properties in the "neighborhood" supposed to be damaged or benefited by the improvement.²⁰ By statute it may be provided that land "near" the improvement may be assessed therefor.²¹ By statute or by constitutional provisions, it is sometimes provided that property adjoining the locality to be affected may be assessed.²² Under such constitutional provision the decision of the city council as to what property adjoins the locality to be affected is said to be final, except in case of fraud or demonstrable mistake, where the statute authorizes the council to define the boundaries of the assessment district.²³

§ 627. Other methods of describing property.

Under some statutes it is provided that land along an improvement is to be assessed. Such provisions are followed, if not coupled with an improper rule as to the apportionment of benefits.¹ Such a statute is in effect an adjudication that the property along the improvement is benefited thereby.² Under some statutes it is provided that land in front of which the improvement is constructed is to be assessed.³ By statute, it may be provided that land through

¹⁸ Chestnut Avenue, 68 Pa. St. (18 P. F. Smith) 81 [1871].

¹⁹ Fifty-fourth Street, Pittsburg's Appeal, 165 Pa. St. 8, 30 Atl. 503 [1894]; Morewood Avenue, Chamber's Appeal, 159 Pa. St. 20, 28 Atl. 123 [1893]; Chestnut Avenue, 68 Pa. St. (18 P. F. Smith) 81 [1871].

²⁰ Morewood Avenue, Chamber's Appeal, 159 Pa. St. 20, 28 Atl. 123 [1893].

²¹ Scoville v. City of Cleveland, 1 O. S. 126 [1853]; (followed without opinion in Clark v. City of Cleveland, 1 O. S. 139).

²² Little Rock v. Katzenstein, 52 Ark. 107, 12 S. W. 198 [1889].

²³ Little Rock v. Katzenstein, 52 Ark. 107, 12 S. W. 198 [1889].

¹ City of Kansas City v. Gibson, 66 Kan. 501, 72 Pac. 222 [1903]; Dexter v. City of Boston, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379 [1900]; City of Scranton v. Levers, 200 Pa. St. 56, 49 Atl. 980 [1901].

² City of Kansas City v. Gibson, 66 Kan. 501, 72 Pac. 222 [1903].

³ City of Napa v. Easterby, 61 Cal. 509 [1882]; City of New Orleans v. Elliott, 10 La. Ann. 59 [1855]; O'Leary v. Sloo, 7 La. Ann. 25 [1852]. In the Matter of the Application of the Board of Street Opening and Improvement of the City of New York to Acquire Title to Forest Avenue, 64 Hun. (N. Y.) 59, 18 N. Y. Supp. 727 [1892].

which an improvement passes is to be assessed therefor.⁴ Under such statute a tract of land was separated from a street by a narrow strip a few inches in width. It was held that the action of the lower court in excepting such property from assessment was not reviewable.⁵ Assessments are sometimes found in which the property assessed is described as on the line of the improvement.⁶ Such a method of describing an assessment district seems to be regarded as proper. Such statute is a valid exercise of the power of assessment and amounts to an adjudication that real property on the line of the improvement is benefited thereby.⁷ A statute requiring an assessment to be made against the owners of land on the line of the street, does not restrict such assessment district to land touching the part of the street for the improvement of which the assessment is levied.⁸ While a statute providing for assessing property on the line of the street opposite the improvement has been held to be invalid, it was not from any consideration of the propriety of the assessment district, but because the statute did not in any way restrict the amount of the assessment to the benefits conferred.⁹ The term "on the line of the improvement" is substantially synonymous with abutting.¹⁰ Property not on the line of the improvement cannot be assessed under such statute.¹¹ Under some statutes it is provided that the assessment district shall consist of the lots and lands upon the street to be improved.¹² Under such statute only the lots bounded by the lines of the street to be improved can be assessed.¹³ Lots

⁴ *In re Opening of Park Avenue*, Huidekoper's Appeal, 83 Pa. St. (2 Norris) 167 [1876].

⁵ *In re Opening of Park Avenue*, Huidekoper's Appeal, 83 Pa. St. (2 Norris) 167 [1876].

⁶ *Smith v. Mayor and Aldermen of Worcester*, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40 [1902]; *Butler v. City of Worcester*, 112 Mass. 541 [1873]; *Chestnut Avenue*, 68 Pa. St. (18 P. F. Smith) 81 [1871].

⁷ *Smith v. Mayor and Aldermen of Worcester*, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40 [1902].

⁸ *Chestnut Avenue*, 68 Pa. St. (18 P. F. Smith) 81 [1871].

⁹ *Bogert v. City of Elizabeth*, 27 N. J. Eq. (12 C. E. Green) 568

[1876]; (reversing *Bogert v. City of Elizabeth*, 25 N. J. Eq. (10 C. E. Green) 426 [1874]).

¹⁰ *In re Grafius Run*, 218 Pa. St. 632, 67 Atl. 982 [1907]; *Fifty-fourth Street*, Pittsburg's Appeal, 165 Pa. St. 8, 30 Atl. 503 [1894].

¹¹ *Fifty-fourth Street*, Pittsburg's Appeal, 165 Pa. St. 8, 30 Atl. 503 [1894]; *Morewood Avenue*, Chamber's Appeal, 159 Pa. St. 20, 28 Atl. 123 [1893].

¹² *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889]; *City of Schenectady v. Trustees of Union College*, 144 N. Y. 241, 26 L. P. A. 614, 39 N. E. 67 [1894].

¹³ *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889].

back of the lots abutting upon the street cannot be assessed under such statute, even if benefited by the improvement.¹⁴ Under a statute providing for assessing the lots and buildings lying upon a street in which the public had an easement, the ultimate fee being in the original owner could not be assessed.¹⁵ This decision, however, turns upon the proposition that such land is not a "lot," rather than upon the construction of the term "lying upon."

§ 628. Assessment district consisting of blocks or parts of blocks.

Under some statutes it is provided that the assessment district shall consist of the squares or parts thereof which adjoin the improvement.¹ This has been held a proper method of laying off assessment districts, both in assessments for streets,² and in assessments for wells and cisterns.³ Statutes in Kentucky provide that streets shall be improved at the cost of the owners of lots in each fourth of a square.⁴ This method of determining what property is benefited and is hence subject to assessment, is not a violation of the Fourteenth Amendment.⁵ Within the meaning of such a statute a square is a subdivision bounded on all sides by principal streets.⁶ While it may be possible that a tract of land surrounded on all sides by principal streets is so large that it must be presumed that the legislature did not intend to treat such

¹⁴ *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889].

¹⁵ *City of Schenectady v. Trustees of Union College*, 144 N. Y. 241, 26 L. R. A. 614, 39 N. E. 67 [1894].

¹ *City of Louisville v. Osborne*, 73 Ky. (10 Bush.) 226 [1874]; *City of Lexington v. McQuillan's Heirs*, 39 Ky. (9 Dana) 513, 35 Am. Dec. 159 [1840].

² *City of Lexington v. McQuillan's Heirs*, 39 Ky. (9 Dana) 513, 35 Am. Dec. 159 [1840].

³ *City of Louisville v. Osborne*, 73 Ky. (10 Bush.) 226 [1874]. So as to the cost of intersections. *Parker v. Reay*, 76 Cal. 103, 18 Pac. 124 [1888].

⁴ *Holt v. Figg*, — Ky. —, 94 S. W. 34, 29 Ky. L. Rep. 613 [1906]; *Specht v. Barber Asphalt Paving Company*, — Ky. —, 80 S. W. 1106, 26 Ky. Law Rep. 193 [1904]; *Pfaffinger v. Kremer*, 115

Ky. 498, 74 S. W. 238, 24 Ky. L. Rep. 2368 [1903]; *City of Louisville v. Selvage*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899]; *Gleason v. Barnett*, 106 Ky. 125, 50 S. W. 67 [1899]; *Washle v. Nehan*, 97 Ky. 351, 41 S. W. 1040 [1895]; *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887]; *Caldwell v. Rupert*, 73 Ky. (10 Bush.) 179 [1873].

⁵ *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 25 S. 466 [1905]; (affirming 76 S. W. 1097, 25 Ky. L. R 1024).

⁶ *City of Louisville v. American Standard Asphalt Co.*, — Ky. —, 102 S. W. 806 [1907]; *Pfaffinger v. Kremer*, 115 Ky. 498, 74 S. W. 238, 24 Ky. L. Rep. 2368 [1903]; *Caldwell v. Rupert*, 73 Ky. (10 Bush.) 179 [1873]; *Broadway Baptist Church v. McAtee*, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871].

subdivision of territory as a square within the meaning of such statute, the mere fact that a square is materially larger than the usual squares of the city does not withdraw it from the operation of the statute.⁷ It has been said, however, that while the foregoing meaning of the term "square" is its ordinary meaning, it is not of universal application, but that each case must be determined by its own peculiar facts, and that one of the controlling considerations is that the property benefited by the improvement should bear the expense.⁸ In doubtful cases the court has some discretion in determining what a square is.⁹ A tract of land which was the size of two ordinary city squares, which was surrounded by streets and opposite the middle of which on either side a street had been opened but did not extend through the large tract in question was treated as consisting of two squares by regarding such street as opened so as to extend through such tract.¹⁰ Where it is shown that cross streets on the north side of the street improved were not extended to intersect the streets on the south side, because of the existence of an intervening right of way, such cross streets will be regarded as extended for the purpose of the assessment.¹¹ A tract of land which is bounded on three sides by streets, and on the fourth side of which is a street which extends part way across such tract, but which does not connect with the other street so as to complete the enclosure, there being a gap of over two hundred feet where no street exists, is regarded as a square.¹² Where a tract of land is bounded by principal streets which do not meet at right angles so that the enclosed tract is not a right angled parallelogram, the quarter square which is to be the assessment district is to be determined by ascertaining what is one quarter of the entire area of the square.¹³ Under such a

⁷ *Cooper v. Nevin*, 90 Ky. 85, 13 S. W. 841 [1890]; *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887]; See also *Watson v. Nevin*, 86 Ky. 495, 5 S. W. 546, where the court treated a tract of land seven hundred and forty feet deep as an undivided square.

⁸ *Dumesnil v. Shanks*, 97 Ky. 354, 30 S. W. 654, 31 S. W. 864 [1895].

⁹ *Dumesnil v. Shanks*, 97 Ky. 354, 30 S. W. 654, 31 S. W. 864 [1895].

¹⁰ *Dumesnil v. Shanks*, 97 Ky. 354, 30 S. W. 654, 31 S. W. 864 [1895].

¹¹ *Specht v. Barber Asphalt Paving Company*, — Ky. —, 80 S. W. 1106, 26 Ky. Law Rep. 193 [1904].

¹² *Holt v. Figg*, — Ky. —, 94 S. W. 34, 29 Ky. L. Rep. 613 [1906]. (The land which would be covered by the street were the street extended should be excluded from the assessment district.)

¹³ *R. B. Park & Co. v. Cane*, — Ky. —, 73 S. W. 1121, 24 Ky. Law Rep. 2294 [1903].

statute, land is not within the assessment district unless the fourth of the square in which it lies is contiguous to the improvement.¹⁴ It is the location of the fourths of the squares and not the location of the lots assessed which determines whether property is subject to assessment or not.¹⁵ Under such statute, it is not necessary that the property to be assessed should abut upon the improvement.¹⁶ A lot within a square contiguous to the improvement may be assessed although such lot does not itself abut upon the improvement,¹⁷ or although the improvement extends along only a part of its face.¹⁸ However, it has been held that a provision in an ordinance which provides for assessing the property fronting the street does not render the entire ordinance invalid since the statute will control as to the apportionment.¹⁹ Such a statute is not applicable to territory which is not divided into squares.²⁰ In the absence of some specific provision as to assessing territory not divided into squares it cannot, under such statute, be assessed, by regarding it as divided into squares although it is not in fact so divided.²¹ It is provided by statute that if property is not divided into squares the council is to fix the depth to which the property is benefited and is to be assessed.²² Under such provision in connection with the preceding provisions, the council has no power in fixing such depth to fix a depth which will cross another street.²³ Under such statutes an assessment may be invalid because, owing to the fact that the property on one side of an improved street is divided into blocks and on the other side is not so divided, gross inequality in assessments is thus produced.²⁴ In such case the assessment should be equalized

¹⁴ Washle v. Nehan, 97 Ky. 351, 41 S. W. 1040 [1895].

¹⁵ Washle v. Nehan, 97 Ky. 351, 41 S. W. 1040 [1895].

¹⁶ Pfaffinger v. Kremer, 115 Ky. 498, 74 S. W. 238, 24 Ky. L. R. 2368 [1903].

¹⁷ Pfaffinger v. Kremer, 115 Ky. 498, 74 S. W. 238, 24 Ky. L. R. 2368 [1903].

¹⁸ Boone v. Nevine, — Ky. —, 23 S. W. 512, 15 Ky. L. Rep. 547 [1893].

¹⁹ Fox v. Middlesborough Town Company, 96 Ky. 262, 28 S. W. 776 [1894].

²⁰ Button v. Kremer, 114 Ky. 463,

71 S. W. 332, 24 Ky. L. R. 1193 [1902]; Caldwell v. Rupert, 73 Ky. (10 Bush.) 179 [1873].

²¹ Button v. Kremer, 114 Ky. 463, 71 S. W. 332, 24 Ky. L. Rep. 1193 [1902]; Caldwell v. Rupert, 93 Ky. (10 Bush.) 179 [1873].

²² Gleason v. Barnett, 106 Ky. 125, 50 S. W. 67 [1899]. See §§ 609, 629.

²³ Louisville Ry. Co. v. Southwestern Alcatraz Asphalt & Construction Co., — Ky. —, 74 S. W. 237, 24 Ky. Law Rep. 2380 [1903].

²⁴ City of Louisville v. Selvage, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899]; Preston v. Roberts, 75 Ky. (12 Bush.) 570 [1877].

by fixing the depth of the assessment district so as to include territory of equal depth on both sides of the street.²⁵ Inequality, resulting from different sizes of squares, where the adjoining land is all divided into squares does not, however, invalidate the assessment.²⁶ Since these statutes are to be construed so that the cost of an improvement will be assessed upon property benefited thereby as far as this can be done in compliance with the terms of the statute,²⁷ an alley which is situated entirely in one-fourth of a square and which benefits only property situated in that one-fourth must be paid for by assessments upon that fourth alone.²⁸ There is, however, no arbitrary rule that an alley lying exclusively in two quarters of a square must be paid for by an assessment upon those two quarters alone.²⁹ If an alley is situated in a square, eighty feet on one side of the middle line thereof, but the lots in such square are so laid out that all of them touch the alley at the edge, it is proper to assess all the lots in such square.³⁰ If an alley lies entirely in two quarters of a square and the lots in the other two quarters do not touch such alley, it is proper to assess the cost of such alley upon the two quarters through which it runs.³¹ If an alley divides two quarters of a square from each other and extends a short distance into the other two quarters, it has been held proper to assess the cost of that part of the alley extending into such other two quarters upon such two quarters, while the rest of the cost of such alley should be assessed upon the two quarters between which the rest of such length runs.³² A right of way fifty feet wide had been improved as a highway and buildings had been erected fronting upon it. It was held that although not formally dedicated, it was a public street and not an internal improvement, and hence that it was not necessary to charge its cost on the entire square.³³ Such street did not

²⁵ *City of Louisville v. American Standard Asphalt Co.*, — Ky. —, 102 S. W. 806 [1907].

²⁶ *Cooper v. Nevin*, 90 Ky. 85, 13 S. W. 841 [1890]; *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887]; *Baker v. Selva*, 7 Ky. L. R. 838.

²⁷ *Dumesnil v. Shanks*, 97 Ky. 354, 30 S. W. 654, 31 S. W. 864 [1895].

²⁸ *Washle v. Nehan*, 97 Ky. 351, 41 S. W. 1040 [1895]; (cited in *Dumesnil v. Shanks*, 97 Ky. 354, 30 S. W. 654, 31 S. W. 864 [1895] as a manuscript opinion).

²⁹ *Dumesnil v. Shanks*, 97 Ky. 354, 30 S. W. 654, 31 S. W. 864 [1895].

³⁰ *Schmelz v. Giles*, 75 Ky. (12 Bush.) 491 [1877].

³¹ *Wagner v. Gast*, — Ky. —, 71 S. W. 533, 24 Ky. L. R. 1401 [1903].

³² *Wagner v. Gast*, — Ky. —, 71 S. W. 533, 24 Ky. L. R. 1401 [1903].

³³ *Steinaecker v. Gast*, — Ky. —, 89 S. W. 481, 28 Ky. Law Rep. 573 [1905].

run through the block but terminated in an alley. It was held that the land on either side could not be regarded as divided into blocks by such street, and it was accordingly proper for the city to charge the cost of improving such street upon the property lying north and south of it to the points midway to the next streets.³⁴ If property is not divided into squares but is assessed as if it were so divided and the amount of such assessment is less than it would be if assessed properly, the owner of such land cannot complain.³⁵ So, if the council has fixed the depth of the property to be assessed and such action is erroneous because the assessment should have been levied upon the adjacent quarter squares, yet if the depth is so fixed as to assess the quarter squares in point of fact though not by that description, the property owners cannot complain.³⁶ Such statute if made applicable only to streets is not applicable to curbing, which, in this jurisdiction is regarded as part of the sidewalk, and non-abutting property cannot therefore be assessed therefor.³⁷ By statute it may be provided that for certain improvements only the blocks opposite which the street is improved are to be assessed.³⁸ Under this statute, an improvement may stop in the middle of the block and the assessment district may end there.³⁹ Under such statutes it is erroneous to limit the assessment for other kinds of improvements to the blocks opposite which the improvement has been constructed. Thus, under a statute which provides that the cost of street openings where no buildings are to be taken, is to be assessed upon the blocks opposite the part of the street opened, it is error so to restrict the assessment if buildings are taken.⁴⁰ On the other hand, if buildings are taken it is error to assess more than a proportionate part of the cost of the buildings taken upon the property beyond the block opposite which the street is opened.⁴¹ Under a group of similar statutes, it is provided that land may be assessed on either

³⁴ *Steinacker v. Gast*, — Ky. —, 89 S. W. 481, 28 Ky. Law Rep. 573 [1905].

³⁵ *McHenry v. Selvage*, 99 Ky. 232, 35 S. W. 645 [1896].

³⁶ *Zender v. Barber Asphalt Paving Co.*, 24 Ky. Law Rep. 2279, 74 S. W. 201 [1903].

³⁷ *Marshall v. Barber Asphalt Paving Co.* — (Ky.) —, 66 S. W. 734, 23 Ky. L. R. 1971 [1902]; (substitute for opinion in 66 S. W. 182,

which modified 52 S. W. 1117, 21 Ky. L. R. 712).

³⁸ *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373 [1888].

³⁹ *Breevort v. Detroit*, 24 Mich. 322 [1872].

⁴⁰ In the Matter of Board of Street Opening, 74 Hun. 561, 26 N. Y. Supp. 855 [1893].

⁴¹ In the Matter of the Board of Street Opening, 64 Hun. 59, 18 N. Y. Supp. 727 [1892].

side of the improvement back to the center of the block on either side thereof, or, which is substantially the same thing, half way back to the next street on either side of such improvement. This is held to be a proper way of laying out and describing an assessment district.⁴² The land on either side of the improvement up to the lines thus described constitutes the assessment district.⁴³ While it has been said that a block is any portion of the city entirely enclosed by streets,⁴⁴ the same court has subsequently held that land can be called a "block" even when surrounded by streets only when it is platted into lots.⁴⁵ Under a statute providing that the land on either side of a street to the center of a block is to be assessed, land within such distance is to be assessed whether it abuts on the improvement or not.⁴⁶ Under a statute providing for assessing platted lots which front on the improvement and for assessing unplatted land to the midway line between the street improved and the next parallel street, the whole of a platted lot fronting on the street improved may be assessed, although it extends beyond such midway line.⁴⁷ On the other hand, if ground is platted into lots, the fact that the owner has used a number of such lots as an entire tract does not justify the assessment on any lots except those that front upon the street improved where they

⁴² *Olsson v. City of Topeka*, 42 Kan. 709, 21 Pac. 219 [1889]; *Blair v. City of Atchison*, 40 Kan. 353, 19 Pac. 815 [1888]; *City of Ottawa v. Barney*, 10 Kan. 270 [1872]; *State ex rel. Barber Asphalt Paving Company v. City of St. Louis*, 183 Mo. 230, 81 S. W. 1104 [1904]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *City of Spokane v. Security Sav. Society*, — Wash. —, 89 Pac. 466 [1907]; *Felt v. City of Ballard*, 38 Wash. 300, 80 Pac. 532 [1905].

⁴³ *Olsson v. City of Topeka*, 42 Kan. 709, 21 Pac. 219 [1889]; *Blair v. City of Atchison*, 40 Kan. 353, 19 Pac. 815 [1888].

⁴⁴ *Blair v. City of Atchison*, 40 Kan. 353, 19 Pac. 815 [1888]; *City of Ottawa v. Barney*, 10 Kan. 270 [1872].

⁴⁵ *McGrew v. City of Kansas City*, 64 Kan. 61, 67 Pac. 438 [1902].

"A block is a portion of platted ground in a city surrounded by streets, and the term is not ordinarily applied to a tract of unplatted land." *McGrew v. City of Kansas City*, 64 Kan. 61, 63, 67 Pac. 438 [1902]. "In the absence of anything showing a contrary intent, the ordinary signification should be given to terms employed in the statutes and according to this interpretation 'lots' and 'blocks' as used in the statute in question must be regarded as the subdivisions ordinarily made in platting." *McGrew v. City of Kansas City*, 64 Kan. 61, 64, 67 Pac. 438 [1902].

⁴⁶ *Olsson v. City of Topeka*, 42 Kan. 709, 21 Pac. 219 [1889]; *City of Ottawa v. Barney*, 10 Kan. 270 [1872].

⁴⁷ *State ex rel. Barber Asphalt Paving Company v. City of St. Louis*, 183 Mo. 230, 81 S. W. 1104 [1904].

extend back to the midway line.⁴⁸ If property is not platted into lots, it is not to be regarded as an entire tract fronting or adjoining the street improved, but it can only be assessed back to the midway line between the street improved and the next street.⁴⁹ Under such statute the assessment district cannot be extended to the next street.⁵⁰ A private way, the title to which is in certain trustees for the abutting property owners is not a street within the meaning of such statutes, though it has been used by the public as a street for over ten years,⁵¹ and accordingly the area to be assessed may extend beyond such private way.⁵² Under a statute providing that property fronting on the street improved should, if platted into blocks, be assessed back to the center of the blocks, it was held that a triangular corner lot which touched the improvement only at the apex of the lot and was entirely or almost entirely outside of a line drawn at right angles to the part of the street improved, was nevertheless subject to the assessment, since it lay between the street improved and the center of a block which abutted thereon.⁵³ Some statutes provide for assessing property up to the next street adjacent to the improvement.⁵⁴ Land between which and the improvement there is a street, cannot be assessed under such statute.⁵⁵ Under a statute providing for assessing land back to the next adjoining street, land may be assessed, although an alley lies between it and the improvement.⁵⁶ Thus, under a statute providing that half the cost of street and alley intersections shall be apportioned upon the lots abutting upon the intersecting streets or alleys to the first street parallel to the street or alley improved, land which abuts upon an alley

⁴⁸ State ex rel. Barber Asphalt Paving Company v. City of St. Louis, 183 Mo. 230, 81 S. W. 1104 [1904].

⁴⁹ State ex rel. Barber Asphalt Paving Company v. City of St. Louis, 183 Mo. 230, 81 S. W. 1104 [1904]; Meier v. City of St. Louis, 180 Mo. 391, 79 S. W. 955 [1903].

⁵⁰ Collier Estate v. Western Paving and Supply Company, 180 Mo. 362, 79 S. W. 947 [1904]. If the next street is at different distances from the street improved at different places, the assessment district is necessarily of different widths. Fruin-Bambrick Construction Co. v. St.

Louis Shovel Co., — Mo. App. —, 110 S. W. 86 [1908].

⁵¹ Collier's Estate v. Western Paving and Supply Company, 180 Mo. 362, 79 S. W. 947 [1904].

⁵² Collier's Estate v. Western Paving and Supply Company, 180 Mo. 362, 79 S. W. 947 [1904].

⁵³ Felt v. City of Ballard, 38 Wash. 300, 80 Pac. 532 [1905].

⁵⁴ In the Matter of the Petition of Van Buren, 79 N. Y. 384 [1880].

⁵⁵ In the Matter of the Petition of Van Buren, 79 N. Y. 384 [1880].

⁵⁶ Praigg v. Western Paving and Supply Company, 143 Ind. 358, 42 N. E. 750 [1895].

which intersects a street improved, which land is located between such street and the next parallel street may be assessed, although between such land and the street improved is a cross alley, which is wide enough to be recognized in some states as a street.⁵⁷

§ 629. Assessment district consisting of land within certain distance of improvement.

Under some statutes it may be provided that land is to be assessed if within a certain number of feet of the improvement for which the assessment is levied.¹ In assessments or special taxes for county roads it is often provided that land within a certain distance of the road is to be assessed for the cost thereof.² What this distance shall be, depends largely upon the discretion of the legislature. It may be two miles,³ a mile and one-half,⁴ or one

⁵⁷ *Praigg v. Western Paving and Supply Company*, 143 Ind. 358, 42 N. E. 750 [1895]. [This case arose concerning a street improvement in Indianapolis where, the Supreme Court said with an outburst of local pride, "The wide streets, avenues and even the universal wide alleys are the pride of the whole state."]

¹ *City of Frankfort v. State ex rel. Ross*, 128 Ind. 438, 27 N. E. 1115 [1891]; *Niklaus v. Conkling*, 118 Ind. 289, 20 N. E. 797 [1888]; *Ray v. City of Jeffersonville*, 90 Ind. 567 [1883]; *Rawson v. City of Des Moines*, 133 Ia. 514, 110 N. W. 918 [1907]; *McGrew v. City of Kansas City*, 64 Kan. 61, 67 Pac. 438 [1902]; *Power v. City of Detroit*, 139 Mich. 30, 102 N. W. 288 [1905]; *Asphalt Granitoid Const. Co. v. Hauessler*, 201 Mo. 400, 100 S. W. 14 [1907]; (affirming, *Asphalt & Granitoid Const. Co. v. Hauessler*, — Mo. App. —, 80 S. W. 5 [1904]); *Wolfert v. City of St. Louis*, 115 Mo. 139, 21 S. W. 912 [1892]; *Stifel v. Brown*, 24 Mo. App. 102 [1887]; *State ex rel. v. Hoffman*, 35 O. S. 435 [1880]; *Coates v. Village of Norwood*, 16 Ohio C. C. 196 [1898]; *St. Benedict's Abbey v. Marion County*, — Or. —, 93 Pac. 231 [1908].

² *Bowen v. Hester*, 143 Ind. 511, 41 N. E. 330 [1895]; *Greencastle and Bowling Green Turnpike Company v. Albin*, 34 Ind. 554 [1870]; *Robbins v. Sand Creek Turnpike Company*, 34 Ind. 461 [1870]; *New Haven and Fort Wayne Turnpike Company v. Bird*, 33 Ind. 325 [1870]; *Hardwick v. Danville and North Salem Gravel Road Company*, 33 Ind. 321 [1870]; *Turner v. Thornton and Mechanicsburg Gravel Road Company*, 33 Ind. 317 [1870]; *State on the relation of Lingenfelter v. Danville and North Salem Gravel Road Company*, 33 Ind. 133 [1870]; *Cornell v. Commissioners of Franklin County*, 67 O. S. 335, 65 N. E. 998 [1902]; *Carlisle v. Hetherington*, 47 O. S. 235, 24 N. E. 488 [1890]; *Commissioners of Putnam County v. Young*, 36 O. S. 288 [1880]; *Lear v. Halstead*, 41 O. S. 566 [1885].

³ *Spaulding v. Mott*, 167 Ind. 58, 76 N. E. 620 [1906]; *Bowen v. Hester*, 143 Ind. 511, 41 N. E. 330 [1895]; *St. Benedict's Abbey v. Marion County*, — Or. —, 93 Pac. 231 [1908].

⁴ *New Haven and Fort Wayne Turnpike Company v. Bird*, 33 Ind. 325 [1870]; *Turner v. Thornton and Mechanicsburg Gravel Road Company*, 33 Ind. 317 [1870].

mile.⁵ Under a statute providing for taxing land "within one mile on each side of the road," land within a radius of one mile from the end of the road or beyond the termination of such road cannot be taxed.⁶ Under such statutes, all the land within the prescribed area must be taxed.⁷ Land within the limits of a municipal corporation,⁸ such as a village,⁹ may be taxed for such road if within the prescribed distance. Under such statutes it is occasionally provided that if another road runs on either side of the proposed road, the assessment district is to extend half way from the proposed road to such other road.¹⁰ Thus, where the assessment district is to be one mile on either side of the proposed road, the boundaries to such district are to be reduced in case another road runs substantially parallel to the proposed road within two miles thereof.¹¹ This exception does not, however, exist where a road crosses the proposed road but is not connected with it and does not run in a course substantially parallel to it.¹² It has been held that the legislature does not abuse its discretion in finding that a district within three hundred feet of the improvement is benefited and that such assessment district is not too small.¹³ Provision is made for the adjustment of the assessment in land included within two overlapping districts.¹⁴ To what distance from the improvement the assessment district may extend has been determined variously by different legislatures, assessment districts extending three hundred feet,¹⁵ one hundred and fifty

⁵ *Carlisle v. Hetherington*, 47 O. S. 235, 24 N. E. 488 [1890]; *Lear v. Halstead*, 41 O. S. 566 [1885].

⁶ *Lear v. Halstead*, 41 O. S. 566 [1885].

⁷ *Greencastle and Bowling Green Turnpike Company v. Albin*, 34 Ind. 554 [1870]; *Robbins v. Sand Creek Turnpike Company*, 34 Ind. 461 [1870]; *New Haven and Fort Wayne Turnpike Company v. Bird*, 33 Ind. 325 [1870]; *Hardwick v. Danville and North Salem Gravel Road Company*, 33 Ind. 321 [1870]; *Turner v. Thornton and Mechanicsburg Gravel Road Company*, 33 Ind. 317 [1870].

⁸ *Commissioners of Putnam County v. Young*, 36 O. S. 288 [1880].

⁹ *Commissioners of Putnam County v. Young*, 36 O. S. 288 [1880]; *Mak-*

emson v. Kauffman, 35 O. S. 444 [1880].

¹⁰ *Cornell v. Commissioners of Franklin County*, 67 O. S. 335, 65 N. E. 998 [1902]; *Carlisle v. Hetherington*, 47 O. S. 235, 24 N. E. 488 [1890].

¹¹ *Carlisle v. Hetherington*, 47 O. S. 235, 24 N. E. 488 [1890].

¹² *Cornell v. Commissioners of Franklin County*, 67 O. S. 335, 65 N. E. 998 [1895].

¹³ *Power v. City of Detroit*, 139 Mich. 30, 102 N. W. 288 [1905].

¹⁴ *St. Benedict's Abbey v. Marion County*, — Or. —, 93 Pac. 231 [1908]; (adjustment to be made by the county court.).

¹⁵ *McGrew v. City of Kansas City*, 64 Kan. 61, 67 Pac. 438 [1902]; *Power v. City of Detroit*, 139 Mich. 30, 102 N. W. 288 [1905].

feet,¹⁶ one hundred feet,¹⁷ and fifty feet,¹⁸ from the improvement having been held to be valid. In some cases it is left for the council to fix the depth to which the land shall be subject to assessment.¹⁹ Under the statutes of Kentucky authorizing the council to fix the depth to which property may be assessed where the land is not divided into blocks by principal streets, it has been held that council cannot fix such a depth as will extend the assessment district across a principal street.²⁰ Where the land on one side of the improvement is divided into blocks and on the other side is not, the inequality caused by fixing the depth to which the land is to be assessed may invalidate the assessment.²¹ Under such statutes land cannot be assessed to a greater depth on one side of the improvement than on the other.²² If the assessment district is made to extend to a greater distance on one side than on the other it is said that such irregularity does not avoid the entire assessment but that it is invalid as to the excess distance included on the one side.²³ If by statute the council is to fix the depth of the land to be assessed not more than one hundred fifty, nor less than twenty feet, such provision does not exempt land less than twenty feet in

¹⁶ *Rawson v. City of Des Moines*, 133 Ia. 514, 110 N. W. 918 [1907]; *City of Frankfort v. State ex rel. Ross*, 128 Ind. 438, 27 N. E. 1115 [1891]; *Asphalt & Granitoid Const. Co. v. Haessler*, 201 Mo. 400, 100 S. W. 14 [1907]; (affirming, *Asphalt & Granitoid Const. Co. v. Haessler*, — Mo. App. —, 80 S. W. 5 [1904]); *Wolfert v. City of St. Louis*, 115 Mo. 139, 21 S. W. 912 [1892]; *Stifel v. Brown*, 24 Mo. App. 102 [1887]; *Coates v. Village of Norwood*, 16 Ohio C. C. 196 [1898].
¹⁷ *State ex rel. v. Hoffman*, 35 O. S. 435 [1880].

¹⁸ *Niklaus v. Conkling*, 118 Ind. 289, 20 N. E. 797 [1888]; *Ray v. City of Jeffersonville*, 90 Ind. 567 [1883].

¹⁹ *Louisville Ry. Co. v. Southwestern Aleatraz Asphalt & Construction Co.*, — Ky. —, 74 S. W. 237, 24 Ky. Law Rep. 2380 [1903]; *Fidelity Trust and Safety Vault Company v. Voris, Exrs.*, 110 Ky. 315,

61 S. W. 474 [1901]; *City of Louisville v. Selvage*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899]; *Gleason v. Barnett*, 106 Ky. 125, 50 S. W. 67 [1899]; *Loeser v. Redd & Bro.*, 77 Ky. (14 Bush.) 18 [1878]; *Kohler Brick Co. v. City of Toledo*, 29 Ohio C. C. 599 [1907].

²⁰ *Louisville Ry. Co. v. Southwestern Aleatraz Asphalt & Construction Co.*, — Ky. —, 73 S. W. 237, 24 Ky. Law Rep. 2380 [1903]; *Fidelity Trust and Safety Vault Company v. Voris' Executors*, 110 Ky. 315, 61 S. W. 474 [1901].

²¹ *City of Louisville v. Selvage*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899]; *Preston v. Roberts*, 75 Ky. (12 Bush.) 570 [1877].

²² *Loeser v. Redd & Bro.*, 77 Ky. (14 Bush.) 18 [1878]; *Preston v. Roberts*, 75 Ky. (12 Bush.) 570 [1877].

²³ *Preston v. Roberts*, 75 Ky. (12 Bush.) 570 [1877].

depth.²⁴ Statutes restricting the depth to which property can be assessed often apply only to unplatted land.²⁵ Under such a statute a highway cannot be assessed, nor can land separated from the improvement by a highway, be assessed.²⁶ The provision restricting the depth to which land may be assessed is often inserted for the purpose of determining whether the assessment exceeds the percentage of the value of the property assessed to which it is restricted by statute.²⁷ Under such statutes the value is to be calculated only to the specified depth.²⁸ It may be provided that land abutting upon the improvement is to be assessed to a certain depth; and that, if this is insufficient, back lying land to a certain depth further may be assessed.²⁹ The fact that the owners of the land abutting on the improvement have signed a waiver of irregularities and have promised to pay the assessment does not relieve the owners of the back lying land from assessment.³⁰ By statute it is sometimes provided that unplatted property is to be assessed to the average depth of lots in the neighborhood,³¹ or to the average depth to which assessments on subdivided lots are levied.³² Under such statutes an assessment cannot be levied beyond such depth.³³ It seems to be held that the failure of the council to fix such average depth of lots in the neighborhood, does not invalidate the assessment if the law fixes such depth,³⁴ and the court is given power on hearing to determine the depth to which the

²⁴ *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904]; (not affected on this point by reversal in *Londoner v. City and County of Denver*, 210 U. S. 373, 28 S. 708 [1908]).

²⁵ *City of Frankfort v. State ex rel. Ross*, 128 Ind. 438, 27 N. E. 1115 [1891].

²⁶ *City of Frankfort v. State ex rel. Ross*, 128 Ind. 438, 27 N. E. 1115 [1891].

²⁷ *Stifel v. Brown*, 24 Mo. App. 102 [1887].

²⁸ *Rawson v. City of Des Moines*, 133 Ia. 514, 110 N. W. 918 [1907]; *Stifel v. Brown*, 24 Mo. App. 102 [1887].

²⁹ *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Porter*, 210 U. S. 177, 28 S. 647 [1908]; (affirming *S. C.* 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179); *Voris v. Pitts-*

burg Plate Glass Co., 163 Ind. 599, 70 N. E. 249; *City of Terre Haute v. Mack*, 139 Ind. 99, 38 N. E. 468; *Diven v. Burlington Savings Bank*, — Ind. App. —, 82 N. E. 1020 [1907].

³⁰ *Voris v. Pittsburgh Plate Glass Co.*, 163 Ind. 599, 70 N. E. 249 [1904]; *Diven v. Burlington Savings Bank*, — Ind. App. —, 82 N. E. 1020 [1907].

³¹ *Barber Asphalt Paving Co. v. Watt*, 51 La. Ann. 1345, 26 So. 70; *Baltimore and Ohio R. R. Co. v. City of Bellaire*, 60 O. S. 301, 54 N. E. 263 [1899].

³² *Cain v. City of Omaha*, 42 Neb. 120, 60 N. W. 368 [1894].

³³ *Cain v. City of Omaha*, 42 Neb. 120, 60 N. W. 368 [1894].

³⁴ *Wilson v. City of Cincinnati*, 5 Ohio N. P. 68 [1887].

assessment is to extend.³⁵ If no such power were given to the court it would seem that the failure of the council or other assessing body to fix the depth would invalidate the assessment. Under such statutes land further away from the improvement than the distance indicated cannot be assessed.³⁶ Whether property assessed must, under such statutes, touch the improvement or not, depends upon the wording of the statute. If the statute merely provides that lands within a certain distance of the improvement are to be assessed, lands within such distance may be assessed though they do not touch the improvements.³⁷ On the other hand, if the statute provides that abutting property is to be assessed to a certain depth from the improvement, property within such distance but not abutting, cannot be assessed.³⁸ Under a statute of the latter class in determining what property adjoins or touches the improvement, the use of the property and not merely the platted lines are to be considered.³⁹ Thus, under a statute providing that the adjoining property is to be assessed to a depth of one hundred and fifty feet, a tract of land bordering on the street and running back from it a depth of sixty feet is subject to assessment if used by the owner as an entire tract, although as platted such tract consists of two lots, one of which does not adjoin the improvement.⁴⁰

§ 630. Meaning of "lot."

In statutes describing the land which is subject to assessment, the term "lot" is often used. There is a divergence of authority as to the meaning of this term. In some jurisdictions, it is said that the term "lot" is synonymous with the term "tract" or "parcel,"⁴¹ and does not necessarily imply that the land is platted into

³⁵ *Baltimore and Ohio R. R. Co. v. City of Bellaire*, 60 O. S. 301, 54 N. E. 263 [1899].

³⁶ *Niklaus v. Conkling*, 118 Ind. 289, 20 N. E. 797 [1888]; *Asphalt & Granitoid Const. Co. v. Hauessler*, 201 Mo. 400, 100 S. W. 14 [1907]; (affirming, *Asphalt & Granitoid Const. Co. v. Hauessler*, — Mo. App. —, 80 S. W. 5 [1904]); *State ex rel. v. Hoffman*, 35 O. S. 435 [1880].

³⁷ *Ray v. City of Jeffersonville*, 90 Ind. 567 [1883]; *Coates v. Village of Norwood*, 16 Ohio C. C. 196 [1898].

³⁸ *McGrew v. City of Kansas City*, 64 Kan. 61, 67 Pac. 438 [1902].

³⁹ *Wolfert v. City of St. Louis*, 115 Mo. 139, 21 S. W. 912 [1892].

⁴⁰ *Wolfert v. City of St. Louis*, 115 Mo. 139, 21 S. W. 912 [1892].

⁴¹ *State v. Robert P. Lewis Company*, 82 Minn. 390, 402; *sub nomine*, *Ramsey County v. Robert P. Lewis Co.*, 53 L. R. A. 421, 85 N. W. 207, 86 N. W. 611, [1901]; *State of Minnesota v. Robert P. Lewis Company*, 72 Minn. 87, 75 N. W. 108; *sub nomine*, *Ramsey County v. Robert P. Lewis Co.*, 42 L. R. A. 639 [1898].

small divisions suitable for residence or business purposes.² The term "parcel" is said to be equivalent to lots as subdivided.³ So the word "lot" has been said to apply to any portion, piece or division of land.⁴ Under a somewhat similar theory as to the meaning of the term "lot," it has been said that the terms "lots, blocks, traets and pareels of land" is as broad as the term "real estate."⁵ In other jurisdictions, the term "lot" is held to be applicable only to land which has been platted into small tracts suitable for business and residence purposes.⁶ This result has been reached under a statute requiring the owners of "town lots" to grade and pave or plank sidewalks.⁷ If it is specifically provided that only land which has been subdivided into lots and blocks can be assessed, such terms exclude unplatted land.⁸ A street which intersects the improvement is not a "lot" abutting or fronting thereon within the meaning of statutes providing for assessing lots.⁹ The right of way of a railroad which lies wholly within the street and runs along the length thereof is not a "lot" within the meaning of such statutes.¹⁰ neither is it a "lot and pareel of land,"¹¹ "lots, blocks, traets and pareels of land,"¹²

² *State of Minnesota v. Robert P. Lewis Co.*, 72 Minn. 87, 75 N. W. 108; *sub nomine*, Ramsey County v. Robert P. Lewis Co., 42 L. R. A. 639 [1898].

³ *City of Terre Haute v. Mack*, 139 Ind. 99, 38 N. E. 468.

⁴ *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986 [1895]; *Buell v. Ball*, 20 Ia. 282 [1866].

⁵ *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894].

⁶ *Town of Greendale v. Suit*, 163 Ind. 282, 71 N. E. 658 [1904].

⁷ *Town of Greendale v. Suit*, 163 Ind. 282, 71 N. E. 658 [1904].

⁸ *Minnesota & M. Land & Improvement Co. v. City of Billings*, 111 Fed. Rep. 972, 50 C. C. A. 70 [1901].

⁹ *Cunningham v. City of Peoria*, 157 Ill. 499, 41 N. E. 1014 [1895]; *Holt v. City of East St. Louis*, 150 Ill. 530, 37 N. E. 927 [1894]; *City of Schenectady v. Trustees of Union College*, 144 N. Y. 241, 26 L. R. A. 614, 39 N. E. 67 [1894]; *Lowerre v. Mayor, Aldermen and Commonalty of the City of New York*, 46 Hun. (N. Y.) 253 [1887].

¹⁰ *Indianapolis and Vincennes Railway Company v. Capitol Paving and Construction Company*, 24 Ind. App. 114, 54 N. E. 1076 [1899]; *Chicago, Rock Island & Pacific Railway Company v. City of Ottumwa*, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900]; *City of Muscatine v. Chicago, Rock Island & Pacific Railway Company*, 88 Ia. 291, 55 N. W. 100 [1893]; *City of Maysville v. Maysville St. R. and Transfer Co.*, — Ky. —, 108 S. W. 960 [1908]; *North Jersey Street Railway Company v. Mayor and Aldermen of Jersey City*, 68 N. J. L. (39 Vr.) 140, 52 Atl. 300 [1902]; *Chicago, Milwaukee & St. Paul Railway Company v. City of Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417 [1895].

¹¹ *Chicago, Rock Island & Pacific Railway Company v. City of Ottumwa*, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900]. (However, the statute also added "fronting on the street").

¹² *In re City of Seattle*, — Wash.

"lands,"¹³ or "real estate."¹⁴ A right of way by the side of an improvement and touching the same, even though acquired by eminent domain and amounting to an easement only, has been held to be a "lot" within the meaning of a statute authorizing the assessment of lots.¹⁵ If the statute provides for assessing the "lots and land,"¹⁶ or for assessing "land,"¹⁷ the propriety of assessing the right of way of a railway is still more clear. Water mains and surface pipes belonging to the city and the pipes of gas and light companies and the poles and wires of telegraph, telephone and electric light companies are not included in the term "lots."¹⁸ Neither are they parcels of land within the meaning of the statute providing for assessing lots and parcels of land.¹⁹

§ 631. Effect of platted lines.

In determining what area of land constitutes a lot the general rule is that the platted lines control unless the property is actually used and occupied in a manner inconsistent with the platted lines, in which case the actual use and occupation controls.¹ Thus, if

—, 94 Pac. 1075 [1908]; *Seattle v. Seattle Electric Co.*, — Wash. —, 94 Pac. 194 [1908].

¹³ *Brick & Terra Cotta Co. v. Hull*, 49 Mo. App. 433 [1892]. (Lands on both sides of and adjoining the street.) *O'Reilly v. City of Kingston*, 114 N. Y. 439, 21 N. E. 1004 [1889]; ("bordering or adjoining" the street).

¹⁴ *State of Minnesota ex rel. St. Paul City Railway Company v. District Court of Ramsey County*, 31 Minn. 354, 17 N. W. 954 [1884]. See also §§ 594-606.

¹⁵ *Figg v. Louisville & N. R. R. Co.*, 116 Ky. 135, 75 S. W. 269, 25 Ky. L. R. 350 [1903]. "Under the statute governing street improvement a lot is any piece of land within the territory defined by the statute, or the general council where the territory to be assessed is not bounded by principal streets. The use or nonuse, or the character of the use to which the parcel of land is put does not determine the question whether it is or is not a lot. The strip of land used by the railroad company the day be-

fore it was appropriated by it as a right of way was a lot, in the meaning of the statutes and to thus appropriate it cannot change its character." *Figg v. Louisville & Nashville R. R. Co.*, 116 Ky. 135, 143, 75 S. W. 269, 25 Ky. L. R. 350 [1903]; quoted in *Louisville and Nashville R. R. Co. v. Barber Asphalt Paving Co.*, 116 Ky. 856, 76 S. W. 1097 [1903].

¹⁶ *Indianapolis and Vincennes Railway Company v. Capitol Paving and Construction Company*, 24 Ind. App. 114, 54 N. E. 1076 [1899].

¹⁷ *Northern Indiana Railroad Company v. Connelly*, 10 O. S. 160 [1859]. (Where the railroad crosses the street at right angles.)

¹⁸ *Elwood v. City of Rochester*, 43 Hun. (N. Y.) 102 [1887].

¹⁹ *Elwood v. City of Rochester*, 43 Hun. (N. Y.) 102 [1887].

¹ *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986 [1895]; *Langlois v. Cameron*, 201 Ill. 301, 66 N. E. 332 [1903]; *Hamilton v. City of Fond du Lac*, 25 Wis. 490 [1870].

the owner of two or more tracts of land which as platted are separate lots, uses them together as one entire lot, they may be treated as one lot.² The owner of such tracts need not have acquired the title thereto from the same source or hold the same estate therein. Thus, one in possession of two tracts of land, one of which he owns in fee and the other of which he holds by perpetual lease with the privilege of purchase,³ or one who holds two tracts of land, one by the legal title and the other by an equitable title,⁴ may so use such tracts as to make them for assessment purposes one lot. A tract of land of over six hundred feet frontage, five hundred feet of which is from one hundred to two hundred feet deep, while the rest is twelve feet deep, may if used as an entire lot, be so regarded for assessment purposes.⁵ However, three lots which are used together, two of which belong to the wife and the third of which belongs to the husband, are not to be regarded as one lot for assessment purposes.⁶ If a tract of land which, as platted, constitutes one lot, is actually occupied and used as two or more distinct lots, it must be treated for assessment purposes as consisting of different parcels according to the use made of them.⁷ This view is not entertained, however, in all jurisdictions. In some cases the platted lines prevail over the use.⁸ Thus, where land which as platted composed two lots was used as one entire

² *Ottumwa Brick & Construction Co. v. Ainley*, 109 Ia. 386, 80 N. W. 510 [1899]; *Wolfert v. City of St. Louis*, 115 Mo. 139, 21 S. W. 912 [1892]; *Heman Construction Co. v. Loevy*, 64 Mo. App. 430 [1895]; *Kemper v. King*, 11 Mo. App. 116 [1881]; *Clements v. Village of Norwood*, 2 Ohio N. P. 274 [1895]. "Where property is unimproved and vacant the divisions thereof on plats of survey may generally be regarded as the basis for such assessments as these; but where the owner, by the manner of his use and improvement of his land has discarded such artificial divisions and has practically made one lot of several, he cannot justly complain if the taxing authority treats his property as one piece, just as he himself has done." *Wolfert v. City of St. Louis*, 115 Mo. 139,

144 [1892]; (citing *Kemper v. King*, 11 Mo. App. 116 [1881]).

³ *Clements v. Village of Norwood*, 2 Ohio N. P. 274 [1895].

⁴ *Ottumwa Brick & Construction Co. v. Ainley*, 109 Ia. 386, 80 N. W. 510 [1899].

⁵ *Moale v. Mayor of Baltimore*, 61 Md. 224 [1883]; (even if it is all assessed at a uniform rate per front foot.)

⁶ *M'Maken v. Hayes*, 29 Ohio C. C. 535 [1907].

⁷ *Langlois v. Cameron*, 201 Ill. 301, 66 N. E. 332 [1903]; *Romig v. City of Lafayette*, 33 Ind. 30 [1870]; *City of New Albany v. Cook*, 29 Ind. 220 [1867]; *Brennan v. City of St. Paul*, 44 Minn. 464, 47 N. W. 55 [1890]; *Clanton v. Taylor*, 49 Mo. App. 117 [1892].

⁸ *Smith v. City of Des Moines*, 106 Ia. 590, 76 N. W. 836 [1898].

tract, it was held that only the lot which as platted abutted on the street, could be used under a statute which provided that the assessment should be limited to the lots or lands bounding or abutting on such street.⁹ If the statute shows that the legislature in providing for the assessment of property had in mind the property as platted, as distinct from the use made of it, full effect must be given to such intention, and the platted lines will control the use.¹⁰ So, if a division of a large platted lot has been made in fact, but such division does not appear on the city plan, the lot may be assessed as an entirety, as it appears on such plan.¹¹ Such intention has been found where the legislature provided that platted property was to be assessed to the depth of the lots fronting on the improvement while unplatted property was to be assessed to a line drawn midway between the street improved and the next street.¹² Where the legislature thus makes the lines as platted the material factor in determining what a "lot" is, a division of property in a partition suit, which has not been approved by the board of public improvements or recorded in the recorder's office, does not constitute a division by recorded plat.¹³ If an improvement extends in front of a part of an entire tract, it has been said that the entire tract should be assessed and that it is error to attempt to subdivide it.¹⁴ A somewhat different view has, however, been expressed where the assessment district is to include the property fronting on the improvement, and it has been held that if the improvement extends over a part of the frontage only, the lot should be assessed only for an amount based on such frontage.¹⁵ If a city has appropriated land for opening a street and has thereby severed what was originally an entire tract into two distinct tracts, such tracts are to be treated as separate lots

⁹ *Smith v. City of Des Moines*, 106 Ia. 590, 76 N. W. 836 [1898].

¹⁰ *State ex rel. Barber Asphalt Paving Company v. City of St. Louis*, 183 Mo. 230, 81 S. W. 1104 [1904]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *Hutchinson v. Pittsburg*, 72 Pa. St. (22 P. F. Smith) 320 [1872].

If a lot is divided by deeds, the new lot thus created must be recognized in levying assessments; *State ex rel. Skrainka Construction Co. v.*

City of St. Louis, — Mo. —, 111 S. W. 89 [1908].

¹¹ *Hutchinson v. Pittsburg*, 72 Pa. St. (22 P. F. Smith) 320 [1872].

¹² *State ex rel. Barber Asphalt Paving Company v. City of St. Louis*, 183 Mo. 230, 81 S. W. 1104 [1904].

¹³ *Collier Estate v. Western Paving & Supply Company*, 180 Mo. 362, 79 S. W. 947 [1904].

¹⁴ *Scott County v. Hinds*, 50 Minn. 204, 52 N. W. 523 [1892].

¹⁵ *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891].

or parcels for the purpose of assessment,¹⁶ even if they still stand on the duplicate for general taxation as one tract.¹⁷ Land which is platted into separate tracts and which is not in effect used as an entire tract cannot be treated by the taxing officials as an entire tract for the purpose of assessment.¹⁸ Each separate lot must be assessed separately.¹⁹ Hence the lien of the assessment is not an entirety, but may be released as to one of the lots without affecting the others.²⁰ If land is platted and used as an entire tract, the taxing officials cannot in assessing it regard it as subdivided into smaller tracts.²¹ Ordinarily, however, if the amount of the assessment is not increased, the owner cannot complain because the assessment is levied upon a smaller portion of his property than it should have been levied upon.²² The charge is properly made upon the entire tract.²³ The property owner cannot insist

¹⁶ *Younglove v. Hackman*, 43 O. S. 69, 1 N. E. 230 [1885]; *Spangler v. City of Cleveland*, 35 O. S. 469 [1880]. *Contra*: that such tract is to be regarded as an entirety. *Watts v. Village of River Forrest*, 227 Ill. 31, 81 N. E. 12 [1907]; *DeKoven v. City of Lake View*, 129 Ill. 399, 21 N. E. 813 [1890]; (followed in *Waggeman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895]). So a tract of land belonging to a railroad and divided by the right of way has been regarded as one lot; the assessment not to be increased thereby. *The Chicago, Rock Island and Pacific R. R. Co. v. Chicago*, 139 Ill. 573, 28 N. E. 1108.

¹⁷ *Younglove v. Hackman*, 43 O. S. 69, 1 N. E. 230 [1885]; *Spangler v. City of Cleveland*, 35 O. S. 469 [1880].

¹⁸ *Sharp v. Johnson*, 4 Hill (N. Y.) 92, 40 Am. Dec. 259 [1843]; *McGrew v. City of Kansas City*, 64 Kan. 61, 67 Pac. 438 [1902].

¹⁹ *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889 [1891]; *Balfe v. Johnson*, 40 Ind. 235 [1872]; *Becker v. Baltimore and Ohio Southwestern Railway Company*, 17 Ind. App. 324, 46 N. E. 685 [1897]; *Ross v. Gates*, 117 Mo. App. 237, 93 S. W. 856 [1906]; *Sharp v. Johnson*, 4 Hill (N. Y.) 92, 40 Am. Dec. 259 [1843].

Contra: that sixteen lots may be assessed together as an entire tract: *State, Mann, Pros. v. Mayor and Common Council of Jersey City*, 24 N. J. L. (4 Zabriskie) 662 [1855].

²⁰ *Ross v. Gates*, 117 Mo. App. 237, 93 S. W. 856 [1906].

²¹ *People ex rel. Kochersperger v. Cook*, 180 Ill. 341, 54 N. E. 173 [1899]; *Barber v. City of Chicago*, 152 Ill. 37, 38 N. E. 253 [1894]; *Cram v. City of Chicago*, 139 Ill. 265, 28 N. E. 758 [1893]; *Warren v. City of Chicago*, 118 Ill. 329, 11 N. E. 218 [1888]; *Scott County v. Hinds*, 50 Minn. 204, 52 N. W. 523 [1892]; *Forry v. Ridge*, 56 Mo. App. 615 [1893]; *State, Coward, Pros. v. Mayor, etc., of North Plainfield*, 63 N. J. L. (34 Vr.) 61, 42 Atl. 805 [1899]; *State, Muller, Pros. v. Mayor and Council of the City of Bayonne*, 55 N. J. L. (26 Vr.) 102, 25 Atl. 267 [1892]; *Council v. Moyamensing*, 2 Pa. St. 224 [1845]; *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692 [1887].

²² *Barber v. City of Chicago*, 152 Ill. 37, 38 N. E. 253 [1894]; *Forry v. Ridge*, 56 Mo. App. 615 [1894]; *State, Aldridge, Pros. v. Essex Public Road Board*, 46 N. J. L. (17 Vr.) 126 [1884].

²³ *Scott County v. Hinds*, 50 Minn. 204, 52 N. W. 523 [1892].

upon having the tract divided for purposes of assessment. It is the right and the duty of the taxing officials to assess such tract as an entirety.²⁴

§ 632. Assessments of strips of land.

In laying out city lots and in constructing buildings, long and narrow strips of land are sometimes left which border upon a subsequent improvement. By reason of their shape, little use can be made of such strips of land unless the owner of such strip buys the land back of it, or unless he sells to the owner thereof. Neither party can, of course, be compelled to sell or buy and there is accordingly no assurance that the ownership of the two tracts of land will be combined in one person so that the entire tract will be benefited by the improvement. Such strip of land may or may not be subject to an easement. Even if not subject to an easement and if conveyed in good faith before assessment proceedings are begun, it is held in some jurisdictions that a long, narrow strip of this kind is not benefited and therefore cannot be assessed.¹ In some jurisdictions it seems to be held that a long, narrow strip of this sort may be assessed for an adjoining improvement without reference to the absence of special benefits.² This holding may be justified upon the theory that land-owners cannot by voluntarily severing their interests withdraw their lands from the operation of local assessments. If property abut upon the street improved, the fact that such property consists of a long, narrow strip, which has by conveyance been severed from the rest of the original tract, does not

²⁴ *Schroeder v. Overman*, 18 Ohio C. C. 385 [1899].

¹ *City of Atlanta v. Hamlein*, 101 Ga. 697, 29 S. E. 14 [1897]; *City of Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408 [1895]. (A strip three feet deep on one street, seven feet deep on another and four hundred seven feet long along a third street.) *City of Atlanta v. Gabbett*, 93 Ga. 266, 20 S. E. 306 [1893]. See also *Bacon v. Mayor and Aldermen of Savannah*, 91 Ga. 500, 17 S. E. 749 [1893]; *Speer v. Mayor and Council of Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890].

² *Whiting v. Quackenbush*, 54 Cal. 306 [1889]; *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904]; *Terry v. City of Hartford*, 39 Conn. 286 [1872]; *Amery v. City of Keokuk*, 72 Ia. 701, 30 N. W. 780 [1887]; *Moale v. Mayor of Baltimore*, 61 Md. 224 [1883]; *Creamer v. McCune*, 7 Mo. App. 91 [1879]; (a strip one foot wide); *City of Williamsport v. Beck*, 128 Pa. St. 147, 18 Atl. 329 [1889]; *City of Harrisburg v. McCormick*, 129 Pa. St. 213, 18 Atl. 126; *Tripp v. City of Yankton*, 10 S. D. 516, 74 N. W. 447 [1898].

prevent an assessment from being levied upon such property.³ In some jurisdictions, however, it is held that the value of such narrow strip must be considered in determining whether the assessment thereon exceeds the benefits.⁴ If the long, narrow strip of land in question receives an especial benefit, in fact such strip may undoubtedly be assessed in proportion to such benefits.⁵ If a strip of land along the front of a larger tract is conveyed fraudulently in order to prevent such larger tract from being assessed for an improvement upon which, as an entirety, it abuts, such conveyance is regarded as of no effect for purpose of assessment, and does not prevent an assessment from being levied upon the whole of the original tract.⁶ The existence of fraud is especially clear where such conveyance is made without consideration under an agreement to reconvey on request and in anticipation of a proposed improvement.⁷ The subsequent conveyance of the property separated from the improvement by such strip, to a third person does not prevent such property from being subjected to assessment; at least if such third person has knowledge of the purpose of such conveyance.⁸ If a long, narrow strip of land is subject to an easement, it is held in some jurisdictions that such strip cannot be assessed if it is not benefited by the improvement with reference to its subjection to such easement.⁹ Thus, where the owner of certain property in platting it reserved the strip of land along a street two feet in width to be used by the owners of the several lots for a fence, such strip is not subject to assessment.¹⁰ If a strip of land is conveyed after the improvement proceedings have begun, such conveyance is ineffectual and does not prevent the entire tract from being assessed.¹¹ This result seems to be reached whether the conveyance is made in order to defeat the assessment or not.

³ *Amery v. City of Keokuk*, 72 Ia. 701, 30 N. W. 780 [1887].

⁴ *Bacon v. Mayor and Aldermen of Savannah*, 91 Ga. 500, 17 S. E. 749 [1893].

⁵ *Terry v. City of Hartford*, 39 Conn. 286 [1872].

⁶ *Eagle Manufacturing Company v. City of Davenport*, 101 Ia. 493, 38 L. R. A. 480, 70 N. W. 707 [1897]; (a strip two feet wide); *Stifel v. Brown*, 24 Mo. App. 102 [1887]; *Fass v. Seehawer*, 60 Wis. 525, 19

N. W. 533 [1884]; (a strip one foot wide).

⁷ *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533 [1884].

⁸ *Eagle Manufacturing Company v. City of Davenport*, 101 Ia. 493, 38 L. R. A. 480, 70 N. W. 707 [1897].

⁹ *Town of Woodruff Place v. Raschig*, 147 Ind. 517, 46 N. E. 990 [1896].

¹⁰ *Town of Woodruff Place v. Raschig*, 147 Ind. 517, 46 N. E. 990 [1896].

¹¹ *Dougherty v. Miller*, 36 Cal. 83

§ 633. Property benefited by future improvement.

Property which is not benefited by the improvement as constructed and will be benefited thereby only if a subsequent improvement is constructed, which the public corporation is free to construct or not as it chooses, cannot be assessed for the possible benefits which may inure to it in the future.¹ The same result is reached in some states under a different procedure. Thus, it has been held that where a trunk sewer is constructed which will benefit certain property if a connecting sewer is built, and the city is free to build such sewer or not as it chooses, such property may be assessed for the cost of such trunk sewer, and such assessment is to be levied at the same time and in connection with that levied for benefits caused by the building of the trunk sewer alone, but the lien of such assessment does not come into existence until the connecting sewer or drain is built.²

§ 634. Land on which improvement is not located.

Since an assessment for benefits is levied upon the theory that a special benefit is conferred by the improvement upon the property assessed, and since such benefit may be conferred in most cases, as well upon property on which such improvement is not located as upon property on which such improvement is located, it is not necessary that the improvement be located upon the land assessed in order to sustain the assessment.¹ While the location of the improvement upon the land assessed has been said in obiter to be necessary to justify an assessment,² this obiter has subsequently been overruled and it has been held not necessary that

[1868]; *State, Gobisch, Pros. v. Inhabitants of the Township of North Bergen in the County of Hudson*, 37 N. J. L. (8 Vr.) 402 [1875]; *Douglas v. City of Cincinnati*, 29 O. S. 165 [1876].

¹*Title Guarantee and Trust Co. v. City of Chicago*, 162 Ill. 505, 44 N. E. 832 [1896]; *Hutt v. City of Chicago*, 132 Ill. 352, 23 N. E. 1010 [1891]; (distinguished in *Harris v. City of Chicago*, 162 Ill. 288, 44 N. E. 437 [1896]; and in *Clark v. City of Chicago*, 166 Ill. 84, 46 N. E. 730 [1897]); *State, Morris, Pros. v. Mayor and Common Council of the City of Bayonne*, 53 N. J. L. (24

Vr.) 299, 1 Mun. Corp. Cas. 299, 21 Atl. 453 [1891]; *State, Kellogg, Pros. v. City of Elizabeth*, 40 N. J. L. (11 Vroom) 274 [1878]; *Park Avenue Sewers, Appeal of Parker*, 169 Pa. St. 433, 32 Atl. 574 [1895].

²*Seaman v. City of Camden*, 66 N. J. L. (37 Vr.) 516, 49 Atl. 977 [1901]. For a discussion of this subject see §§ 417, 418.

¹*City of New Orleans Praying for Opening of Casaealoo and Moreau Streets*, 20 La. Ann. 497 [1868]; *State, Sigler, Pros. v. Fuller, etc.*, 34 N. J. L. (5 Vr.) 227 [1870].

²*State ex rel. Chouteau v. Leffingwell*, 54 Mo. 458 [1873].

the improvement for which the assessment is levied should be located on the land assessed.³

§ 635. Condition of property when proceedings are begun controls.

In determining what land may be assessed for a given improvement, the question is not as to the condition of such land at the time the assessment is collected, but as to its condition at the time of undertaking the improvement and levying the assessment.¹ At what precise stage of the proceedings this question is to be determined we find a diversity of opinion. It has been said that the condition of the land is to be determined when jurisdiction attaches,² when the proceedings are begun,³ when the ordinance is passed,⁴ when the improvement is made,⁵ when the assessment is made,⁶ and when the lien attaches.⁷ Hence, if land has been subdivided into smaller parcels during the assessment proceeding, it is liable to assessment as an entire tract.⁸ In Ohio, with reference to the determination of the frontage of a lot and the amount of the depth thereof for which a corner lot may be assessed for the improvement of the street along its side, a change in the condition of the lot during the assessment proceeding is ineffectual. The original condition of the lot determines.⁹ If, during the assessment proceedings the owner of a tract conveys that part of it upon the street, he does not thereby relieve the entire tract from assessment to which it would

³ *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600 [1896].

¹ *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605; *Barron v. City of Lexington*. — Ky. —, 105 S. W. 395 [1907].

² *Dougherty v. Miller*, 36 Cal. 83 [1868].

³ *Brennan v. City of St. Paul*, 44 Minn. 464, 47 N. W. 55 [1890]; *City of Cincinnati v. James*, 2 Ohio N. P. 345 [1895].

⁴ *State, Gobisch, Pros. v. Inhabitants of the Township of North Bergen in the County of Hudson*, 37 N. J. L. (8 Vr.) 402 [1875]; *Douglass v. City of Cincinnati*, 29 O. S. 165 [1876]; *Shiner v. Village of Norwood*, 17 Ohio C. C. 631 [1898].

⁵ *Sandrock v. Columbus*, 51 Ohio St. 317, 42 N. E. 255 [1894]; *Metcalf v. Carter*, 19 Ohio C. C. 196 [1900]; *City of Philadelphia to Use of Mack v. Gorgas*, 180 Pa. St. 296 36 Atl. 868 [1897]; *Keith v. City of Philadelphia*, 126 Pa. St. 575, 17 Atl. 883 [1889].

⁶ *Preston v. Roberts*, 75 Ky. (12 Bush.) 570 [1877].

⁷ *Clapton v. Taylor*, 49 Mo. App. 117 [1892].

⁸ *Dougherty v. Miller*, 36 Cal. 83 [1868]; *Shiner v. Village of Norwood*, 17 Ohio C. C. 631 [1898].

⁹ *Sandrock v. Columbus*, 51 Ohio St. 317, 42 N. E. 255 [1894]; *Metcalf v. Carter*, 19 Ohio C. C. 196 [1900]; *City of Cincinnati v. James*, 2 Ohio N. P. 345 [1895].

be liable in its original condition.¹⁰ If the owner of a tract conveys the rear of such tract before the lien attaches, it is said that the part of the lot abutting on the street is to be assessed.¹¹ Thus, if the condition when the work is done determines, it was held where a tract which was entire when the ordinance was passed, was divided into smaller lots when the improvement was made, such division could be considered in determining whether the property is urban or rural.¹² It has, however, been held that each parcel into which the lot has been divided after the assessment is liable for a proportionate part of the assessment.¹³

§ 636. Improvement outside of taxing district.

Whether a public corporation or a taxing district can levy an assessment for an improvement constructed by it outside of the territorial limits of such public corporation or taxing district, is a question frequently presented for judicial consideration. If the improvement in question is one which can confer a special local benefit upon the property in such public corporation or taxing district, and if there is statutory authority for constructing an improvement outside of such district, no valid objection exists to levying assessments upon land in such corporation or district for improvements without the limits thereof.¹ A public corporation, in constructing a system of sewerage, may provide for an outlet outside of the limits of such public corporation.² A drainage district may, as a part of its own system of drainage, maintain and repair drains outside of the drainage district which are neces-

¹⁰ *State, Gobisch, Pros. v. Inhabitants of the Township of North Bergen, in the County of Hudson*, 37 N. J. L. (8 Vr.) 402 [1875]; *Douglass v. City of Cincinnati*, 29 O. S. 165 [1876].

¹¹ *Clapton v. Taylor*, 49 Mo. App. 117 [1892].

¹² *City of Philadelphia to Use of Mack v. Gorgas*, 180 Pa. St. 296, 36 Atl. 868 [1897].

¹³ *City of Cincinnati v. Wynne*, 19 Ohio C. C. 747 [1900].

¹ *Minnesota and M. Land and Improvement Co. v. City of Billings*, 111 Fed. 972, 50 C. C. A. 70 [1901]; *Laguna Drainage District v. Charles Martin Co.*, 144 Cal. 209, 77 Pac. 933 [1904]; *Maywood Co. v. Village*

of Maywood, 140 Ill. 216, 29 N. E. 704 [1893]; *Briggs v. Union Drainage District No. 1*, 140 Ill. 53, 29 N. E. 721 [1893]; *Shreve v. Town of Cicero*, 120 Ill. 226; *sub nomine, Albertson v. Town of Cicero*, 21 N. E. 815 [1890]; *People ex rel. Huck v. Gage*, 83 Ill. 486 [1876]; *Fittinger v. City of Buffalo*, 148 N. Y. 332, 42 N. E. 803 [1896].

² *Minnesota and M. Land and Improvement Co. v. City of Billings*, 111 Fed. 972, 50 C. C. A. 70 [1901]; *Maywood Co. v. Village of Maywood*, 140 Ill. 216, 29 N. E. 704 [1893]; *Shreve v. Town of Cicero*, 120 Ill. 226; *sub nomine, Albertson v. Town of Cicero*, 21 N. E. 815 [1890].

sary as an outlet for such system.³ It has been held that corporate authorities of a town may levy an assessment for an appropriation for park purposes of a tract of land a part of which is without the corporate limits of such town.⁴ A park board, which has exclusive power to pave roads and places within the park may levy an assessment for such paving, though work included in the assessment is done upon streets outside the park, where such work is necessary to complete the paving in such park and furnish access thereto, and drainage therefor, even though the city council has jurisdiction outside of such park.⁵ In the absence of statutory authority a public corporation, or assessment district, cannot levy an assessment for an improvement outside of its limits.⁶ Under a statute which provides with reference to an assessment for a sewer, "the cost and expenses of constructing the same shall be assessed against the lots or pieces of ground contained in the district in which the same is situated," a city cannot construct a discharging sewer outside of a sewer district drained thereby, and assess the cost of such sewer against the land within such sewer district.⁷ However, if money raised in one district has been expended in another, the taxpayers of the first district cannot compel the second district to repay such amount.⁸ In the absence of such statutes, a drainage district extending over more than one township may raise money by special assessment within its area and expend it, without restricting the expenditure of the amount raised in one township to that part of the improvement in that township.⁹ After the repeal of a statute which provided for apportioning the expense of maintaining a highway or a bridge

³ *Laguna Drainage District v. Charles Martin Co.*, 144 Cal. 209, 77 Pac. 933 [1904]; *Briggs v. Union Drainage District No. 1*, 140 Ill. 53, 29 N. E. 721 [1893].

⁴ *People ex rel. Huck v. Gage*, 83 Ill. 486 [1876]. See also, *Hundley and Rees v. Commissioners of Lincoln Park*, 67 Ill. 559 [1873].

⁵ *Kittinger v. City of Buffalo*, 148 N. Y. 332, 42 N. E. 803 [1896].

⁶ *Rector v. Board of Improvement*, 50 Ark. 116, 6 S. W. 519 [1887]; *City of Fort Scott v. Kaufman*, 44 Kan. 137, 24 Pac. 64 [1890]; *Town of Underhill v. Town of Essex*, 64 Vt. 28, 23 Atl. 617 [1891].

⁷ *City of Fort Scott v. Kaufman*, 44 Kan. 137, 24 Pac. 64 [1890]. For decisions under similar statutes see *Crescent Hotel Co. v. Bradley*, 81 Ark. 286, 98 S. W. 971 [1906]; *Rector v. Board of Improvement*, 50 Ark. 116, 6 S. W. 519 [1887].

⁸ *Crescent Hotel Co. v. Bradley*, 81 Ark. 286, 98 S. W. 971 [1906].

⁹ *Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District*, 127 Ill. 581, 21 N. E. 206 [1890]. See also *Gilman v. City of Milwaukee*, 55 Wis. 328, 13 N. W. 266 [1882].

not wholly within the limits of any given town upon the towns benefited by the maintenance thereof, it was held that no town, even though benefited by the maintenance of a highway or bridge, could be compelled to contribute to the expense thereof.¹⁰ So a city cannot assess for the construction of a sidewalk outside of its boundaries;¹¹ but, if the city constructs the walk with reference to a well recognized and undisputed line bounding such city the correctness of such line cannot be questioned in a collateral proceeding.¹² If an improvement is constructed partly within and partly without the assessment district, and no authority exists for assessing land within the district for an improvement without it, an assessment may nevertheless be levied for so much of the improvement as is within the district where the cost of such improvement can be separated from the rest.¹³ An ordinance for an improvement need not specifically state that the improvement proposed is within the city. The omission of such affirmative and specific statement does not necessarily render the ordinance invalid;¹⁴ but if, from a fair construction of the entire ordinance it appears that the improvement is within the city, the ordinance will be regarded as sufficient. Any statement, no matter how informal, which shows that the improvement is within the given city, is sufficient. Thus, an ordinance which provided that "Davis street in the city of Evanston, from the west line of Maple avenue to the east line of Wesley Avenue in said city, be paved." shows that the improvement in question is located within the city.¹⁵ If the ordinance provides for an improvement upon certain named streets, but does not state that they are within the city, it will ordinarily be presumed that they are within such city.¹⁶ An

¹⁰ *Town of Underhill v. Town of Essex*, 64 Vt. 28, 23 Atl. 617 [1891]; (citing and following *Wardsboro v. Jamaica*, 59 Vt. 514; *Tunbridge v. Royalton*, 58 Vt. 212).

¹¹ *Bloomington Cemetery Association v. People of the State of Illinois*, 139 Ill. 16, 28 N. E. 1076 [1893].

¹² *Bloomington Cemetery Association v. People of the State of Illinois*, 139 Ill. 16, 28 N. E. 1076 [1893].

¹³ *Prendergast v. Richards*, 2 Mo. App. 187 [1876].

¹⁴ *Philadelphia and Reading Coal*

and Iron Co. v. *City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895]; *Beach v. People ex rel. Kern*, 157 Ill. 659, 41 N. E. 1117 [1895]; *City of Chicago v. Silverman*, 156 Ill. 601, 41 N. E. 162; *Bliss v. City of Chicago*, 156 Ill. 584, 41 N. E. 160 [1895]; *Zeigler v. People ex rel. Kern*, 156 Ill. 133, 40 N. E. 607 [1895].

¹⁵ *Sargent v. City of Evanston*, 154 Ill. 268, 40 N. E. 440 [1894].

¹⁶ *Chicago West Division Railway Company v. People ex rel. Kern*, 154 Ill. 256, 40 N. E. 342 [1894]; *Stan-ton v. City of Chicago*, 154 Ill. 23, 39 N. E. 987.

ordinance for a public improvement which shows upon its face that it was enacted by a city council of a certain city, will be regarded *prima facie* as being within the jurisdiction of such council, since it will not be presumed that the city council exceeded its statutory jurisdiction and violated its legal duty. Accordingly, if the city council has no authority to provide for an improvement outside of the city limits, it will be presumed, in the absence of anything to show a contrary intent, that the improvement was within the territorial jurisdiction of the council.¹⁷ If the party who resists an assessment wishes to interpose the objection that the street improved is outside of the territorial limits of the municipality, he must show such fact by affirmative proof, even if the ordinance does not state that the improvement is within the city.¹⁸

§ 637. Property outside of public corporation which levies assessment.

The power of a taxing district, or a public corporation, to levy an assessment for benefits upon land which is situated outside of the territorial jurisdiction of such public corporation, or taxing district, has been presented for judicial consideration. If, under the statutes in force a benefit is positively secured by such improvement to the owners of the land assessed, there seems to be no constitutional objection to authorizing the levy of an assessment upon land outside of the jurisdiction of the public corporation which constructs such improvement and levies such assessment.¹ Accordingly, if the statute provides for the levy of such assessment, such lands may be subjected to assessment for such improvement.² A common illustration of this is found in the case

¹⁷ Philadelphia and Reading Coal and Iron Co. v. City of Chicago, 158 Ill. 9, 41 N. E. 1102 [1895]; Beach v. People ex rel. Kern, 157 Ill. 659, 41 N. E. 1117 [1895]; Wisner v. People ex rel. Kern, 156 Ill. 180, 40 N. E. 574 [1895]; West Chicago Street Railway Company v. People ex rel. Kern, 156 Ill. 18, 40 N. E. 605 [1895]; West Chicago Street Railway Company v. People ex rel. Kern, 155 Ill. 299, 40 N. E. 599 [1895]; Wheeler v. People ex rel. Kern, 153 Ill. 480, 39 N. E. 123 [1894]; Kansas City v. Block, 175 Mo. 433, 74 S. W. 993 [1903].

¹⁸ Kansas City v. Block, 175 Mo. 433, 74 S. W. 993 [1903].

¹ Reclamation District No. 108 v. Hagar, 66 Cal. 54, 4 Pac. 945 [1884]; Watkins v. State ex rel. Van Auken, 151 Ind. 123, 49 N. E. 169, 51 N. E. 79 [1898]; Hudson v. Bruch, 116 Ind. 63, 18 N. E. 390 [1888]; Crist v. State ex rel. Whitmore, 97 Ind. 389 [1884]; State for the Use of Cram v. Elliott, 32 Ind. App. 605, 70 N. E. 397 [1903].

² Watkins v. State ex rel. Auken, 151 Ind. 123, 49 N. E. 169, 51 N. E. 79 [1898].

of ditches and drains, where it is held competent for the legislature by statute to authorize a county to construct drains and to assess a part of the expense thereof upon lands in other counties benefited by such improvement.³ The board of supervisors of one county may be authorized by the legislature to include within a reclamation district, lands which are situated in another county.⁴ Another example of the operation of this principle is found in the power of the legislature to authorize a city to furnish water to persons outside of the city limits, and to enforce the collection of water rents by the entry of a lien therefor, in substantially the same way as water rents charged against real property within the city limits are enforced.⁵ The converse of this proposition is found where the legislature requires a city to furnish water to persons or to public corporations outside of the city limits. If such rates thus fixed are reasonable, such statutes have been held to be valid.⁶ A city, however, has "no extra territorial jurisdiction without some special statute authorizing it,"⁷ and without some special provision authorizing a city to levy an assessment upon land outside of its territorial jurisdiction; no such assessment can be levied under a grant of power to construct an improvement at the expense of the property benefited.⁸ The grant of power to one corporation may impliedly exclude all other corporations from exercising the same power in the same territory.⁹ Two distinct municipal corporations cannot exercise the same powers, jurisdiction and privileges in the same territory at the same time.¹⁰

³ *Watkins v. State ex rel. Van Auker*, 151 Ind. 123, 49 N. E. 169, 51 N. E. 79 [1898]; *Hudson v. Bunch*, 116 Ind. 63, 18 N. E. 390 [1888]; *State for the Use of Gram v. Elliott*, 32 Ind. App. 605, 70 N. E. 397 [1903].

⁴ *Reclamation District No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945 [1884].

⁵ *Pittsburg v. Brace Bros.*, 158 Pa. St. 174, 27 Atl. 854 [1893].

⁶ *City of Chicago v. Town of Cicero*, 210 Ill. 290, 71 N. E. 356 [1904].

⁷ *Gilechrist's Appeal*, 109 Pa. St. 600.

⁸ *City of Chicago v. Carpenter*, 201 Ill. 402, 66 N. E. 362 [1903]; *Bishop v. People of the State of Illinois*, 200 Ill. 33, 65 N. E. 421 [1902]; *Billings v. City of Chicago*, 167 Ill. 337, 47

N. E. 731 [1897]; *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894]; *Hundley and Rees v. Commissioners of Lincoln Park*, 67 Ill. 559 [1873]; *Spaulding v. Mott*, 167 Ind. 58, 76 N. E. 620 [1906]; *Abascal v. Bonny*, 37 La. Ann. 538 [1885]; *In the Matter of the Assessments of Lands in the Town of Flatbush*, 60 N. Y. 398 [1875]; *In the Matter of the City of Brooklyn v. Lott*, 2 Hun. (N. Y.) 628 [1874].

⁹ *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894].

¹⁰ *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894].

Thus, under statutes which authorize a board of park commissioners to levy an assessment for the improvement of streets of which they have assumed jurisdiction, the city has no power to levy assessments, either upon lands in the park,¹¹ or for the improvement of streets running along the park of which the park commissioners have assumed jurisdiction.¹² It is not that park lands are exempt from assessment, but because the exclusive power of levying assessments is in the board of park commissioners.¹³ So, if a city assumes jurisdiction and control for drainage purposes of streams and ditches within the city limits, such streams and ditches cannot be made a part of a drainage district organized outside of the city.¹⁴ So, if assessments for constructing a highway may be levied on property within two miles of such highway, it has been held that if a highway is within two miles of the county line, the assessment district cannot extend beyond such county line.¹⁵ So, land included in a city levee district cannot be made a part of another levee district.¹⁶ The acts of the park commissioners in constructing a curb on one side of a street which adjoins the park, building a concrete walk and constructing catch basins, show that the park board has assumed jurisdiction and control over the street, notwithstanding the improvements are all on one side thereof.¹⁷ The fact that the park commissioners have accepted and used a viaduct built by a city and railroad company, in a part of the street which the commissioners had already formally determined to improve does not show that the park commissioners have relinquished control to the city.¹⁸ If the authorities of two towns, each having in its limits a part of one entire park, are authorized to levy assessments therefor, the supervisors and assessors of the two towns should not act as one body in assessing

¹¹ *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731 [1897]; *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894].

¹² *City of Chicago v. Carpenter*, 201 Ill. 402, 66 N. E. 362 [1903].

¹³ *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894].

¹⁴ *Bishop v. People of the State of Illinois*, 200 Ill. 33, 655 N. E. 421 [1902].

¹⁵ *Spaulding v. Mott*, 167 Ind. 58, 76 N. E. 620 [1906].

¹⁶ A statute attempting so to incorporate such land was held unconstitutional as causing unequal taxation. *Abascal v. Bouny*, 37 La. Ann. 538 [1885].

¹⁷ *City of Chicago v. Carpenter*, 201 Ill. 402, 66 N. E. 362 [1903].

¹⁸ *West Chicago Park Commissioners v. Sweet*, 167 Ill. 326, 47 N. E. 728 [1897].

lands in both towns.¹⁹ Under a statute which provides that a lien may be acquired and enforced upon a lot in front of which street improvement work has been done "in an incorporated city," no lien can be acquired where street improvement work has been done in front of a lot outside of the limits of an incorporated city.²⁰ If a statute could be so construed as to permit an assessment upon lands outside of a city for a prior debt incurred by such city in appropriating lands inside its limits for a park, it has been said that under such construction, such statute would be unconstitutional.²¹ A statute authorizing an assessment for an improvement by which the property assessed could not be benefited, would be as we have seen, unconstitutional.²² Accordingly, if the fact that the property assessed is outside of the taxing district or public corporation, prevents the owner of such property from having any fixed right in the use of the improvement for which such assessment is levied, the same facts render such assessment invalid. The owner of land outside of the limits of a city cannot be compelled to pay special assessments for a sewer constructed by the city in the street in front of his land where the owner of such lot is not given the right to connect his lot with such sewer.²³ If land is outside the city limits when a street improvement is begun, and accordingly it is omitted from assessment, although it abuts on one side of the street, but before the improvement is completed such land is taken into the city, it is proper to extend the assessment district so as to include such land.²⁴

§ 638. Land in two or more assessment districts.

The courts are occasionally called upon to determine whether one tract of land can be situated in two or more different assessment districts, and can be subjected to two or more distinct assessments, levied by each of said districts. The question thus presented is in part constitutional, and part statutory. If the land in question can, under the rules for determining the question of benefits,¹ be legally said to receive a benefit from each

¹⁹ *Hundley and Rees v. Commissioners of Lincoln Park*, 67 Ill. 559 [1873].

²⁰ *Durrell v. Dooner*, 119 Cal. 411, 51 Pac. 628 [1897].

²¹ *In the Matter of the Assessment of Lands in the Town of Flatbush*, 60 N. Y. 398 [1875].

²² See §§ 118, 284.

²³ *Farlin v. Hill*, 27 Mont. 27, 69 Pac. 237 [1902].

²⁴ *In re Hollister*, 180 N. Y. 518, 72 N. E. 1143; (affirming 89 N. Y. S. 518, 96 App. Div. 501).

¹ See §§ 561-567.

of such improvements, there seems to be no constitutional objection to allowing a given tract of land to be subjected to two or more assessments levied by different assessment districts for different improvements.² If, on the other hand, the benefit conferred by one improvement is such that no further benefit enures to the land in question by reason of the other improvements, no assessment can be levied for the improvement which does not enure to the benefit of the land thus assessed. Subject to the constitutional restrictions already given, the remaining questions are purely those of statutory construction. If the legislature, either expressly or by implication, has provided that the jurisdiction of one assessment district shall exclude the jurisdiction of another assessment district, the tract of land which is situated in the first cannot be subjected to an assessment levied by the second district, even if it falls within the geographical limits thereof, since it is within it from a territorial standpoint, but not from a standpoint of jurisdiction.³ Thus, if the legislature gives exclusive control over streets and boulevards situated within a park district to the commissioners of such park district, a city, within the limits of which such land is situated, cannot levy an assessment upon the same land for the same purposes.⁴ Thus, a city cannot levy an assessment for a street,⁵ or for the cost of boulevard lamps,⁶ upon land of which the park commissioners have exclusive jurisdiction. Under the same principle, if the effect of a statute is to give to a city exclusive jurisdiction over the subject of drains and sewers within the territorial limits of a city, land within such city cannot be subjected to an assessment levied for drainage purposes by a county,⁷ or

² *People ex rel. Miller v. Scott*, 132 Ill. 427, 23 N. E. 1119 [1891].

³ *City of Chicago v. Carpenter*, 201 Ill. 402, 66 N. E. 362 [1903]; *Bishop v. People of the State of Illinois*, 200 Ill. 33, 65 N. E. 421 [1902]; *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731 [1897]; *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894]; *Village of Pleasant Hill v. Commissioners*, 71 O. S. 133, 72 N. E. 896; *City of Dayton v. Taylor's Administrator*, 62 O. S. 11, 56 N. E. 480.

⁴ *City of Chicago v. Carpenter*, 201 Ill. 402, 66 N. E. 362 [1903]; *Billings*

v. City of Chicago, 167 Ill. 337, 47 N. E. 731 [1897]; *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894].

⁵ *City of Chicago v. Carpenter*, 201 Ill. 402, 66 N. E. 362 [1903]; *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731 [1897].

⁶ *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894].

⁷ *Village of Pleasant Hill v. Commissioners*, 71 O. S. 133, 72 N. E. 896; *City of Dayton v. Taylor's Administrator*, 62 O. S. 11, 56 N. E. 480.

by a drainage district,* within the territorial limits of which the land in such city is situated. If the land in question can legally be said to be benefited by the improvements constructed by each of the assessing districts, the legislature may authorize the levy of assessments by each district upon such land. Thus, under the Illinois Drainage Act of 1885, a new and independent drainage district could be organized and maintained within the limits and boundaries of another drainage district theretofore organized, maintained and in full operation.⁹

§ 639. Unauthorized omission of land benefited.

Land is sometimes omitted from the effect and operation of assessment, although such land is benefited by the improvement for which the assessment is levied; is not excluded from the operation of the assessment by any legislative determination that it is not benefited, or by the determination of the public corporation or other public body by which such assessment is levied; and is not omitted for reasons peculiar to the character of such property, which make it exempt from assessment. If the entire cost of the improvement has been assessed upon the property benefited by such improvement, the fact of such improper omission of property benefited is not only to exempt the omitted property from the burden of the assessment which it ought to bear, but also to increase the burden of the assessment upon the rest of the property which has been benefited. If the assessment is to be paid in part by the owners of the property benefited and in part by general taxation, the effect of such improper omission is to increase the burden cast upon the general tax payer. In either case such omission operates unfairly and if taken advantage of in the proper manner invalidates such assessment.¹ Such action is said to be "arbitrary and unlaw-

* *Bishop v. People of the State of Illinois*, 200 Ill. 33, 65 N. E. 421 [1902].

⁹ *People ex rel. Miller v. Scott*, 132 Ill. 427, 23 N. E. 1119 [1891].

¹ *Rooke's Case*, 5 Rep. 99 b. (Hil. 40 Eliz.); *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184 [1886]; *Town of Monticello v. Banks*, 48 Ark. 251, 25 S. W. 852; *Kutchin v. Engelbret*, 129 Cal. 635, 62 Pac. 214 [1900]; *Ryan v. Altschul*, 103 Cal. 174, 37 Pac. 339

[1894]; *Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771 [1890]; *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373 [1888]; *Dyer v. Harrison*, 63 Cal. 447 [1883]; *People of the State of California v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677 [1875]; *People ex rel. Davidson v. Cole*, 128 Ill. 158, 21 N. E. 6 [1890]; *Gilkerson v. Scott*, 76 Ill. 509; *Page v. City of Chicago*, 60 Ill. 441 [1871]; *City of Chicago v. Baer*, 41 Ill. 306 [1866];

ful.”² Thus, the omission of vacant property from assessment, when such property is benefited in the same way that occupied property is benefited, invalidates the assessment.³ In some jurisdictions it has even been held that the legislature cannot confer upon a city the power to exempt certain benefited land from local assessments, or to make valid contracts for that

Forgey v. Northern Gravel Road Co., 37 Ind. 118 [1871]; Nevins and Otter Creek Township Draining Company v. Alkire, 36 Ind. 189 [1871]; City of Columbus v. Storey, 35 Ind. 97 [1871]; Greencastle and Bowling Green Turnpike Company v. Albin, 34 Ind. 554 [1870]; Robbins v. Sand Creek Turnpike Company, 34 Ind. 461 [1870]; Hardwick v. Danville and North Salem Gravel Road Company, 33 Ind. 321 [1870]; New Haven and Fort Wayne Turnpike Company v. Bird, 33 Ind. 325 [1870]; Law v. Madison, Smyrna and Graham Turnpike Company, 30 Ind. 77 [1868]; Helm v. Witz, 35 Ind. App. 131, 73 N. E. 846 [1905]; Drake v. Grout, 21 Ind. App. 534, 52 N. E. 775 [1898]; City of Ottawa v. Barney, 10 Kan. 270 [1872]; Clay v. City of Grand Rapids, 60 Mich. 451, 27 N. W. 596 [1886]; Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 468 [1874]; Beck v. Holland, 29 Mont. 234, 74 Pac. 410 [1903]; Simmons v. City of Millville, — N. J. L. —, 66 Atl. 895 [1907]; State ex rel. Wilson v. Longstreet, 38 N. J. L. (9 Vr.) 312 [1876]; State, Kilburn, Pros. v. Essex Public Road Board, 37 N. J. L. (8 Vr.) 273 [1874]; State, Van Horne, Pros. v. Town of Bergen, 30 N. J. L. (1 Vr.) 307 [1863]; State, Culver, Pros. v. Town of Bergen, in the County of Hudson, 29 N. J. L. (5 Dutcher.) 266 [1861]; State, Vanderbeck, Pros. v. Mayor and Common Council of Jersey City, 29 N. J. L. (5 Dutcher) 441 [1861]; State Water Commissioners of Jersey City, Pros. v. Mayor and Common Council of the City of Hudson, 27 N. J. L. (3 Dutcher) 214 [1858]; Van Deventer v. Long Island

City, 139 N. Y. 133, 34 N. E. 774 [1893]; Hassan v. City of Rochester, 67 N. Y. 528 [1876]; (reported on former appeal, 65 N. Y. 516 [1875]); Hassen v. City of Rochester, 65 N. Y. 516 [1875]; Hassan v. City of Rochester, 6 Lans. (N. Y.) 185 [1871]; Savage v. City of Buffalo, 59 Hun. 606, 14 N. Y. Supp. 101 [1891]; People ex rel. Connelly v. Reis, 96 N. Y. S. 597, 109 App. Div. 748 [1905]; People ex rel. Tietjen v. Reis, 96 N. Y. S. 601, 109 App. Div. 919 [1905]; Webber v. Common Council of the City of Lockport, 43 Howard (N. Y.) 368 [1872]; *In re* Cedar Park, 1 How. Pr. N. S. 257 [1885]; Copcutt v. City of Yonkers, 83 Hun. 178, 31 N. Y. S. 659 [1894]; Bell v. City of Yonkers, 78 Hun. 196, 28 N. Y. S. 947 [1894]; *In the Matter of the Application of the Board of Street Opening and Improvement of the City of New York, Relative to Acquiring Title to Forest Avenue in the Twenty-third Ward of the City of New York*, 74 Hun. 561, 26 N. Y. Supp. 855 [1893]; Parsons v. City of Rochester, 43 Hun. 258 [1887]; Kennedy v. City of Troy, 14 Hun. 308 [1878]; City of Asheville v. Trust Company, 143 N. C. 360, 55 S. E. 800 [1906]; Upington v. Oviatt, 24 O. S. 232 [1873]; Huntington v. City of Cincinnati, 2 Ohio N. P. 35 [1895]; City of Scranton v. Levers, 200 Pa. St. 56, 49 Atl. 980 [1901]; Fulkerson v. City of Bristol, 105 Va. 555, 54 S. E. 468 [1906]; Fraser v. Mulany, 129 Wis. 377, 109 N. W. 139 [1906].

² Friedrich v. City of Milwaukee, 114 Wis. 304, 90 N. W. 174 [1902].

³ Town of Monticello v. Banks, 48 Ark. 251, 2 S. W. 852.

purpose.⁴ In this respect, there is a marked difference between the local assessment and general taxation. A person whose property has been assessed and taxed, cannot resist the payment of such tax because other property liable to such taxation has been omitted.⁵ That omission of land which should have been assessed results in an unfair apportionment was noticed at an early date. Thus, where 800 acres of land belonging to the King was omitted from assessment, such assessment was held invalid, the court saying, "The tax is unjust because by the not taxing of them (i. e. the lands belonging to the King) a greater burden was laid upon the rest of the land than of right ought to be."⁶ In some jurisdictions, the reason assigned for holding that assessments are rendered invalid by the improper omission of benefited property is that such assessment violates the constitutional provisions of uniformity and equality.⁷ While the correct result has undoubtedly been reached in these cases, the propriety of such reason is doubtful, as it is ordinarily held that the constitutional provision requiring uniformity and equality applies to general taxation only and not to local assessments. However, this reason may be justified on the theory that the provision requiring uniformity and equality of taxation applies to local assessments in the special sense of requiring a fair apportionment according to benefits. There is some authority for saying that the omission of property which should be assessed invalidates a charge levied for the non-performance of a legal duty, which the owner of the property assessed is bound to perform.⁸ Thus, it has been said that an ordinance requiring property owners to construct sidewalks must apply in a uniform manner to all land similarly situated.⁹ This view, however, seems contrary to the weight of authority. Such charges have nothing to do with benefits and in the absence of special constitutional restrictions, the power of the legislature

⁴ *City of Chicago v. Baer*, 41 Ill. 306 [1866]. See § 616.

⁵ *Van Deventer v. Long Island City*, 139 N. Y. 133, 34 N. E. 774 [1893].

⁶ *Whitley v. Fawsett*, Styles 12 (23 Car. 1).

⁷ *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184 [1886]; *Town of Monti-*

cello v. Banks, 48 Ark. 251, 2 S. W. 852; *Peay v. City of Little Rock*, 32 Ark. 31 [1877]; *Fletcher v. Oliver*, 25 Ark. 281.

⁸ *James v. Pine Bluff*, 49 Ark. 199, 4 S. W. 760 [1887].

⁹ *James v. Pine Bluff*, 49 Ark. 199, 4 S. W. 760 [1887].

or the city to determine the necessity of the performance of such legal duties is final.

§ 640. Omission to impose proper charge on street railway.

A case analogous to that of the omission of benefited property is found where a part of the cost of a street improvement should be borne by a railroad, the tracks of which occupy a part of the street, but the entire cost of such improvement has been assessed upon the owners of property abutting on such a street. By such a method of assessing, not only is the railway company relieved from the burden which in justice it ought to bear, but the owners of abutting property are assessed in excess of the amount which in justice they ought to pay. Omission to require the railway company to pay its proportionate share of the cost of such improvement will, if properly taken advantage of, invalidate the assessment.¹ Whether the presumption is that a street railway company is bound to pay a part of the cost of paving the street upon which its tracks are situated, or whether such liability is never presumed to exist, but must be shown affirmatively, is a question upon which there is a conflict of authority.² It has been said to be at least necessary to show that the company, when it obtained the right to lay its tracks, had agreed to pave a part of the street.³ If it is shown that the company entered into a contract to pave a part of the street, such liability will be presumed to exist, unless it is shown that the company has been released in some way.⁴ If the city is given the power to require a street railway company to pave a part of the street upon which its tracks are located within the

¹ *American Hide & Leather Company v. City of Chicago*, 203 Ill. 451, 67 N. E. 979 [1903]; *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39 [1903]; *McFarlane v. City of Chicago*, 185 Ill. 242, 57 N. E. 12 [1900]; *Sawyer v. City of Chicago*, 183 Ill. 57, 55 N. E. 645 [1899]; *State ex rel. Keith v. Common Council of the City of Michigan City*, 138 Ind. 455, 37 N. E. 1041 [1894]; *State ex rel. Wheeler v. District Court of Ramsey County*, 80 Minn. 293, 83 N. W. 183 [1900]; *Wales v. Warren*, 66 Neb. 455, 92 N. W. 590 [1902]; *Philadelphia to Use of Nes-*

tor v. Spring Garden Farmers Market Company, 161 Pa. 522, 29 Atl. 286 [1894].

² *Presumption in favor of liability of railway company*. *Page v. City of Chicago*, 60 Ill. 441 [1871]. *Presumption against liability of railway company*. *State ex rel. Wheeler v. District Court of Ramsey County*, 80 Minn. 293, 83 N. W. 183 [1900].

³ *State ex rel. Wheeler v. District Court of Ramsey County*, 80 Minn. 293, 83 N. W. 183 [1900].

⁴ *Sawyer v. City of Chicago*, 183 Ill. 57, 55 N. E. 645 [1899].

city, and is given a discretion as to the exercise of such power, a property owner cannot complain because the city has not seen fit to impose such charge upon a street railway company,⁵ nor because the city has seen fit to release a street railway company from such liability.⁶ It has been held that a property owner who attacks an assessment because no charge is imposed upon a street railway company must show that the expense of improving the part of the street occupied by the tracks of the railway company was included in the assessment against such property owner.⁷ An ordinance giving to a street railway company a power to occupy a part of the street and requiring it to pave the part so occupied, imposes no liability until accepted by the company. Accordingly, such an ordinance does not of itself repeal a prior ordinance for improving such street at the cost of the property owners.⁸

§ 641. Omission of land not subject to assessment.

The omission of land which, under the circumstances of the particular case it is not proper to assess, does not, of course, invalidate the assessment.¹ The omission of property which is legally exempt, either by the provisions of a specific statute,² or by reason of its peculiar use,³ or by reason of its being public property⁴ does not invalidate the assessment. Since land belonging to the United States cannot be assessed, the omission of such land does not invalidate the assessment.⁵ Cases are found in which the public improvement has been constructed in front of part of the property by the owners thereof at their own

⁵ Ft. Dodge Electric Light and Power Company v. City of Ft. Dodge, 115 Ia. 568, 89 N. W. 7 [1902].

⁶ Lacey v. City of Marshalltown, 99 Ia. 367, 68 N. W. 726 [1896].

⁷ McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885 [1891].

⁸ Thomson v. People ex rel. Foote, 184 Ill. 17, 56 N. E. 383 [1900].

¹ People ex rel. Doyle and Ralston v. Austin, 47 Cal. 353 [1874]; Snyder v. Village of West Hammond, 225 Ill. 154, 80 N. E. 93 [1907]; Rich v. City of Chicago, 152 Ill. 18, 38 N. E. 255 [1894]; Ganen v. Moredock and Ivy Landing Drainage District, No. 1, 131 Ill. 446, 23 N. E.

633 [1890]; Dumesnil v. Louisville Artificial Stone Co., 109 Ky. 1, 58 S. W. 371 [1900]; Ford v. City of Toledo, 64 O. S. 92, 59 N. E. 779 [1901].

² See § 618.

³ See § 578 *et seq.*

⁴ Smith v. City of Buffalo 159 N. Y. 427, 54 N. E. 62 [1899]; Smith v. City of Buffalo, 90 Hun. 118, 35 N. Y. S. 635 [1895]; In the Matter of the Application of Churchill to Vacate an Assessment, 82 N. Y. 288 [1880].

⁵ People ex rel. Doyle and Ralston v. Austin, 47 Cal. 353 [1874].

expense, either under the precedent authority of the public corporation, or with its sanction and adoption. Provision is often made in such cases for constructing the improvement in front of the rest of the property and for exempting from the operation of such assessment land in front of which such improvement was already constructed.⁶ On the same principle the legislature may provide for an assessment for laying water pipe, excepting therefrom property to which water is supplied and against which water rates are charged.⁷ After assessment proceedings have been initiated by a resolution of intention to order a certain street improvement, the council has no power to permit individual lot owners to construct the improvement in front of their property and to omit such improvement from the contract and such property from the assessment.⁸ Cases are found in which an assessment has been levied in a manner so defective that it has subsequently been set aside. Before such judgment vacating the assessment, owners of part of the land assessed have paid such assessments voluntarily. In providing for a re-assessment the land of those who have paid such assessment voluntarily is often omitted from the operation of such re-assessment. The omission of such land does not invalidate such assessment.⁹ A different rule applies where such credit is given for some reason other than prior payment. If certain land is credited with the amount assessed against it on the theory that such land is not benefited, this is in legal effect the omission of such land from assessment and if no power exists to omit such land from assessment directly it cannot be done indirectly.¹⁰

⁶ *Barber v. Board of Supervisors of the City and County of San Francisco*, 42 Cal. 630 [1872]; *City of Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112 [1895]; *Dumesnil v. Louisville Artificial Stone Co.*, 109 Ky. 1, 58 S. W. 371 [1900]; *Beek v. Obst*, 75 Ky. (12 Bush.) 268 [1876]; *Warren v. Street Commissioners of Boston*, 187 Mass. 290, 72 N. E. 1022 [1905]; *In the Matter of the Assessment for Improving East Eighteenth Street in the Town of Flatbush*, 75 Hun. 603, 27 N. Y. Supp. 591 [1894]; *City of Erie v. Griswold*, 184 Pa. 435, 39 Atl. 231

[1898]; *Blount v. City of Janesville*, 31 Wis. 648 [1872].

⁷ *R. & A. R. R. Co. v. City of Lynchburg*, 81 Va. 473 [1866].

⁸ *Kutchin v. Engelbret*, 129 Cal. 635, 62 Pac. 214 [1900].

⁹ *Mayor and City Council of Baltimore v. Ulman*, 79 Md. 469, 30 Atl. 43, 165 U. S. 719 [1894]; (original assessment held invalid in *Ulman v. Mayor and City Council of Baltimore*, 72 Md. 587, 11 L. R. A. 224, 32 Am. & Eng. Corp. Cases 228, 20 Atl. 141, 21 Atl. 709 [1890]).

¹⁰ *The People ex rel. Davidson v. Cole*, 128 Ill. 158, 21 N. E. 6 [1890].

§ 642. Omission by legislative determination.

The legislature, the public corporation levying the assessment, and the like, have a wide discretion in determining the limits of the assessment district. If such discretion is not abused, the assessment is not invalid by the fact that in the exercise of such discretion the legislature or corporation has omitted land which the evidence may intend to show was in fact benefited.¹

§ 643. Presumption of propriety of omission.

Every reasonable presumption is made in favor of the regularity and propriety of the action of public officers. Accordingly, a property owner who complains of the omission of land from a local assessment must show affirmatively that such land was benefited by such improvement and that the omission thereof was improper.¹ The mere fact that certain land was omitted from the assessment is not sufficient to invalidate the assessment unless the complainant further shows that such property

¹ *Cleneay v. Norwood*, 137 Fed. 962 [1905]; *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020 [1904]; *In the Matter of the Bonds of the Madera Irrigation District*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891]; *Reclamation District No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676 [1884]; *Duane v. City of Chicago*, 193 Ill. 471, 64 N. E. 1033 [1902]; *Gauen v. Moredock and Ivy Landing Drainage District No. 1*, 131 Ill. 446, 23 N. E. 633 [1890]; *Lake v. City of Decatur*, 91 Ill. 596 [1879]; *Bigelow v. City of Chicago*, 90 Ill. 49 [1878]; *Wright v. City of Chicago*, 48 Ill. 285 [1868]; *Bowen v. Hester*, 143 Ind. 511, 41 N. E. 330 [1895]; *Ricketts v. Spraker*, 77 Ind. 371 [1881]; *Mock v. City of Muncie*, 9 Ind. App. 536, 37 N. E. 281 [1893]; *City of Kansas City v. Gibson*, 66 Kan. 501, 72 Pac. 222 [1903]; *Lincoln v. Board of Street Commissioners of the City of Boston*, 176 Mass. 210, 57 N. E. 356 [1900]; *State ex rel. Ashby v. Three States Lumber Company*, 198 Mo. 430, 95 S. W. 333 [1906];

Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860 [1898]; *State, Central New Jersey Land and Improvement Co., Pros. v. Mayor and Council of the City of Bayonne*, 56 N. J. L. (27 Vr.) 297, 28 Atl. 713 [1893]; *State, Society for Establishing Useful Manufactures, Pros. v. Mayor and Aldermen of the City of Paterson*, 42 N. J. L. (13 Vr.) 615 [1880]; *State, Board of Chosen Freeholders of the County of Hudson, Pros. v. Peterson Avenue and Secaucus Road Commissioners*, 41 N. J. L. (12 Vr.) 83 [1879]; *State, Hunt, Pros. v. Mayor and Common Council of the City of Rahway*, 39 N. J. L. (10 Vroom) 646 [1877]; *Weston v. Commissioners of Hamilton County*, 6 Ohio C. C. 641 [1892]; *City of Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077 [1891].

¹ *Culver v. City of Chicago*, 171 Ill. 399, 49 N. E. 573 [1898]; *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894]; *Chicago, Rock Island and Pacific Railway Company v. City of Chicago*, 139 Ill. 573, 28 N. E. 1108 [1893].

should have been included.² The fact that after an assessment has been levied, the city confesses in court that certain property is not benefited thereby, and the court accordingly sets aside such assessment as to such property does not, in the absence of fraud or of a showing that the omitted property was in fact benefited, invalidate the assessment as to the remaining property.³ The mere fact that contiguous property is not assessed does not invalidate the assessment in the absence of a showing that such property is benefited, where the assessment is to be levied on property benefited and there has been no determination that contiguous property has been benefited.⁴ The fact that land benefited by the original construction of a ditch is not assessed for the repairs thereof, does not invalidate the assessment unless it is further shown that such land is benefited by such repairs.⁵

§ 644. Omission not operative if not prejudicial.

A property owner who complains of the omission of other property, must show that by reason of such omission his own assessment will be increased disproportionately and unfairly.¹ In some jurisdictions, it is held that the omission of property which should have been assessed does not invalidate the assessment unless the

² *Holdom v. City of Chicago*, 169 Ill. 109, 48 N. E. 164 [1897]; *Payne v. Village of South Springfield*, 161 Ill. 285, 44 N. E. 105 [1896]; *Holt v. City of East St. Louis*, 150 Ill. 530, 47 N. E. 927 [1894]; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894]; *Illinois Central Railroad Company v. City of Chicago*, 141 Ill. 509, 30 N. E. 1036 [1893]; *Fagan v. City of Chicago*, 84 Ill. 227 [1876]; *Goodrich v. City of Minonk*, 62 Ill. 121 [1871]; *Warren v. Street Commissioners of Boston*, 187 Mass. 290, 72 N. E. 1022 [1905]; *Beals v. James*, 173 Mass. 591, 54 N. E. 245 [1899]; *Whiting v. Mayor and Aldermen of the City of Boston*, 106 Mass. 89 [1870]; *Dooling, Pros. v. Ocean City*, 67 N. J. L. (38 Vr.) 215, 50 Atl. 621 [1901]; *Dean v. Mayor and Aldermen of the City of Paterson*, 67 N. J. L. (38 Vr.) 199, 50 Atl. 620 [1901]; *Bloch v. Godfrey*, 26 Ohio C. C. R. 781 [1904].

³ *Culver v. City of Chicago*, 171 Ill. 399, 49 N. E. 573 [1898].

⁴ *Holdom v. City of Chicago*, 169 Ill. 109, 48 N. E. 164 [1897]; *Chicago, Rock Island and Pacific Railway Company v. City of Chicago*, 139 Ill. 573, 28 N. E. 1108 [1893].

⁵ *Goodrich v. City of Minonk*, 62 Ill. 121 [1871].

¹ *Bowditch v. City of New Haven*, 40 Conn. 503 [1873]; *Gilbert v. City of New Haven*, 39 Conn. 467 [1872]; *Balfe v. Bell*, 40 Ind. 337 [1872]; *State, Humphreys v. Mayor and Council of the City of Bayonne*, 60 N. J. L. (31 Vr.) 406, 38 Atl. 761 [1877]; *Davis v. City of Newark*, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891]; *State, Righter, Pros. v. Mayor and Common Council of the City of Newark*, 45 N. J. L. (16 Vr.) 104 [1883]; *Bloch v. Godfrey*, 26 Ohio C. C. R. 781 [1904].

party complaining thereof can show that the result of such omission has been to impose upon his land an assessment greater than it otherwise would have been called upon to bear.² Thus, the omission to assess a part of the cost of a street improvement against a street railway company does not invalidate the assessment if the property owners are assessed less than they would have been had the assessment been made with strict regularity.³ The omission to assess two small lots has been held to be too unimportant a matter to authorize the court to set aside the entire assessment, it not appearing that substantial injustice was done.⁴ It seems, however, to be assumed elsewhere that the omission to assess sixteen feet of land might invalidate the entire assessment.⁵ It has been held, however, that the fact that the assessment upon the property included in the operation of the assessment, does not exceed the benefits, does not of itself prevent the omission of certain land which should have been assessed, from invalidating the assessment.⁶ If it is shown that certain land which should have been assessed has been omitted, the presumption will be that such omission has resulted in a substantial increase of the assessment upon the property included in the operation of such assessment.⁷ While such omission will not be allowed to affect the assessment if the amount is trifling, such fact will not be presumed, but must be established.⁸ One who seeks relief on the ground that certain land which should have been assessed has been omitted, must be able to show that he has suffered some material prejudice thereby. If all the land which should have been assessed has in fact been included, but some of it has been included as belonging to one who is not its owner,

² *Bowditch v. City of New Haven*, 40 Conn. 503 [1873]; *Gilbert v. City of New Haven*, 39 Conn. 467 [1872]; *Balfe v. Bell*, 40 Ind. 337 [1872]; *State, Humphreys v. Mayor and Council of the City of Bayonne*, 60 N. J. L. (31 Vr.) 406, 38 Atl. 761 [1897]; *Davis v. City of Newark*, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891]; *State, Righter, Pros. v. Mayor and Common Council of the City of Newark*, 45 N. J. L. (16 Vr.) 104 [1883].

³ *Bowditch v. City of New Haven*, 40 Conn. 503 [1873].

⁴ *Gilbert v. City of New Haven*, 39 Conn. 467 [1872].

⁵ *State ex rel. Wilson v. Longstreet*, 38 N. J. L. (9 Vr.) 312 [1876]. [The real point involved, however, was that as the commissioners could not amend their report mandamus would not lie to compel them to include such land.]

⁶ *Masters v. City of Portland*, 24 Ore. 161, 33 Pac. 540 [1893].

⁷ *Hassan v. City of Rochester*, 67 N. Y. 528 [1876].

⁸ *Hassan v. City of Rochester*, 67 N. Y. 528 [1876].

and no advantage is taken by such owner of such defect, another property owner cannot resist such assessment on the ground that property which should have been assessed has been omitted.⁹

§ 645. Remedies for improper omission.

If the legislature has provided a method for attacking the local assessment and has given an opportunity for a full hearing and ample relief, the aggrieved property owner must ordinarily pursue such remedy and if he does not take advantage of the defect in the manner indicated by the legislature, he cannot raise the question subsequently. Accordingly, omission to assess land benefited by the improvement for which the assessment is levied, must be taken advantage of by the other property owners in the manner indicated by statute, or such objection is to be regarded as waived.¹ Thus, if such objection is to be taken advantage of by appeal, omission to appeal prevents the aggrieved property owner from raising such objection in a suit to foreclose such assessment.² So, if the remedy of the property owner is mandamus to compel the assessment of the omitted property, equity will not restrain the collection of such assessment for such omission.³ If the court has power on finding that certain land which should have been assessed has been omitted, to reduce the assessment upon the land which is assessed to the amount it would have borne had no land been omitted improperly, it may exercise such power and refuse to treat the assessment as a nullity.⁴ Under some systems of assessment, the Court has no power to reduce the amount of the assessment to the amount which the assessors would have assessed against the land in question, had they included land which should have been included but was in fact omitted. Where the power of the court is thus limited, the court

⁹ *Cohen v. City of Alameda*, 124 Cal. 504, 57 Pac. 377 [1899]; *Hendricks v. Gilchrist*, 76 Ind. 369 [1881].

¹ *Minnesota & M. Land & Improvement Co. v. City of Billings*, 111 Fed. Rep. 972, 50 C. C. A. 70 [1901]; *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125 [1896]; *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71 [1893]; *The People ex rel. Barber v. Chapman*, 127 Ill. 387, 19 N. E. 872; *Lincoln v. Board of Street Commis-*

sioners of the City of Boston, 176 Mass. 210, 57 N. E. 356 [1900]; *Butler v. City of Worcester*, 112 Mass. 541 [1873]; *Downs v. Village of Irvington*, 66 (N. Y.) Howard 93 [1883].

² *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125 [1896].

³ *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171 [1898].

⁴ *Creamer v. McCune*, 7 Mo. App. 91 [1879].

can only set aside the assessment where land which should have been assessed is omitted.⁵ If a board of commissioners appointed to assess benefits, omits certain land and has no power to amend its report, the effect of such omission is to invalidate the assessment.⁶ Improvements are sometimes constructed by corporations which are in outward form private corporations, such as turn-pike companies. If the appraisers who are to assess lands benefited are appointed by the county commissioners, their omission of land within the assessment district is not regarded as the act of the company in the sense that it is ground for an information against such company.⁷ The omission of property which should be assessed is said to be sufficient ground for enjoining the collection of the assessment, but not for enjoining the improvement, since there may be a sufficient fund in the treasury to pay the expense of such improvement.⁸ Cases are found in which property which is benefited by a public improvement is unintentionally omitted from the assessment. Thus, notice may be given to certain property owners but omitted as to others, whereby the lands of the latter class of owners are relieved from such assessment. In such case, if the power of levying a supplemental assessment exists, the omission of such land does not invalidate the assessment as to the rest of the property benefited.⁹ The proper procedure is said in other states to be to set aside the entire assessment without prejudice to the right of the city to make a reassessment in which all the land benefited may be included.¹⁰ If no power exists to levy another assessment, which will include the omitted property, the omission of such property is said to invalidate the entire assessment. An assessment was

⁵ In the Matter of the Petition of Auchmuty to Vacate an Assessment, 18 Hun. 324 [1879]. "There is no fixed sum or criterion for the court to act upon. The court would occupy the position of assessors and the assessment would be according to its judgment instead of the judgment of the assessors. Besides, it would have no power to make the assessments upon the omitted parcels and thus make a valid assessment for the improvement. I think that the whole assessment is void." Matter of New York Protestant Episcopal School, 75 N. Y. 324, 329 [1878].

⁶ State ex rel. Wilson v. Longstreet, 38 N. J. L. (9 Vr.) 312 [1876].

⁷ State on the Relation of Lingenfelter v. Danville and North Salem Gravel Road Company, 33 Ind. 133 [1870].

⁸ Hoke v. Perdue, 62 Cal. 545 [1881].

⁹ State of Washington, on the Relation of the Barber Asphalt Paving Company v. City of Seattle, 42 Wash. 370, 85 Pac. 11 [1906].

¹⁰ Upton v. Oviatt, 24 O. S. 232 [1873].

levied in Virginia before the adoption of the recent constitution forbidding assessments for such purposes.¹¹ This assessment was perfected as to some of the property to be assessed, but not as to the rest, when the new constitution was adopted, making it impossible to proceed to perfect the incomplete assessments. It was held that the assessments already perfected could not be enforced as this would violate the principle of apportionment according to benefits.¹²

§ 646. Effect of construction of improvement by property owner.

If a property owner has done a part or all of the work of constructing an improvement of a public character, adjoining his property in substantial compliance with the plans adopted by the public corporation, some allowance must ordinarily be made to such property owner for the value of such work, if the same is used by the city as a part of a subsequent improvement.¹ On the other hand, the fact that a property owner has done a part of the work which is used ought not to exempt him from all assessment for the work actually done.² In such cases, the relief given to the property owner ordinarily takes the form of a credit upon his assessment.³ If the property owner has constructed the entire improvement in front of his property, credit of some sort should be made. The method of crediting such property owner is a matter of legislative discretion. It usually assumes one of two forms. The property owner who has constructed the whole of an improvement adjoining his property may be entirely relieved from assessment when the city or other public corporation completes such improvement.⁴ It is proper to omit from assessment, land in front of which an improvement has been construct-

¹¹ See §§ 107, 161.

¹² *Fulkerson v. City of Bristol*, 105 Va. 555, 54 S. E. 468 [1906].

¹ *Holloran v. Morman*, 27 Ind. App. 309, 59 N. E. 869 [1901]; *State, Mann, Pros. v. Mayor and Common Council of Jersey City*, 24 N. J. L. (4 Zab.) 662 [1855]. See § 641.

² In the Matter of *Auchmuty*, 18 Hun. (N. Y.) 324 [1879]; In the Matter of *Auchmuty*, 11 Hun. (N. Y.) 76 [1877]; *State ex rel. Christopher v. City of Portage*, 14 Wis. 550 [1861].

³ *People ex rel. Barber v. Chapman*, 128 Ill. 496, 21 N. E. 507 [1890]; In the Matter of *Auchmuty*, 18 Hun. (N. Y.) 324 [1879].

⁴ *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71 [1893]; *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373 [1888]; *Dumesnil v. Louisville Artificial Stone Co.*, 109 Ky. 1, 58 S. W. 371 [1900]; In the Matter of the Assessment for Improving East 18th Street, 75 Hun. (N. Y.) 603, 27 N. Y. Supp. 591 [1894]; *Hutchinson v. Pittsburg*, 72 Pa. St. (22 P. F. Smith) 320 [1872].

ed by the owner thereof in accordance with the terms of a statute authorizing property owners to construct the improvement at their own expense and thus relieve such property from assessment, if such improvement is in accordance with the plan adopted by the city.⁵ Land in front of which an improvement is contracted for by one who has no authority to bind the owner of the land, is not exempted from the operation of a contract entered into by the city for improving the street except such part as the owners and representatives of the property had already contracted for.⁶ In other jurisdictions, the property owner in front of whose property the work is done is assessed for his share of the cost of the entire improvement and then the cost of the work done by him is credited upon his assessment.⁷ The result reached by these two methods is substantially the same. Accordingly, under a statute which provides that where a property owner has already made an improvement similar in character to the one proposed, his lot shall be excluded from assessment, it has been held proper to assess the cost of setting new curb stones upon lots in front of which curb stones had already been set by the property owner and then to credit such property owner with the cost of setting such curb stones.⁸ In the absence of statute, the property owner cannot by voluntarily constructing an improvement preclude the city from constructing a different style of improvement and assessing the abutting property therefor.⁹ If the work done by the property owner is not authorized by statute, is not in accordance with the general plan of the improvement adopted by the public corporation¹⁰ and is not adopted and used by the city, the property owner who has made such improvement voluntarily, cannot claim exemption from assessment by reason thereof, nor can he claim a credit on the amount of his assessment for the

⁵ *McSherry v. Wood*, 102 Cal. 647, 36 Pac. 1010 [1894]; *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373 [1888]; *San Francisco Paving Co. v. Dubois*, 2 Cal. App. 42, 83 Pac. 72 [1905]; *Dumesnil v. Louisville Artificial Stone Co.*, 109 Ky. 1, 58 S. W. 371 [1900]; *Beck v. Obst*, 75 Ky. (12 Bush.) 268 [1876].

⁶ *Chicago v. Sherwood*, 104 Ill. 549. [The signature "Newton Burke, Agent for Seeley Estate" was here held insufficient.]

⁷ *People ex rel. Barber v. Chapman*, 128 Ill. 496, 21 N. E. 507 [1890]; *Holloran v. Morman*, 27 Ind. App. 309, 59 N. E. 869 [1901]; *Johnson v. City of Tacoma*, 41 Wash. 51, 82 Pac. 1092 [1905].

⁸ *Blount v. City of Janesville*, 31 Wis. 648 [1872].

⁹ *Parsons v. City of Columbus*, 50 O. S. 460, 34 N. E. 677 [1893].

¹⁰ *Lux & Talbott Stone Company v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903].

cost of such improvement. If the statute provides for exempting such property from assessment if the city approves the kind and quality of the work done, the mere construction of such work without obtaining the approval of the city does not prevent the city from levying an assessment against such property for the cost of the subsequent improvement.¹¹

§ 647. Property on which owner has paid invalid assessment.

Where an invalid assessment has been levied and some of the property owners have paid such assessments on their property, it has been held that in case of re-assessment, it is proper to omit the property upon which such prior invalid assessment has been paid voluntarily.¹

§ 648. Land already assessed for similar improvement.

It is often sought to assess for benefits from an improvement, land which has already been assessed for the same or a similar improvement. No inflexible rule of law can be laid down for determining whether such property can be assessed or not. The question is primarily whether the improvement for which it is sought to levy the assessment confers a benefit upon the property assessed or not. If such benefit is conferred, payment of the prior assessment does not prevent levy of the subsequent assessment.¹ If, on the other hand, the improvement for which it is sought to levy the assessment, does not confer any special benefit upon the property assessed, such assessment cannot be levied.² In most cases, therefore, the question of the existence and payment of a prior assessment is immaterial. Thus, an assessment may be levied for a local sewer upon property which has already been assessed for the construction of a sewer.³ In most jurisdictions, the power to improve and to levy local assessments is a continuing power and assessments may be levied for repairs and re-

¹¹ Philadelphia to Use v. Baker, 140 Pa. St. 11, 21 Atl. 238 [1891].

¹ Mayor and City Council of Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43 [1894]; (original assessment held invalid in Ulman v. Mayor and City Council of Baltimore, 72 Md. 587, 11 L. R. A. 274, 32 Am. & Eng. Corn. Cases 228, 20 Atl. 141, 21 Atl. 709 [1890]). See also § 64.

¹ Park Ecclesiastical Society v. City of Hartford, 47 Conn. 89 [1879]; Byram v. Foley, 17 Ind. App. 629, 47 N. E. 351 [1897].

² Toledo v. Potter, 19 Ohio C. C. 661 [1893].

³ Park Ecclesiastical Society v. City of Hartford, 47 Conn. 89 [1879]; Byram v. Foley, 17 Ind. App. 629, 47 N. E. 351 [1897].

construction where such improvements confer a benefit upon the property assessed.⁴ Statutes are occasionally found which provide that property may be assessed but once for a given kind of improvement. A provision in a city charter that a street may be improved at the expense of the owners of abutting property and that if so improved it shall not be improved again at their expense, has been held to constitute a contract when such owner has paid such assessment and he cannot be assessed for a reconstruction under a subsequent statute which attempts to authorize such assessment.⁵ Under a statute which provided that no property fronting on any street should be exempt from assessment on account of paving such street with a permanent pavement having a concrete foundation, until such property should have paid for the street pavements thereon the sum of three dollars per square yard, and under another statute providing that when a street has once been paved at the cost of the owners of adjoining property, the expense of construction should be paid out of the general fund, it was held that where a street had once been paved at the expense of the owners of adjoining property at a cost of less than three dollars a square yard, an assessment should not be levied for a reconstruction unless it was shown that the pavement for which the assessment had been levied had a concrete foundation.⁶ In Pennsylvania, the courts have held that property owners cannot be assessed for reconstruction where the assessment is levied on the theory of benefits.⁷ This doctrine is applied in this state, however, whether the original improvement was paid for by local assessment or by general taxation. If the assessment is one levied under the theory of an exaction for the performance of a public duty, such assessment may be levied for reconstruction.⁸ If an assessment has been levied and is proved to be defective, it has been held proper on re-assessment to omit the property of those who have voluntarily paid the original assessment.⁹ Indeed, it is improper to assess such property a

⁴ *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853]; *Dunker v. Stiefel*, 57 Mo. App. 379 [1894].

⁵ *Ladd v. City of Portland*, 32 Ore. 271, 67 Am. St. Rep. 526, 51 Pac. 654 [1898].

⁶ *Schintgen v. City of La Crosse*, 117 Wis. 158, 94 N. W. 84 [1903].

⁷ See § 382.

⁸ *Assessment for reconstruction of sidewalk. Wilksburg Bor. v. Home for Aged Women*, 131 Pa. St. 109, 6 L. R. A. 531, 18 Atl. 937 [1890].

⁹ *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]); *Mayor and City Council of Baltimore v. Ul-*

second time unless the city has repaid to such owners the amount of the assessment thus paid by them.¹⁰ If property benefited is exempted by the legislature because the owner thereof has already contributed his share toward the cost of such improvement, it is generally held that such exemption does not invalidate such assessments.¹¹ It has, however, been held in some jurisdictions that such exemption invalidates the assessment.¹²

§ 649. Title not involved.

In determining what property may be assessed on the theory of benefits for the cost of constructing a legal improvement, the question of the title or ownership of such property is not involved in the absence of a statutory provision making questions as to such ownership material.¹ Thus, an action to have special tax bills paid out of the proceeds arising from the condemnation of land, does not involve the title of land within the meaning of a statute giving to the Supreme Court jurisdiction of such cases irrespective of the amount involved.² If, however, the question of personal liability of the owner of the property assessed is involved, a person who is charged with the payment of an assessment may show that he is not in fact the owner of the property assessed.³ Thus, an alleged owner of property may show that he possesses merely an easement in the nature of a right of way

man, 79 Md. 469, 30 Atl. 43 [1894]; *State ex rel. Eaton v. District Court of Ramsey County*, 95 Minn. 503, 104 N. W. 553 [1905].

¹⁰ *State, Norris, Pros. v. City of Elizabeth*, 51 N. J. L. (22 Vr.) 485, 18 Atl. 302 [1889].

¹¹ *Warren v. Street Commissioners of the City of Boston*, 187 Mass. 290, 72 N. E. 1022 [1905]; *City of Erie v. Griswold*, 184 Pa. St. 435, 39 Atl. 231 [1898].

¹² *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184 [1886].

¹ *Himmelhmann v. Steiner*, 38 Cal. 175 [1869]; *Murphey v. Mayor and Council of Wilmington*, 5 Del. Ch. 281 [1879]; *McGill v. Bruner*, 65 Ind. 421 [1879]; *Ball v. Balfe*, 41 Ind. 221 [1872]; *Kendrick v. Knight*, 60 Ia. 29, 14 N. W. 78 [1882]; *Gilmore v. Norton*, 10 Kan. 491 [1872];

Zion Church of the City of Baltimore v. Mayor and City Council of Baltimore, 71 Md. 524, 18 Atl. 895 [1889]; *Masonic Building Association v. Brownell*, 164 Mass. 306, 41 N. E. 306 [1895]; *Smith v. Carney*, 127 Mass. 179 [1879]; *Brewer v. City of Springfield*, 97 Mass. 152 [1867]; *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107 [1904]; *Roberts v. First National Bank of Fargo*, 8 N. D. 504, 79 N. W. 1049 [1899]; *Village of St. Bernard v. Kemper*, 60 O. S. 244, 45 L. R. A. 662, 54 N. E. 267 [1899]. See § 887 *et seq.*

² *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107 [1904].

³ *Dashiell v. Mayor and City Council of Baltimore, Use of Hax*, 45 Md. 615 [1876]; *Board of Health v. Gloria Dei*, 23 Pa. St. (11 Harr.) 259 [1854].

over such property and the legal title thereto is not in such alleged owner.⁴ The fact that the owner of property is under legal disability does not prevent such property from being assessed on the theory of benefits.⁵ Thus, where coverture constitutes a disability, land belonging to a married woman may nevertheless be assessed for its share of the cost of a street improvement.⁶

§ 650. Change of statute pending assessment proceedings.

If the statute which provides what property may be subject to assessment is changed after the commencement of the proceedings which will result in an assessment, such statute is ordinarily regarded as not retroactive.¹ Where the law in force when the improvement ordinance was passed required council to fix the front of the land assessed to the usual depth of the lots in the neighborhood in case among others "there be lots numbered and recorded . . . lying lengthwise" along such street, and before the assessment was made the law was amended omitting reference to lots lying lengthwise, it was held that the assessment should be levied in accordance with the law in force when the improvement ordinance was passed.² At the time that the work was done the statute in force allowed only abutting lots to be assessed. Before the assessment was levied, the statute was changed so that other property than that abutting might be assessed,³ but it was held that the assessment for this work could be only upon abutting lots.⁴ A different view has been entertained in some jurisdictions.⁵ At the time of the adoption of the improvement ordinance, the statute in force limited the assessment to contiguous property. Subsequently this statute was amended omitting the word "contiguous" and allowing any property benefited to be assessed. Subsequently, a supplementary petition was filed in the assessment proceedings. It was held that the assessment might be made under the law as it stood when the assessment was made and might therefore include

⁴ Board of Health v. Gloria Dei, 23 Pa. St. (11 Harr.) 259 [1854].

⁵ Ball v. Balfe, 41 Ind. 221 [1872].

⁶ Ball v. Balfe, 41 Ind. 221 [1872].

¹ Durrett v. Kenton County, — (Ky.) —, 87 S. W. 1070, 27 Ky. Law Rep. 1173 [1905]; Jones v. Aldermen of Boston, 104 Mass. 461.

² Cincinnati v. Seasingood, 46 O. S. 296, 21 N. E. 630 [1889].

³ Ray v. City of Jeffersonville, 90 Ind. 567 [1883].

⁴ Balfe v. Lammers, 109 Ind. 347, 10 N. E. 92 [1886].

⁵ In the Matter of Westlake Avenue, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

property which was benefited but not contiguous.⁶ If the assessment ordinance as originally passed, provided for assessing only contiguous property and a subsequent ordinance with reference to the same improvement provided for assessing all property benefited, the owner of property, which is contiguous to the improvement, cannot object to an assessment levied under the new ordinance.⁷ Under a statute providing for assessing lands on both sides of and adjoining the streets improved, a street railway company whose track is wholly within a street running along the length thereof cannot be assessed.⁸

⁶ In the Matter of Westlake Avenue, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

Commissioners, 182 Ill. 250, 55 N. E. 325 [1899].

⁷ Ferrell v. West Chicago Park . Hull, 49 Mo. App. 433 [1892].

⁸ Brick & Terra Cotta Company v.

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